How equal is equal? A legal-anthropological note on the status of African women in South Africa

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OPSOMMING

Hoe gelyk is gelyk? 'n Regsantropologiese aantekening oor die status van swart vrouens in Suid-Afrika

Die Grondwet van die Republiek van Suid-Afrika waarborg gelykheid van mans en vrouens. Hierdie artikel ondersoek die huidige toedrag van sake in swart gemeenskappe in die lig van die tradisionele partriargale lewenswyse. Die wetgewer het onder die huidige menseregtebedeling aansienlike vordering gemaak om ongelykheid uit te wis, onder andere, deur mans en vroue in gebruiklike huwelike op gelyke voet te stel. Daar is egter nog terreine soos die funksies van *lobolo* en poliginie wat verdere oorweging verg. Die skrywers wys egter daarop dat verdere wetgewing nie noodwendig al is wat nodig is nie. Diep-gewortelde opvattings oor die status en rol van mans en vrouens verg 'n verandering in gesindheid.

1 Background

In terms of the Constitution of the Republic of South Africa, the South African government is committed to address economic and social inequalities that relate to, *inter alia*, race, gender, sex, ethnic or social origin, religion, conscience, belief, culture, language and birth.[1] Although it guarantees rights to culture,[2] it implies the eradication of cultural practices which discriminate against women. Section 8 of The Promotion of Equality and Prevention of Unfair Discrimination Act,[3] deals specifically with the prohibition of unfair discrimination on gender grounds. Grounds mentioned in this section that have a direct relevancy to customary law, include the customary system of preventing women from inheriting family property[4] and practices (traditional, customary or religious) which harm the dignity of women and undermine equality between men and women.[5]

1 S 9(3) and (4).
2 S 30 and 31.
3 4 of 2000.
4 S 8(c).
5 S 8(d).

Vorster[6] points out that in practice the implementation of section 8(c) of the Promotion of Equality and Prevention of Unfair Discrimination Act will imply the termination of the customary law of succession and inheritance as it discriminates against women. Section 8(d) of that Act is rather vaguely phrased. However, Vorster[7] holds the opinion that it has the potential to dispose of some cultural practices, more particularly *lobolo* and polygyny. In terms of section 1(1) of the Law of Evidence Amendment Act[8] no court may declare the custom of *lobolo* or *bogadi* as contrary to the principles of public policy and natural justice. The Recognition of Customary Marriages Act[9] does not outlaw polygamous marriages.

When the provisions of the Constitution and these acts are considered from an anthropological point of view, it becomes clear that the phenomenon of patriarchal societies in terms of the status and roles of women among rural communities, requires to be reconsidered. This contribution investigates and considers the meaning of patriarchy among African communities and the extent to which women still have an inferior legal status.

2 Patriarchy

The term patriarchy refers to a cultural order in which the social and juridical status and authority of the father and his male successors play a decisive role.[10] In essence this is also the meaning that is given to the term by Seymour-Smith,[11] "as a type of social system dominated by the principle of 'fatherright' or the sole control of domestic and public-political authority by senior males within the group". As such, patriarchy may be viewed as the unilateral right of the father to dispose of the property of his wives and children in the domestic sphere as well as a male monopoly on social, political and economic decisions. In patriarchal societies the female is regarded as a "minor" person who is not competent to conduct any activities of a legal nature.[12]

Seymour-Smith[13] remarks that it –

> "is necessary to recognize that 'patriarchy' is not a unitary concept or a conglomerate of features which will always coexist. Rather we should distinguish different elements or expressions of patriarchy which may coexist with expressions of matriarchy or of gender complimentarity or equality".

Notwithstanding this relativity of male dominance in patriarchal societies, for many feminist anthropologists the term patriarchy is synonymous with male dominance in general.[14]

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6 "South African customary law and ethnicity: challenges for South Africa" 2001 *South African Journal of Ethnology* 123.
7 *Ibid.*
8 45 of 1988.
9 120 of 1998.
10 Coertze and Coertze *Verklarende Vakwoordeboek vir Antropologie en Argeologie* (1996) 236.
11 *Dictionary of Anthropology* (1986) 217.
12 Bennett *Human Rights and African Customary Law* (1995) 80.
13 *Dictionary of Anthropology* (1986) 217–218.

2 1 Possible Role of Missionary Work

The question could be asked what role missionary work has played in sustaining and strengthening patriarchy among tribal communities. As justification for this question it should be kept in mind that the Bible came into being during a time when patriarchy was the general acceptable discourse. Furthermore, there is a strong fundamentalist movement across the world according to which the Bible is interpreted almost literally. In such circles the patriarchal discourse is sustained purposefully. In particular, the marriage formulary which emphasises the headship of the husband in marriage, could also have contributed to the fact that patriarchy is regarded as alive and well in South Africa.

On the one hand, there is, in a historical and descriptive sense, the perspective that Christianity has taught and continues to teach male headship.[15] Ideals about gender roles are embedded in formative religious practices of men as elders and priests, in prayers and creeds, praising a male deity as well as the apparent minor role that women have played in sacred rituals and socio-political issues. In addition, there has been a continued resistance by men to change in these spheres.

On the other hand, in a normative sense, it is judged that Christianity should not and the gospel does not, teach male headship. For at least the last two decades feminist theologians have advocated the ideal of mutuality and shared responsibility in parenting and marriage as founded on biblical, historical, contemporary, and practical studies in religion and theology.[16] The problem is that the affirmation of mutuality and equality assumes similarity between mothers and fathers, who differ in essence in their relationship with their children. As children grow, special responses, responsibilities and roles are demanded from each parent, including those particular to a spouse's sexual identity.

But,[17] and that is the essence for present purposes, the Europeans that colonised and ruled in South Africa from 1652 onwards, were patriarchal on Biblical grounds. This probably made it comfortable for African men to accept Christianity. When the colonists interpreted and "codified" customary law they *situ-situ* enacted patriarchy. It culminated in legislation such as section 11(3)(b) of the Black Administration Act[18] in terms of which "a native woman who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian".

Thus the official customary law came to be based on patriarchy. As stated by Bennett:[19]

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14 *Ibid.*

15 See among others Costa "Poligamy, other personal relationships and the Constitution" Sept 1994 *De Rebus* 914.

16 Muller *Gesinne van Binne: Vertel die Verlede en Droom oor die Toekoms van Jou Gesin* (2002).

17 Miller-McLemore "Feminist Christian Theologian Looks (Askance) at Headship" Blankenhorn, Browning and Van Leeuwen *Does Christianity Teach Male Headship?* (2004) 50 51 55.

18 38 of 1927.

19 *Customary Law in South Africa* (2004) 251.

> "The official version of customary law . . . represented some of the worst features of 'invented tradition'. The idea that women were 'minors' under the guardianship of their husbands was derived from the antiquated common-law doctrine, which treated women the same way as children. Nevertheless, for many years, this portrayal went unquestioned, and, as a result the law lagged behind social practice."

We hasten to add that it is not to be seen as a customary law issue only. Common law precepts of female inferiority, however, had a profound effect on the status of African women. Bearing that in mind, we proceed to examine the current position under the following headings: Equality of status; the right to own property; *lobolo;* polygyny*;* guardianship and custody of children; and succession to status and property.

3 Equality of Status

As indicated above the system of patriarchy relegated women to an inferior status. The consequent disadvantages experienced by them affected women of all communities in South Africa. This led to the enactment of the Matrimonial Property Act.[20] The Act was aimed at ensuring equality between spouses with regard to their status when the marriage was in community and their financial position when the marriage was out of community. The equality initially applied to whites, coloureds and Indians only, but was extended to Africans married by civil rites by the Marriage and Matrimonial Property Law Amendment Act.[21]

The minority provision of the Black Administration Act,[22] quoted above, however, still applied to African women married by customary law. This was remedied prospectively by several provisions of the Recognition of Customary Marriages Act.[23] In terms of section 7(2), a customary marriage entered into after the commencement of the Act, is in community of property, unless excluded by an ante-nuptial contract. Moreover, if the husband does not have more than one spouse, the equality provisions of the Matrimonial Property Act[24] generally apply to customary marriages. The parties may also change their matrimonial property regime. A husband who wishes to enter into a further customary marriage with another woman *must* make an application to the court to approve a written contract to regulate the future matrimonial property system of his marriages.[25]

Section 6 of the Recognition of Customary Marriages Act further provides that –

> "A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to

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20 88 of 1984.
21 3 of 1988.
22 38 of 1927.
23 120 of 1998.
24 88 of 1984.
25 S 7(6) of Act 120 of 1998.

> dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law."

One could not wish for more, but in terms of section 7(1) the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law. This nullifies the equality provided for by section 6 (quoted above) because that equality is "subject to the matrimonial property system governing the marriage".

Unmarried women were in terms of customary law always under the guardianship of their fathers or their male successors. Section 9 of the Recognition of Customary Marriages Act now provides unequivocally that "despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 57 of 1972".

4 Right to Own Property

In the circumstances sketched above, African women may of course own property. Be that as it may, even customary law has undergone change in this regard.

As a result of the influence of western culture, there are signs among African communities,[26] that a process of individualization is manifesting itself with regard to indigenous law. Contact with the western money economy had enabled women to sell their labour and agricultural products. As a result family property consists in many cases of assets which were obtained by both husband and wife. Contrary to the position in the past when a woman had, due to her minor status in customary law, no right to her personal earnings obtained from sold agricultural products that she grew or furniture purchased from her earnings, she is now entitled to all assets that she has brought into the estate. In practice it implies that in case of a divorce she is entitled to her personal earnings, the income from agricultural products that she cultivated, the harvest on her land, as well as all furniture that she bought from her personal means. In the latter instance, the implication is that the woman is entitled to all goods that were purchased from her means only. Should the woman not have made any contribution to the furniture, it will be divided in such a way between husband and wife that each receives more or less an even share.[27]

Women are also in many cases the *de facto* owners of land in communal areas. But rights to land in these areas must be viewed in a different light. From a gender perspective, it appears that women do have a significant degree of economic independence in African rural societies. On marriage they are given access to productive land, which they work themselves. They are in control of the process of agricultural production and

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26 Cf Boonzaaier *Die Familie-, Erf- en Opvolgingsreg van die Nkuna van Ritavi met Verwysing na ander Aspekte van die Privaatreg* (D Phil Thesis 1990 UP) 566–573.

27 Boonzaaier "Individualisation and the law among the Nkuna of Ritavi" *SA Journal of Ethnology* (1994) 23 case 2.

retain a substantial proportion of the products of that land for their own use.

Unfortunately, the colonial overlords did not see land as a unit of production, but as an entity (albeit not surveyed) that must belong to or be owned by somebody. Their obvious choice of an owner was the male household head. So, although the family, rather than an individual, owned the land, legislation was passed in terms of which communal land was allocated to men only.[28]

One would have thought that the equality provisions quoted above were adequate. But Parliament saw it fit to put it beyond doubt that women may own communal land in their own right or jointly with their husbands, however married. The Communal Land Rights Act[29] coined the terms "old order rights" for any communal rights to land acquired predominantly by males and "new order rights" which would afford anybody who acquires such right, security of tenure. Section 9(2) and (3) of the Act provides as follows:

> "(2) An old order right held by a married person is, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in the marriage in which such person is a spouse, jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage and must, on confirmation or conversion in terms of section 18(3), be registered in the names of all such spouses.
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> (3) A woman is entitled to the same legally secure tenure rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person."

This is supplemented by section 10 as follows:

> "The Minister may confer a new order right on a woman –
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> (i) who is a spouse of a male holder of an old order right, to be held jointly with her spouse;
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> (ii) who is the widow of a male holder of an old order right, or who otherwise succeeds to such right, to be held solely by such woman; or
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> (ii) in her own right."

Bekker and Van Schalkwyk[30] expressed reservations as to whether it was necessary at all to include these provisions in an act on land tenure, because section 6 of the Recognition of Customary Marriages Act[31] (see above) seems to be sufficient. On the other hand, Claassens[32] has misgivings as to whether the Act as a whole would really enhance African women's rights to communal land. Her objective, however, seems to be an attack on the wisdom of the Act as such. She does not deal with the status of women in civil marriages nor the fact that the status of women

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28 The latest was s 56(1) of the Black Land Regulations Proc R188 of 1969.

29 11 of 2004.

30 "All African Women May at Last Own Property: Particularly Land" 2005 *De Jure* 395 401–402.

31 120 of 1998.

32 "Women, customary law and discrimination: The Impact of the Communal Land Rights Act" 2006 *Stell LR* 42–81.

married by customary law has been enhanced by section 6 of the Recognition of Customary Marriages Act. We merely wish to reiterate that the Act affords women rights to land they never had before.

5 *Lobolo*

The question of whether *lobolo* relegates women to an inferior status is a moot point. The Recognition of Customary Marriages Act[33] does not specifically provide for *lobolo*, but defines it as –

> "the property in cash or in kind, whether known as *lobolo*, *bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage".

The references to the prospective husband's and prospective wife's family head may create the presumption that the legislature had patriarchal families in mind. The equality of status and capacity of spouses conferred by section 6 of the Recognition of Customary Marriages Act would, however, justify an interpretation that a woman might be the head of a family.

Research that has been done among the different ethnic groups in rural parts of South Africa,[34] has found that the transfer of marriage goods is not a sale transaction and it also does not give the man rights of ownership over his wife. As such he does not acquire the right to sell her or to mistreat her. In fact, one of the most important functions of marriage goods is to provide a guarantee that the woman will be well treated by her husband and her relatives-in-law. If the husband's family do not take proper care of her, the marriage can be dissolved and they may forfeit the marriage goods. However, the marriage goods do serve as a form of compensation for the parents of the bride.

Referring to the traditional worldview of the Zulu, Dlamini remarks in this respect that

> "(n)o self-respecting Zulu woman will marry without her father's obtaining *ilobolo* for her. Similarly no man will feel that he has married a woman in proper fashion if he has not delivered *ilobolo* for her, nor will he be confident in his paternal rights over the children".[35]

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33 120 of 1998.

34 *Cf* Hartman *Aspects of Tsonga Law* (1991) 35–36; Junod *The Life of a South African Tribe* (1927) 121; Boonzaaier 142–145; De Clercq *Die Familie-, Erf-, en Opvolgingsreg van die abakwa Mzimela met Verwysing na Prosesregtelike Aspekte* (D Phil Thesis 1975 UP) 247–248; Krige and Krige *The Realism of the Rain Queen* (1968) 120–121; Schapera *Handbook of Tswana Law and Custom* (1955) 138–139; Eloff "Sosiale organisasie" in Coertze (ed) *Inleiding tot die Algemene Volkekunde* (1973) 159; Olivier *et al Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1981) 88–91.

35 "The modern legal significance of ilobolo in Zulu society" 1983 *De Jure* 387; Knoetze "The modern significance of lobolo" 2000 *TSAR* 532–542 also deals with this topic. She comes to the conclusion that "[p]eople remain deeply attached to the practise and therefore, clothed in social robe, it should not be abolished. That is, however, not to say that the form of the institution of lobolo has remained, and can remain, unchanged in a modern society".

Furthermore, according to Bruwer,[36] the most important function of the marriage goods is the assurance that the man will have a progeny and that his descent group will be enriched by the addition of children.

This is the textbook account of the significance of *lobolo*, which is still very much in vogue in African civil and customary marriages. Recent research has revealed some ambivalence of opinion about its meaning.

In research done in Atteridgeville and Mamelodi townships in Tshwane, 66,8 percent of the respondents denied that the transfer of marriage goods is similar to a contract of purchase and sale while 29,4 percent regarded it as a contract similar to buying a loaf of bread. Only 3,8 percent did not know whether the delivery of marriage goods was similar to a contract of purchase and sale. When the responses were analysed according to gender, it was found that 23,8 percent male and 33,6 percent female respondents regarded the delivery of marriage goods as similar to a contract of purchase and sale. Thus, it appears that female respondents are more prone to regard the delivery of marriage goods as similar to a contract of purchase and sale ("buying a loaf of bread").[37]

This apparent change in the perception regarding the real meaning of marriage goods is supported by research that has been done among unmarried mature Tswana women. This perception of being an object that can be sold and purchased is strengthened by the fact that the level of education and status of a woman influence the amount of money that is "paid" for her.[38] This finding is supported by the research findings of Vorster,[39] that more marriage goods are expected for a woman who is educated (teacher, nurse, attorney), a business woman, medicine woman, and a woman of chiefly descent, than for a woman with no formal school education and those having a matric qualification.

Notwithstanding the negative perception among women regarding the delivery of marriage goods as similar to a contract of purchase and sale, the dominant opinion of unmarried Tswana women, was that men do have to "pay" marriage goods.[40] Labuschagne[41] said that some black people regard the practice of marriage goods as an African custom which distinguishes them from whites and therefore has to be conserved. These statements are supported by Vorster[42] who claims that 83,3 percent of the respondents in the urban areas mentioned above, stated emphatically that their customary marriage, without the delivery of marriage goods, is not

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36 *Die Verwantskapsbasis van Sosiale Organisasie by Matriliniêre Bantoegemeenskappe met Besondere Verwysing na die Kunda* (D Phil Thesis (1956) UP 75).

37 Vorster (ed) *Urbanites Perceptions of Lobolo: Mamelodi and Atteridgeville, Pretoria* (2000) 23.

38 Erasmus en Ryke "Die ongetroude volwasse Tswana-vrou se persepsies van die huwelik" 2004 *Social Work* 383.

39 35–44.

40 383.

41 "Regsakkulturasie, lobolo-funksies en die oorsprong van die huwelik" 1991 *THRHR* 552.

42 32–33.

possible.[43] This statement is in accordance with the legal position as portrayed in the literature.[44]

According to Erasmus and Ryke,[45] unmarried Tswana women experience internal conflict – the realization of self-esteem and autonomy alongside of the perception that the practice of marriage goods make "objects" of them with a value based on academic qualifications and status. The negative side of marriage goods is that a woman married in the customary way, is under the control of the husband which could lead to dependence and the undermining of self-esteem.[46]

We would like to add that in 21st century social circumstances it seems inappropriate that by paying *lobolo* a man should acquire a woman's reproductive capacity. Maybe Africans themselves, at least the majority, don't see it that way anymore.

The idea that death of the husband does not dissolve a customary marriage is surely also dying out. On the other hand, it does afford women security – belonging to her husband's family. Women in rural areas are extremely poor and many of them are single parents or foster-parents of orphaned children. They need a support system.

6 Polygyny

The practice of polygyny permits a man to be legally married to more than one woman at the same time. It creates a number of different houses – one for each wife – with the husband as head of each of them. The various houses are ranked in a strict order which is determined by the order in which the various wives were married. Accordingly, a man's first wife is normally his principal wife.

This must be understood in the sense that each house in a homestead (polygynous family unit), forms part of a separate socio-economic unit under the supervisory control of the husband. This entails that there is homestead (family home) property and house property in the true sense of the word. The house property belongs to the house. His role is more in the nature of a caretaker on behalf of the family as a whole. The acquisition and disposal of house property are done in concurrence with the wife concerned.

When a man wants to marry an additional wife, he is expected first to get the consent of his wife/wives. It is nothing less than good manners and prevents the relationship between a man and his wife/wives getting

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43 *Ibid.*

44 Bekker *Seymour's Customary Law in Southern Africa* (1989) 17 151; Bennett *Sourcebook of African Customary Law for Southern Africa* (1991) 204–207. Dlamini 148–166, Olivier 54–55 67.

45 383.

46 Labuschagne 1991 *THRHR* 552; although, in terms of s 6 of the Recognition of Customary Marriages Act, she is equal to her husband in all respects, the perception would prevail that the *lobolo* places her under certain obligations to her husband and his family, such as to bear children.

spoilt. It is, however, important to note that a man's wife/wives can't forbid him to marry a further wife. In fact, it is important to realize that the request to marry a second wife is often raised by the first wife. It usually happens when she realizes that her strength is dropping and that she has difficulty in fulfilling all the duties. As a result the second wife is often much younger than the first wife.

Although the practice of polygyny is still a relatively widespread phenomenon among elderly people in particularly rural areas, no numbers are available to determine the incidence thereof. Six of the eight informants in the study of Boonzaaier[47] among the Nkuna of Ritavi had more than one spouse. One had three wives. The informants were all past the age of 70. However, it appears that polygyny among the younger generations is the exception rather than the rule. When male informants were asked about the apparent decrease in polygynous marriages, the reply was that it has become too expensive to care for more than one wife. They emphatically stated that this state of affairs could not be ascribed to the influence of Christianity according to which only monogamous marriages are permitted. From the women's side it appears that the diminishing occurrence of polygyny suits them as it is well-known that there is often friction between co-wives.

In urban areas the same tendency has been noted. Research done in Mamelodi and Atteridgeville has found that polygyny is becoming obsolete among the younger generation because only one of 235 respondents had two spouses, while there was no customary marriage with more than two spouses. In the case of the older generation (respondents' parents) there were thirteen customary marriages with two spouses and four with more than two spouses among the marriages of the respondents' parents.[48]

The Recognition of Customary Marriages Act[49] does provide for polygyny. Section 7(6) provides that if a man wants to enter into a second or further customary marriage *he* must apply to the courts to have a written contract approved to regulate the future matrimonial property system of his marriages.

The Act does not provide for consent to be given by existing wives. As indicated above, such consent would normally be asked, but is not an essential requirement.

The practice of polygyny, although it is dying, gives one a sense of unease. Although polygynous families are well structured and each one knows his or her role, it does, we feel, detract from the dignity and independence of women.

7 Guardianship and Custody of Children

There are many areas of human relations which cannot really be brought home under some or other legal rule. Guardianship and custody of African children is one of them.

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47 Boonzaaier (DPhil thesis 1990 UP).
48 Vorster 13 15.
49 120 of 1988.

The textbooks tell us that the father had guardianship and custody of children, even when a customary marriage was dissolved by divorce. However, Africans never distinguished between guardianship and custody. As a matter of fact, any person of whatever community who has not studied law, must be told what the distinction is when he or she needs to know. In an African context, it is better to say that children belong to their father's family.[50]

The benchmark for custody and guardianship is contained in section 28(2) of the Constitution which provides that "a child's best interests are of paramount importance in every matter concerning the child". That offers poor comfort in many cases. The best interest principle is notoriously vague. The courts have only given a few general guidelines. In the case of African children we submit, African culture and belief systems should also be taken into account. Section 28(2) must in given circumstances be modified by cultural factors peculiar to South Africa. The best interest principle may be limited by the rights to language, culture, and religion contained in sections 30 and 31 of the Constitution. These rights are subject to the other fundamental rights in that "no one exercising [the rights of culture] may do so in a manner inconsistent with a provision of the Bill of Rights". It is generally accepted that cultural factors should play a role in the matter of guardianship and custody of children. Thus the South African Law Reform Commission in its Report on Customary Marriages[51] recommended that – "Because the best interest principle has no specific context, the courts may take into account relevant cultural expectations when deciding a child's future."

Our observation and research have shown that African men are generally reluctant to pay maintenance for children in their mother's care. They say that they are not responsible for children who do not eat from the same dish as they do. The position is exacerbated if the mother should remarry or bear a child from another man. The Maintenance Act[52] has been amended to improve investigations and enforcement of maintenance orders by civil execution and criminal sanctions. But, even so, law is a poor instrument to change peoples' ingrained attitudes.

There is no ready-made answer. We suggest that in most cases the children's interests would be best served by granting the parents joint custody.[53] This idea is winning field.

The new Children's Act[54] is more favourable of awarding joint custody than was previously the position. The Act replaced "custody" with "care" thus introducing a more child-centred approach in dealing with children's issues. This approach is also doing away with the "winners and losers" game that was so typical of the previous dispensation. This should find more favour in an African family context.

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50 *Madyibi v Nguva* 1944 NAC (C&O) 36.
51 Project 90 (1998) 141.
52 Ch 4 5 and 6 of Act 99 of 1998.
53 Bekker and van Zyl deals extensively with the problems encountered with "Custody of African children on divorce" 2002 *Obiter* 116–131.
54 38 of 2005.

8 Succession

The rule of primogeniture, applied in the customary law of succession, is so well-known that it does not need an explanation. One would have thought that the rule had some merits, because the heir was in duty bound to maintain the family – at least the minor children and women. But the Constitutional Court rejected the argument outright; saying:[55]

> "Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities."

We do not for present purpose wish to embark upon an evaluation of the judgment, but must say that it leaves many questions unanswered. To say, for instance, that modern *urban* communities are no longer structured purely along traditional lines is a facile statement. Many, many Africans cannot be said to constitute urban communities. Figures provided by the Department of Constitutional Development in 1996, revealed that seventeen million subjects of chiefly rule were governed by about 800 traditional leaders. It can be assumed that this number has increased to approximately twenty million people that fall under the jurisdiction of traditional leaders in rural areas.[56] What is more, the Court *situ-situ* declared the provisions of the Intestate Succession Act[57] applicable to all estates. Most Africans, despite the demise of apartheid, are still poor – very poor. It is quite impractical to dish out their estates in bits and pieces. Whatever they have, is family property. To regard it as divisible makes a mockery of an African sense of communal (family) ownership of property. One more, of several more questions, is the status of partners in and children born from ancillary marital relationships, such as *ukungena, ukuvusa* and women to women[58] marriages.

The South African Law Reform Commission produced a report[59] that addresses these issues – to provide guidelines on what is to be regulated by law. The minister has not yet released the report – two years later. We predict that two things will happen: The people will do their own thing. It has for instance, been shown long ago that people make oral wills that are

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55 *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; SA Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC).

56 Van Kessel and Oomen "One chief, one vote: The revival of traditional authorities in post-apartheid South Africa" 1997 *African Affairs* 561–585.

57 81 of 1987.

58 See Oomen "Traditional woman-to-woman marriages and the Recognition of Customary Marriages Act" 2000 *THRHR* 274; Bekker *Customary Law in South Africa* (1989) 279–283 and 286–294.

59 Customary Law of Succession Project 90 (April 2004).

respected by the families.[60] Intractable disputes will arise, from which only lawyers will benefit.

We do not suggest that the rules of primogenitures should be brought back. By no means. We say the matter has not been finally resolved. Particularly women will be all the more destitute without a family support system – that is if they have to rely on handouts in terms of the Intestate Succession Act.[61]

9 Conclusion

We feel that great strides have been made in improving the legal status of African women. There are, however, a few areas that require further attention. We mention them without further comments:

(1) The implications of making the Intestate Succession Act *holus-bolus* applicable to African estates.

(2) The legal status of women who entered into customary marriages before 2000-11-15.

(3) Polygynous marriages.

(4) The status of women in marriage relationships.

But one must not confuse legal equality with *de facto* inequality. We are fully aware of the fact that in many areas of life women are still regarded as inferior. The law can lay down parameters, but social change is another matter. The South African Constitution is committed to achieve gender equality. It is guided by the national Policy Framework for Women's Empowerment and Gender Equality. It has also committed itself to international agreements such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It is trusted that in due course there will be real equality across the board.[62]

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60 See Rautenbach *et al* "Law of successions and inheritance" in Bekker, Rautenbach, and Goolam *Introduction to Legal Pluralism in South Africa* (2006) 98.

61 81 of 1987.

62 See Department of Social Development *Population and Gender Equality in South Africa* (undated brochure).