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The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States

Brenda Oppermann*

1. INTRODUCTION

The concept of the rule of law becomes muddied when a government recognizes more than one body of law. Nowhere is this more apparent than in legally pluralistic countries where traditional law[1] and national law[2] exist side by side. Because these bodies of law grew out of culturally distinct customs and practices, their coexistence frequently results in conflict. The implications of conflicts between traditional and national law are particularly serious for women since, in many countries, women's rights — particularly in the context of traditional law — are often subordinate to those of men. Cultural norms reflecting male values and interests permeate traditional or indigenous law regulating family issues and resulting in the legal supremacy of male interests over female interests. This is particularly evident with respect to marriage laws.

"It has been said that marital rights enjoyed by women in their culture and religion are often a good indicator of women's status in society at large."[3] This essay examines the impact of legal pluralism with regard to the laws of marriage on the status of women in Egypt, South Africa, and the United States. While the type of traditional law in each country is different (e.g., Egypt acknowledges religious law (such as Shari'a),

* J.D., 2004, Western New England College School of Law; M.A., 1994, Yale University; B.A., 1985, University of California, Irvine. I would like to thank all of the people who provided assistance with my article, including Professors Art Wolf, Beth Cohen, and Valerie Vojdik. I would also like to thank my friends and family for their steadfast support throughout my many and assorted endeavors both academic and personal.

1. For the purposes of this essay, traditional law refers to bodies of law that emanate from indigenous custom and practices or religion.

2. For the purposes of this essay, national law refers to law derived from legislatures, courts, and judges. Depending on the country, it may also be referred to, inter alia, as civil, public, or state law.

customary law is recognized in South Africa, and Indian tribal law is sanctioned in the United States), these legal orders all share common characteristics in that they are closely related to custom, societal norms, and accepted standards of behavior. Consequently, in many situations traditional law reflects a bias against women in their roles as wives, mothers, and daughters.

Finally, this essay submits that legal pluralism alone does not necessarily disadvantage women. Rather, recognizing and applying traditional law that discriminates against women serves as a detriment to women in their daily lives and, further, weakens their overall status. On the other hand, traditional law can and should be applied because it reflects international human rights and the international standards for equality between men and women. In fact, a dual legal system that embodies these values can actually improve women's status. Since in many countries traditional law is often the only form of law known to many people, particularly those living in nonurban areas, allowing this body of law to continue to operate in accordance with international standards of equity, vis-à-vis women, can help to disseminate and eventually ensconce the concept of gender equity.

II. LEGAL PLURALISM

Traditional legal anthropology views legal pluralism as a system of different legal orders, conceived of as separate entities, coexisting in the same political space. It consists of different bodies of law that form part of the state legal system. In a sense, legal pluralism also represents the

4. Traditional law might also be considered discriminatory towards men, but the scope of this essay is limited to the effect of traditional law on the status of women.


7. John Griffiths, “What is Legal Pluralism?”, 24 J. LEGAL PLURALISM &
"openness" of the law toward society\textsuperscript{8} by allowing the coexistence of legal orders within a social group that do not belong to a single system.\textsuperscript{9} In much of the Muslim world, for instance, Shari'a (Islamic law) coexists with public or national law.\textsuperscript{10} Likewise, many African nations recognize both national law and customary (tribal) law. The United States as well supports a system of legal pluralism in which American Indian law exists alongside federal law.\textsuperscript{11}

A. LEGAL PLURALISM IN EGYPT: ISLAMIC LAW AND CIVIL LAW

Egypt officially embraces two legal codes: Islamic law and civil law. However, as the principles of Islam also represent the source of civil law,\textsuperscript{12} it can be argued that all law in Egypt is in fact Islamic.\textsuperscript{13}

1. Brief History of Egyptian Law

Although the modern nation-state is premised on popular sovereignty, constitutionalism, and a legal system in which citizens have equal rights and obligations, Islamic political thought prior to the influence of Western legal concepts envisaged a system of divine nomocracy, or government administered in accordance with a divine system of law.\textsuperscript{14} Consequently, Islamic political thought did not conceive of a legitimate secular political authority and moreover viewed Islamic law as the only law.\textsuperscript{15} Islamic doctrine has been moving from the theoretical Islamic ideal of a polity as a religiously based and universalist community of believers, known as the


\textsuperscript{9} Griffiths, \textit{supra} note 7, at 5. While the scope of this article precludes a detailed discussion of legal pluralism, Griffiths' analysis of this topic in terms of its "juristic" and "social science" perspectives provides a comprehensive understanding of the impact of law (or laws) on society and custom, as well as the impact of the larger world on law.

\textsuperscript{10} Shari'a is a code of law regulating both public and private life. However, many Islamic nations, recognizing the realities of the modern world that generally require conformity with international norms, have adopted secular Western norms in the realm of public law, but continue to follow the Shari'a in matters of personal status or private law. Bharathis Anandhi Venkatraman, \textit{Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?}, 44 AM. U. L. REV. 1949 app. I, at 1971-72 (1995).


\textsuperscript{12} The Constitution of the Arab Republic of Egypt [hereinafter Egyptian Const.], Part I, art. 2 (provides that "Islamic jurisprudence is the principal source of legislation").

\textsuperscript{13} While Egyptian law uses a legal language familiar to Western jurists for an equally familiar legal concept, this concept itself is based on rules and concepts of Islamic law. \textit{See generally} Maurits S. Berger, \textit{Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law Through the Backdoor}, 50 AM. J. COMP. L. 555 (2002).


\textsuperscript{15} \textit{Id.}
umma, to the contemporary reality of a world comprised of nation-states. Conflicts between secular and religious law came along with the adoption of the modern nation-state as the form of political organization in Muslim milieus. Despite today’s predominance of the modern nation-state as a political model, the conflict between secular and religious law continues. Indeed, the influence of Islamic doctrine remains evident in that most Muslims consider the Qur’an, rather than national law, to be the most fundamental source of guidance.

Egypt exemplifies the dichotomy of dual legal systems by its retention of both Western-inspired national law and Islamic personal law. While the Egyptian Constitution affirms Islam as the state religion, and a 1980 amendment recognizes the principles of Islamic jurisprudence as the principal source of legislation, the only area of law where Shari’a is demonstrably treated as the main source of legislation is personal status law (also known as “family law”). The rest of the Egyptian legal system is based on French civil law. Personal status law recognizes “what differentiates one person from another in terms of natural and family characteristics and take[s] [this] into consideration by the law to entail legal effects governing his/her social life.”

The status of Egyptian women is derived from this same law, which dictates, among others, the rules of marriage, divorce, and inheritance. Legal issues that fall outside of the personal status area are dealt with by

16. Id. at 1015.
25. While Islamic law guides Muslim Egyptians in these areas, non-Muslim Egyptians depend on their religious laws and religious communities. Non-Muslim Egyptians are composed of Christians and Jews, each group has its own provisions governing marriage and divorce. Egypt recognizes one Muslim, two Jewish and 12 Christian communities, with a total of eight personal status laws. The number of laws is less than the communities because some communities share the same law. Berger, *supra* note 13, at n.15.
secular courts with judges trained along Western jurisprudential lines. Despite the prominent role of personal status law in governing individual’s social lives, no comprehensive code governing the rights of the family has been promulgated to date. However, there exist several important laws adopted by the Egyptian legislature in this regard. For the purposes of this paper, only personal status laws concerning marriage will be examined.

2. The Egyptian Court System and Personal Status Law

Earlier, Shari’a courts existed as separate courts, but in 1956 they were integrated into the National Courts. Judges trained in Shari’a preside over family law cases within the National Courts. Appeals of cases are heard by regular judges in the Court of Appeals and then the Court of Cassation. These cases may also eventually be heard by the Supreme Constitutional Court. If a case is reviewed by the Supreme Constitutional Court, the implications are potentially far-reaching since this court is granted the power of statutory interpretation as well as judicial review. Indeed, the Court is not obliged to restrict itself to the immediate question raised. Upon seeing related constitutional violations linked to the original question, the Court has been active in bringing the entire statute into line with constitutional requirements by engaging in statutory interpretation while remaining in the purview of judicial review.

3. Personal Status Law and Marriage in Egypt

Personal status law guides all aspects of marriage in Egypt. Specifically, this body of law sets out the requirements necessary to

27. When the Westernization of legal systems occurred, Islamic law was historically dispensed within areas where the State placed a premium on efficiency and rapid modernization such as government, finance, administration, commercial law, and criminal law, among others. In general, lower priority was accorded to reforms enhancing women’s rights, particularly those that would affect the preservation of Shari’a rule of personal status. Further, moves to replace Shari’a law with Western law were deterred by political and religious conservatives. See Mayer, supra note 22, at 139-143.

28. Several attempts to establish one comprehensive code governing family issues have been made including a committee set up in 1962 to review the draft code of personal status. Although the objective was to issue a comprehensive personal status code, the draft is still pending. Abu-Odeh, supra note 26.

29. Emory U. School of Law, supra note 21.

30. There are separate family law chambers for Copts, see id.

31. Id.


33. Id. at 3.
establish a marriage contract and, further, defines the rights and obligations of wives and husbands. Personal status law also delineates rights and obligations associated with divorce and polygamy.

a. Establishment of a Marriage Contract

Under Shari'a, a woman does not have the right to contract her own marriage. Rather, she needs a wali (guardian) to contract the marriage on her behalf. Her guardian is required to be male and is usually her father. In the absence of the father, the grandfather or another male relative may serve as guardian.

Guardianship of the father (or his surrogate) is not meant to be tyrannical: a woman may accept or refuse an offer of marriage. Nevertheless, the legal condition of requiring a guardian to contract a marriage denies a woman of majority age the guarantee of equality of opportunity afforded by the Constitution. Part II, article 8 of the Constitution provides that “[t]he State shall guarantee equality of opportunity to all citizens.” Unlike a man wishing to enter into a marriage contract, a woman’s desire to enter into a marriage contract must be approved by her guardian. If no approval is forthcoming, she will be prevented from doing so. Clearly, a woman’s dependence on her guardian eliminates the opportunity for her to enter into marriage autonomously. This situation not only violates a woman’s constitutional right of equality of opportunity, but also diminishes her status since it effectively relegates her to a position of legal minor rather than a mature adult.

b. Rights in a Marriage

An Egyptian woman is entitled to both financial and nonfinancial rights in a marriage, such as the right to require a dowry that is hers alone to do

35. The requirement that a wali contract the marriage was historically defended as a protective measure for women who may be swept by their emotions and in order to protect a family's honor in cases where women elect to marry ineligible males. Id. at 15.
36. Qassem, supra note 24, at n.10.
37. Id. at 22, quoting a hadith (saying of the prophet) wherein: “A virgin maiden went to the prophet complaining that her father had coerced her into a marriage against her will. The prophet granted her freedom of choice,” i.e., he gave her the right to opt for acceptance of that marriage or its rejection.
38. Egyptian Const., supra note 12, Part II, ch. 1, art. 8.
39. Id.
41. Egyptian Const., supra note 12, at Part II, art. 8.
42. al-Hibri questions why a woman is required to have a wali today since men are not subject to the same requirement and in response, asserts three reasons: the Qur’an, stereotyping, and the nature of patriarchal society. al-Hibri, supra note 34, at 17-18.
with as she pleases, the right to own property, the right to earnings, and the right to not be harmed by her husband. Yet a husband’s rights in a marriage often effectively negate those of his wife. Among the several rights afforded a husband through a marriage contract, his right to obedience from his wife, in particular, places women at a disadvantage.

Obedience from a wife may require her to gain permission from her husband to engage in work outside the home. This situation effectively denies a woman her right to accumulate wealth through earnings and significantly contributes to her economic dependence on her husband. This tenuous economic situation can be further exacerbated since a wife who “disobeys” may also be denied maintenance, i.e., financial sustenance consisting of food, clothing, housing, toiletries, and medical attention. This is a serious matter for financially vulnerable women and their children.

In situations of divorce the effects of this limitation become particularly pronounced. A woman who has been restricted from working outside of the home rarely has assets of her own. In addition, she is also unlikely to have any training to be able to earn wages. As a consequence, many women become instantly destitute upon divorce. Moreover, because of their nonvirgin status, divorced women have little hope of remarrying.

In addition to requiring a wife to obey her husband, a husband also has

43. While justice is the hallmark of Islam, Muslim societies have been dispensing injustices to women in the name of Islam. This results in large part from the patriarchal reality in Muslim countries, which differs greatly from the Islamic one. In cases of unhappy marriages, divorce or custody, even women’s own families have ignored Islamic law protections for women. For a thorough discussion of Muslim women’s rights, see Azizah Yahia al-Hibri, *Muslim Women’s Rights in the Global Village: Challenges and Opportunities*, 15 J. L. & RELIGION 101 (2001).

44. *Id.* at n.99, referring to Egyptian Code, Act No. 25 (1920) & Act No. 25 (1929) as both are amended by Act No. 100 (1985), L. No. 25 ch.2, art. 11 Repeated Twice (1929) (amend.1985).

45. See Reservations Made by Egypt to the Convention on the Elimination of All Forms of Discrimination Against Women, 3.2(b), http://www.unesco.org/webworld/peace_library/EGYPT/WOMEN/200.HTM (last visited Sept. 9, 2005) (stating that while a wife is entitled to leave her house without permission for work, if she is perceived to “abuse” her right to work and her husband requests her not to work, she may not go out of the house for employment purposes).


47. *Id.*, citing Egyptian Code, L. No. 25 ch. 1 art. 1 (1929) (amend. 1985), and stating that “the wife loses her right to maintenance if she refuses to have conjugal relations with her husband or leaves her home without her husband’s permission (unless she has a legitimate reason for leaving).”


the right of decision-making at home. Included in this right is the wife’s obligation to settle down in her husband’s home and not to leave it without his permission, except in some cases when it is not possible to obtain his permission. 53 This right conflicts with Article 41 of the Constitution concerning “public freedoms, rights and duties” which states: “Individual freedom is a natural right and shall not be touched.” 54 By forbidding a wife from leaving the marital home without permission from her husband, personal status law serves to deny a wife her constitutional guarantee of “individual freedom.” 55 Indeed, Article 41 goes on to declare that “no person may [have] his freedom restricted or prevented from free movement except by and or necessitated by investigations and preservation of the security of the society” (emphasis added). 56

While constitutional law is generally understood to deal with state powers rather than individual action, 57 the Egyptian Constitution’s recognition of the principles of Islamic jurisprudence as the principle source of legislation 58 arguably subjects both state and individual behavior to constitutional law. Personal status law’s demonstrable treatment of Shari’a as the main source of legislation 59 supports this notion. Just as national law governs state action, personal status law governs the actions of individuals. Therefore, the explicit legal right of a husband to restrict the free movement of his wife under Shari’a expressly contradicts the right to individual freedom guaranteed by the Constitution. 60

c. Polygamy

According to Egyptian Personal Status Law No. 100 of 1985, polygamy for husbands is permissible so long as existing and intended wives are notified. The wife of a polygamous husband may demand a divorce within one year of the date her husband has taken another wife. 61 However, the original wife’s right to a divorce on grounds of polygamy is not automatic. 62 Rather, a divorce because of polygamy may be obtained

53. Qassem, supra note 24, at 22.
54. Egyptian Const., supra note 12, at Part III, art. 41.
55. Id.
56. Id.
57. Constitutional law, according to Egyptian jurists, examines the system of government within the state and its sovereign powers and their competencies. It also defines public rights, freedoms and the guarantees for individuals in exercising such rights. A. Sherif, Constitutional Law, in EGYPT AND ITS LAWS 315 (N. Bernard-Maugiron & B. Dupret eds., Kluwer Law International 2002).
58. Egyptian Const., supra note 12, at Part III, art. 41.
59. Mayer, supra note 22, at 139.
60. Egyptian Const., supra note 12, at Part III, art. 41.
61. A wife forfeits her right to claim a divorce for this reason one year after having obtained knowledge of the second marriage, or even before then if she has explicitly or implicitly accepted it.
62. Before the Personal Status (Amendment) Law (Law no. 100/1985) was enacted to revise the 1920 and 1929 Laws on Personal Status, a wife had an automatic right
only if a judge is satisfied that, as a result of her husband’s remarriage, a wife has endured financial or psychological harm. In addition, a judge must direct the parties to attempt reconciliation before making such a ruling.\(^6^3\)

Once again, the existence of religious law alongside national law points to the inequity and disadvantage that women experience as a result of a dual legal system. By permitting a husband to marry more than one wife, Islamic law provides a man with the opportunity to engage in polygamy. However, the law does not provide this same opportunity to women, instead forbidding women from marrying more than one husband. This lack of equality of opportunity (to enter into a marriage) violates Chapter 1, Article 8, of the Constitution.\(^6^4\)

In addition to violating women’s constitutional right to equal opportunity, the Egyptian personal status law allowing polygamy also denies them their constitutional right to be treated equally before the law.\(^6^5\) According to the Qur’an, men may marry as many as four wives so long as they treat their wives equitably and fairly.\(^6^6\) Yet, the Qur’an also states that it is not possible to be equitable and fair in polygamous situations.\(^6^7\) Indeed, the Qur’an expressly states that polygamy results in injustice.\(^6^8\)

While the Constitution guarantees all Egyptians the right to be treated equally before the law, Personal Status Law No. 100 of 1985 subjects women to disparate treatment and thereby denies them this right.

As the Qur’an makes clear, a wife in a polygamous marriage is necessarily subject to inequitable and unfair treatment.\(^6^9\) Further, a woman may be precluded from divorce unless she can prove an injury resulting from this situation.\(^7^0\) A husband, on the other hand, experiences no injustice in this marital arrangement and, moreover, retains his unilateral right to divorce.\(^7^1\) The disparate impact of this personal status law effectively violates Egyptian women’s guaranteed right to equal treatment under the law.

In sum, men’s rights in marriage often conflict with women’s
to divorce her husband if he married polygamosly. As a concession to religious conservatives, the presumption of injury occasioned by a polygamous marriage, as evidenced in Law No. 44 of 1979, was removed.

63. Law No. 100 returns to the teachings of the Shari’a with regard to provisions relating to grounds for divorce and the allocation of support. See 12 Ann. Rev. Population L. 1, 335-38.
64. Egyptian Const., supra note 12, at Ch. 1, art. 8.
65. Id. at Part III, art. 40. (All citizens are equal before law.)
66. For a brief but informative discussion of the complex Qur’anic statement on polygamy, see al-Hibri, supra note 43, at 121 (citing Qur’an 4:3).
67. Id. (citing Qur’an 4:129).
68. Id.
69. Id.
70. Egyptian Const., supra note 12, at Part I, art. 2.
71. Berger, supra note 13, at 579.
constitutional rights as well as the marriage rights afforded women by Islamic law. Men's right to prohibit a woman from contracting her own marriage, earning an income, leaving her marital home, and divorcing if her husband takes another wife, are just a few examples of how men's rights under Islamic marriage laws eclipse those of women. This incongruity places women at greater risk vis-à-vis their economic situation, as well as that of their children, and also causes serious emotional consequences that affect a woman's dignity and self-esteem. More importantly, it weakens Egyptian women’s status overall by subordinating or, in many instances, completely denying their rights in favor of the rights of men.

B. LEGAL PLURALISM IN SOUTH AFRICA: CUSTOMARY LAW AND GENERAL LAW

A characteristic feature of the legal systems of most former European colonies in Africa is the plurality of customary and religious laws that co-existed with the imported European law. South Africa, a former Dutch and later British colony, is no different in this regard since Roman-Dutch law in general, coexisted with official customary law throughout the years of colonization. Today, customary law continues to coexist with national law.

72. Reservations Made by Egypt to the Convention on the Elimination of All Forms of Discrimination Against Women, supra note 45, at 3.1.
74. The British conquered the Cape Colony first in 1795 and then in 1806 Roman-Dutch law was confirmed to the settlers. This was typical of 19th century international legal practice in that when a territory was conquered from a “civilized” (i.e., Western) power, the existing law remained in place. When lands never before colonized were conquered, the new settlers brought with them their own law. Over time, however, the Roman-Dutch law of South Africa became Anglicized. [3-B South Africa] Thomas H. Reynolds & Arturo A. Flores, Foreign Law: Current Sources of Codes and Legislation in Jurisdictions of the World, 4 (William S. Hein & Co. 2003).
75. An exception to this general rule was in the Cape Colony. In 1806 when Britain took occupation of the cape under treaty of cession with the Netherlands, the new colonial authorities assumed that the local law was Roman-Dutch and, consequently, did not recognize indigenous customary law. T.W. Bennett, Human Rights and Constitutional Law Series of the Community Law Centre, University of the Western Centre, Human Rights and African Customary Law Under the South African Constitution, 18-19 (Juta & Co, LTD 1995) (citing R v. Harrison & Dryburgh, 1922 A.D. 320 at 330 (S.Afr.)).
76. Official recognition of customary law is found in Chapter 12 of the Constitution that provides for the recognition and role of traditional leaders and stipulates that “[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.” S. Afr. Const. 1996 ch. 12, § 211(3).

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1. A Brief History of South African Law

Although everyone was initially subject to Roman-Dutch law, a realistic appraisal of the problem of governing a large and potentially rebellious population called for recognition of aboriginal law. Consequently, a Royal Instruction of March 8, 1848, directed that local laws and customs were not to be abrogated unless they were "repugnant to the general principles of humanity recognized throughout the whole civilized world." This same basic approach to African law was adopted for government of the Transkei territories. In essence, "official" customary law was created in the context of the specific historical circumstances of the colonial encounter in southern Africa. Customary law was transformed from a body of customs and norms unique to each tribe and applied by tribal members to a body of law that was formally recognized and applied by government officials.

78. Bennett, supra note 75, at 19.
80. Because the inhabitants were believed "not sufficiently advanced in civilization and social progress" to be governed by common law (Hailey Lord, *An African Survey: A study of problems arising in Africa south of the Sahara* 2 ed. 350 (1945 OUP), courts were given discretion to apply customary law, provided that it was "compatible with the general principles of humanity observed throughout the civilized world." Bennett, supra note 75, at 19.
81. Jill Zimmerman, Note, *Border People and Antidiscrimination Law: The Reconstitution of Customary Law in South Africa: Method and Discourse*, 17 HARV. BLACKLETTER L.J. 197, 199 (Spring 2001). "Official" customary law, i.e., codified law, should be distinguished from the general concept of customary law, i.e., living law. The former is generally understood as "the cumulative of all legislative enactments and judicial pronouncements on African social tradition and custom." Hon. Yvonne Mokgoro, *The Customary Law Question in the South African Constitution*, 41 ST. LOUIS U. L.J. 1279, 1281 (Fall, 1997). However, because of the self-serving political ideals of successive colonial governments and indigenous patriarchal leaders, customary law that was formalized through legislation and infused with the conservatism of positive law is now widely considered an "invented tradition." See *The Invention of Tradition* (Eric Hobsbawm & Terence Ranger eds., 1983); Mokgoro, supra, at 1281; Zimmerman, supra, at 202. In contrast, the latter, as living law, is more closely related to African social tradition and customs that respond to society's contemporary values and reflect its stage of social development. As pointed out by Mokgoro, "There is [a] general tendency to romanticize African custom or tradition as an expression of African social values, pure and unchanged by colonial influence. The truth of the matter is that much of the social tradition and custom has evolved with the development of traditional communities over time." Mokgoro, supra, at 1281-1282. Finally, perhaps the most definitive distinction separating customary (living) law from "official" customary (codified) law is the fact that the former is unwritten while the latter, as codified law, is written. Lona N. Laymon, *Valid-Where-Consummated: The Intersection of Customary Law Marriages and Formal Adjudication*, 10 S. CAL. INTERDISC. L.J. 353, 356 (Spring 2001).
A uniform approach to recognizing customary law in South Africa was eventually imposed in 1927, with the passing of the Native Administration Act. Certain courts were given discretion to apply customary law in legal suits between Africans. In 1988, all courts were granted this discretion. While laws indigenous to South Africa were uniformly recognized by the government, their application was governed by ad hoc responses to particular social and political problems. The state exercised discretion in deciding whether, and to what extent, customary law should be recognized. Courts were obliged to consider all aspects of a case and on the basis of their inquiry, without any prejudice in favor of common or customary law, to select the appropriate legal system. In addition, this law was limited primarily to the statutorily defined limits of marriage, family, succession, and land tenure. In effect, “customary law was considered a second-rate system by the South African government. Roman-Dutch law was always treated as the general law of the land and the model to which customary law should conform.”

The end of apartheid and the beginning of political transformation in 1994 brought about a variety of changes including the drafting of an interim and a new Constitution. The interim Constitution continued to recognize customary law and, moreover, elevated its status by referencing a number of major provisions that were based on this body of law. For instance, it was earlier argued that “the choice of law principle in South African jurisprudence provided a person with the freedom to participate in his or her cultural life.” “Section 31 of the interim Constitution, however, introduced the notion of this choice as a right.” A person had the right to insist on the application of customary law in appropriate legal proceedings as opposed to relying on the discretion of governmental authorities to do so. This view of customary law “has done much to improve the overall status of customary law... [and] it is evident that customary law is at last achieving recognition as a foundation of the South Africa legal system.”

82. Bennett, supra note 75, at 19.
84. Bennett, supra note 75, at 19.
85. Id. at 51-52.
86. Bennett, supra note 75, at 20.
88. S. AFR. (Interim) CONST. 1993.
89. Mokgoro, supra note 81, at 1284.
90. Id. at 1285.
91. Id.
92. Zimmerman, supra note 81, at 205.
While the Constitution is considered the supreme law of the Republic, it continues to require the courts to apply customary law.

2. The South African Court System and Customary Law

While historically there existed a divided court structure that applied either South African national law or the subordinate system of African customary law, today customary law is afforded equal recognition with national law. Indeed, customary law is specifically addressed in the twelfth chapter of the country’s Constitution, which states that courts are obliged to “apply customary law when that law is applicable.” Like all other laws, customary law is also “subject to the Constitution and any legislation that specifically deals with customary law.”

Of particular significance, however, is the role of traditional authorities in applying customary law. While all courts may employ customary law if appropriate, the South African Constitution recognizes “the institution, status and role of traditional leadership, according to customary law” and permits this leadership to “deal with matters relating to . . . the role of . . . customary law and the customs of communities observing a system of customary law.” Consequently, traditional leaders, who may frequently lack legal training or an understanding of the Constitution, are authorized to apply customary law. Considering that “traditional leaders have appealed to cultural relativist Africanist discourses to resist democratization and the recognition of women’s rights,” their role in applying customary law is suspect since it is likely to the disadvantage of women subject to this law. Recent history supports this contention. During the 1992-1993 constitutional negotiations in Kempton Park, traditional authorities presented a proposal to exempt customary law from the reach of the Bill of Rights. Mwelo Nonkonana, who spoke on behalf of the Congress of Traditional Leaders of South Africa (CONTRALESA), argued that the Bill of Rights would “inflict irreparable harm on the entrenched cultural values of the indigenous people of South Africa.”

93. S. AFR. CONST. 1996 chs. 1, 2; “The supremacy of the Constitution stands in direct contrast to the previous administration system, where, in accordance with the British tradition that applied since the British War at the beginning of this century, parliament was sovereign and above the law. South Africa is now a democratic, constitutional state. All three branches of government, legislative, executive, and the judicial, are bound by the Constitution’s provisions.” J.C. Sonnekus, South Africa’s Transition to Democracy and the Rule of Law, 29 INT’L LAW. 659, 661 (1995).
94. S. AFR. CONST. 1996 ch. 12, § 211(3); see also Mokgoro, supra note 81, at 1286.
95. S. AFR. CONST. 1996 ch. 12, § 211(3).
96. Id. § 211(3).
97. Id. § 211(1).
98. Id. §§ 211(1), 212(2).
99. Zimmerman, supra note 81, at 205-06.
100. Id. at 206.
Although CONTRALESA’s proposal was not accepted, it clearly demonstrates the possibility of traditional leaders misusing customary law.

3. Customary Law and Marriage in South Africa

Historically, “civil law marriage was the only marriage that had full legal recognition in the former Republic of South Africa.” Customary law marriages were first accorded official recognition with the passage of The Recognition of Customary Marriages Act in 1998 (hereinafter, “Marriage Act”), which became law in November 2000. The Marriage Act repealed the “infamous section 11 (3) of the Black Administration Act of 1927 which condemned African women to a legal state of ‘perpetual minority’.” By requiring that all customary marriages occurring after the new law was passed abide by the rules of the new order, the Marriage Act served to ameliorate the position of women by creating an equitable marriage relationship between men and women. However, the Marriage Act fails to improve the status of all women since it only affords its protections to customary unions that occurred before the law was passed if these marriages are registered under the new Marriage Act.

South Africans married under customary law before the new law was passed had only had one year (until November 14, 2001) to register such a marriage. 

101. In response to CONTRALESA’s proposal to exempt customary law from the Bill of Rights, black women delegates led a fight to oppose it. In addition, when a compromise clause was suggested that limited the right to equality, various rural women’s organizations sent submissions opposing the clause. Politicized by their involvement in the liberation movement, rural women have consistently repeated an organized demand for fifty-fifty representation in all local government and development councils, the abolition of polygamy, independent rights to land, and the joint registration of all marital property. Zimmerman, supra note 81, at 206-07.


103. Customary marriage in South Africa refers to marriages contracted according to African customary law. It does not include marriages contracted according to other “noncivil” law, such as Islamic law.

104. No. 120 of 1998; the Act became law on 15 November 2000.


107. For a useful discussion concerning the approaches taken by the South African legislature and courts to advance the rights of women under the customary law of marriage and their implications, see Himonga, supra note 102.

108. Women’s Legal Centre, supra note 105 (noting that in order to benefit from the Marriage Act, i.e., to receive protection for legal rights concerning, among others, property, maintenance and inheritance rights, a marriage must be officially registered).
marriage. For the purposes of this essay, customary law marriages that were not registered within the allotted time frame will be referred to as "nonregistered" customary law marriages. "Nonregistered" customary marriages, although officially recognized by the Marriage Act as valid unions, nevertheless remain subject to customary law. The following discussion addresses the implications of legal pluralism for women who are spouses in "nonregistered" customary marriages.

a. Establishment of a Marriage Contract

Under customary law, "the position of women with regard to marriage is circumscribed." Women may not negotiate or terminate their own marriages. Moreover, a woman's consent to enter a marriage is generally not required in that her lack of consent is not considered a bar to the union.

In order to consider a marriage wholly valid, customary law generally requires the payment of *lobolo*, or "the property in cash or in kind . . . 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." Lobolo is given to the bride's family partly in return for the transfer of authority over the woman to her husband's family. As such, it represents the husband's marital power. Accordingly, if a wife "returns to her family, the lobolo, or a portion thereof, must be returned."

Entering into a marriage contract under customary law manifestly perpetuates the subordinate role of a woman by relegating her status to that of a minor. By not requiring a woman's consent to enter into a marriage, customary law further denies a woman her right to equality and dignity afforded by the Constitution. In addition, the practice of lobolo, symbolizing a husband's marital power over his wife, also denies a woman's right to equality. In sum, establishing a marriage contract
according to customary law effectively discriminates against women based on their gender and, accordingly, is in direct violation of Chapter 2, section 9 (4), of the Constitution. This discrimination not only deprives women of exercising their constitutional rights, but, moreover, weakens their overall status in society by not treating them with the human dignity afforded men.\footnote{118. The Constitutional Court has pointed out “that in particular circumstances the rights of equality and dignity are closely related.” \textit{National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others} 1999 (1) SA 6 (CC) at para. 31 (S. Afr.). The Court has also noted that “the denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many ways.” \textit{Id.} at para. 42. This, in turn, “perpetuates[s] and reinforces[s] existing prejudices and stereotypes” resulting in an “invasion of [one’s] dignity” which is respected and protected by section 10 of the South African Constitution. \textit{Id.} at para. 54.}

b. Rights in a Marriage

A husband in a customary marriage has the right of chastisement over his wife. This right entitles him not only to chastise his wife but also to physically discipline her for relatively minor infringements.\footnote{119. \textit{Venter, supra} note 112, at 9.} The authority of the husband over his wife also extends to members of his kinship group. If a woman’s husband should die, for instance, the members of his family group can “continue to assert their authority over the woman, “requiring her [ ] to 'till the soil' as well as cook.”\footnote{120. \textit{Id.}} Another aspect of this authority is the “right to require the woman to make her reproductive services available to a certain member of the group and bear his children.” In some tribes, this results in the practice of the deceased husband’s brother taking the woman as his wife. The death of the husband fails to dissolve the marriage and “the wife may be required to remain with her husband’s family group and bear children to a member of that group.”\footnote{121. \textit{Id.}}

The virtually comprehensive authority of a husband over his wife (both during his lifetime and even after his death) is at odds with the guarantees of equality\footnote{122. S. AFR. CONST. 1996 ch. 2, § 9(2).} and dignity\footnote{123. \textit{Id.} ch. 2, § 10.} under South Africa’s Constitution. Indeed, by depriving a wife of her prerogative, \textit{inter alia}, to decide whether to marry and whether to remain in a marriage, as well as subjecting her to the unquestioned authority of her husband in very nearly all matters, customary marriage law violates the constitutional right of women to experience “the full and equal enjoyment of all rights and freedoms.”\footnote{124. \textit{Id.} ch. 2, § 9(2).} In addition, it deprives women of the right to have their “dignity respected and protected” as guaranteed under the Constitution.\footnote{125. \textit{Id.} ch. 2, § 10.}
A husband's right to control his wife's labor and reproductive functions is also in direct contravention of assorted constitutional guarantees. According to Chapter 2, section 12 (2)(a) of the Constitution, "[e]veryone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction." Clearly, being denied her right to decide whether to have children and with whom, under customary law a wife is divested of her right to make decisions concerning childbearing. In addition, Chapter 2, section 13 states that "[n]o one may be subjected to slavery, servitude or forced labour." Affording a husband the right to his wife's labor creates, at best, a condition of servitude and, at worst, forced labor.

In addition to a husband's right to exercise virtually complete authority over his wife, customary law also affords a husband exclusive rights over property. The Marriage Act attempts to bring customary law in line with the Constitution by stating that customary marriages entered into after the commencement of the Marriage Act will be in community of property and of profit and loss unless otherwise indicated in an antenuptial contract. However, this property system does not apply to "nonregistered" customary marriages. Indeed, Section 7(1) of the Marriage Act expressly notes that the proprietary consequences of a customary marriage entered into before the Marriage Act's commencement are still to be governed by constitutional rights generally limit government, as opposed to individual action, equality rights afforded under the South African Constitution address the actions of both government and individuals. The fundamental character of these rights has been confirmed by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The Act gives effect to Section 9 of the Constitution by stipulating that "no person may unfairly discriminate against any person on the ground of gender," and proscribes "the system of preventing women from inheriting family property" and "any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men . . . ." Zimmerman, supra note 81, at 211-12, quoting Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s. 8. Customary marriage laws that deny women their right to make decisions concerning childbearing and effectively subject women to a condition of servitude or forced labor amount to unfair discrimination based on gender. Consequently, these laws, as well as the individuals who act in accordance with them or even customary practices not codified into law, infringe on the right to equality of women afforded by the Constitution.

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127. Id. § 12 (2)(a). "Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction."

128. Id. ch. 2, § 13.

129. Venter, supra note 112, at 9.

130. Being married in community of property means that you have one joint estate. All assets are jointly owned and all debts are jointly owed, including those that either party had before the marriage. The parties are co-administrators of the joint estate and there are various transactions that require the consent of both parties. For example, both parties would have to consent to the selling or bonding of immovable property and the ceding of any policies. Siva Naidoo, Consumerwise: Ins and Outs of Marriage Contracts, SUNDAY TIMES (Durban, S. Afr.), Sep. 7, 2003, http://www.suntimes.co.za/2003/09/07/news/durban/ndbn12.asp; see also Women’s Legal Centre, supra note 105.
customary law. Accordingly, women in "nonregistered" customary marriages remain subject to this patriarchal and gendered system of law.

The consequences for women subject to customary law as it relates to property are substantial. Women are at a clear "disadvantage in relation to married men with regard to accessing resources in rural areas." Even if obtained, however, resources held by women are considered the property of their husbands. As a person subject to permanent guardianship in one form or another, a woman may generally own no property in her own name. Property acquired by her during the marriage also accrues to her husband. By denying women the right to own property, the rules of customary law marriage violate Chapter 2 section 25 (1) of the Constitution.

c. Polygamy

"A woman subject to African customary law may also find herself in the position of not being her husband's only wife since polygamy is practiced among many tribes in South Africa." In addition, women in customary law marriages have no recourse to this situation. While men are permitted to have more than one wife according to customary law, women are not entitled to have more than one husband. Affording men a right that women do not have violates the Constitutional right to equality. In addition, allowing men to have more than one wife degrades the status of women and thereby contravenes the Constitution's "Bill of Rights [which] applies to all law" (including customary law) and which "affirms the democratic value of human dignity."

In sum, in an African customary law marriage, a woman's position is not on par with a man's position in many respects. On the basis of her sex, she is accorded an inferior status and, consequently, treated as somewhat less than a person. Not only is a woman denied many constitutional rights.

131. Recognition of Customary Marriages Act 120 of 1998 s. 7(1); http://www.afrol.com/Categories/Women/wom010_sa_marriage.htm; see also Gokul, supra note 106.
133. Venter, supra note 112, at 9.
134. S. AFR. CONST. 1996 ch. 2, § 25(1) ("No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.").
136. Bennett, supra note 75, at 120.
137. S. AFR. CONST. 1996 ch. 2, § 9(2).
138. Bennett, supra note 75, at n.59 (noting that one of the reasons put forth in Ismail v. Ismail 1983 (1) SA 1006 (A) at 1024 (S. Afr.) for refusing to recognize an Islamic marriage was that polygamy degrades the status of women and consequently, is contrary to public policy).
139. S. AFR. CONST. 1996 ch. 2, § 8(1).
140. Id. ch. 2, § 7(1).
based on customary marriage laws, but the institution itself with its inherent disparities undermines the achievement of gender equality which is a founding value of the Constitution.\textsuperscript{141} By discriminating against women and denying them their constitutional rights, customary marriage laws serve to diminish women’s overall status in society.

C. LEGAL PLURALISM IN THE UNITED STATES: INDIAN LAW AND FEDERAL LAW

Indians living in the United States are members of sovereign nations that had been conquered in war or otherwise forced to submit to the authority of the United States.\textsuperscript{142} As a conquered people, the United States Congress regulates the internal affairs of Indian tribes.\textsuperscript{143} One aspect of this regulation has been the recognition of Indian tribes’ retention of “their original natural rights” in matters of local government.\textsuperscript{144} This recognition, in turn, resulted in the development of Indian law as distinct from federal law\textsuperscript{145} and from state law

1. A Brief History of American Law

The sovereign status of American Indian nations existed prior to the formation of the United States and continued afterwards.\textsuperscript{146} As either conquered\textsuperscript{147} or soon-to-be conquered nations, they were forced to submit to the authority of the United States.\textsuperscript{148} Indian nations’ sovereign status is further underscored by the fact that they are not signatories to the United States’ Constitution and did not join the federation of powers. Consequently, although the Constitution explicitly regulates the

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\textsuperscript{141} By discriminating against women, customary law marriage contravenes the Promotion of Equality and Prevention of Unfair Discrimination Act of 2002, which gives effect to section 9, the equality provision, of the Constitution; S. AFRI. CONST. 1996 ch. 1, § 1(a); see also Bannatyne v. Bannatyne, Case CCT 18/02 (discussing the gendered nature of the Maintenance Act 99 of 1998 and noting the Constitutional value of achieving gender equality).


\textsuperscript{143} Congress’ power to regulate the internal affairs of Indian tribes was upheld by the Supreme Court in \textit{United States v. Kagama}, 118 U.S. 375, 383 (1886) (noting that Congress had the power to protect its “wards”). See Resnik, \textit{supra} note 11, at 692.


\textsuperscript{145} \textit{Id}.

\textsuperscript{146} \textit{Id}. at 295.

\textsuperscript{147} Cooter & Fikentscher, \textit{supra} at 295 (“In addition to the U.S. Constitution, international law governs relations between tribes and the United States. International law acknowledges the authority of conquerors and imposes obligations on them. . . . In principle, the American government’s power over Indian tribes is rooted in, and limited by, occupatio bellica [a term that refers to a conquered people who persist, leaving the defeated nation as a legal subject]”).

\textsuperscript{148} \textit{Id}.
relationship of Indian nations with the federal and state governments, Indian nations—"nonparties" to the Constitution—are not circumscribed by provisions such as the Bill of Rights.\textsuperscript{149} Rather, the relationship between the Indian tribes and the federal government is more aptly characterized as "pre-constitutional" and "extra-constitutional."\textsuperscript{150} Indeed, "no act of interpretation and no elaboration of consent theory can explain federal exercise of power and dominion over Indian tribes."\textsuperscript{151} In fact, legal relations between the United States and Indian tribes undermine the central tenets of federal courts' jurisprudence—that the Constitution is the beginning of the analysis for the exercise of all the powers of the federal government, and that, by constitutional interpretation, the federal powers are limited and constrained.\textsuperscript{152}

As Chief Justice Marshall's famous oxymoron illustrates, in the United States, American Indian nations are considered "domestic dependant nation[s]."\textsuperscript{153} In further elaborating on this status, Justice Marshall, in \textit{Worcester v. Georgia},\textsuperscript{154} described tribes in Georgia as "distinct political communities, having territorial boundaries, within which their authority is exclusive."\textsuperscript{155}

Despite their "sovereign" status under United States law, Indian tribes are also subject to intrusions by federal authorities since they are also legally "dependent" on the federal government.\textsuperscript{156} The paradox of being simultaneously sovereign and dependent raises questions about the scope of tribal power relative to federal and state governments.\textsuperscript{157} The upshot of this inconsistency is particularly apparent in cases involving the application of tribal law, especially as it pertains to Indian women's rights.

2. The United States Court System and Indian Tribal Law

As "domestic" sovereigns, i.e., separate governments, Indian nations enjoy both political and cultural sovereignty.\textsuperscript{158} This includes the right to establish courts of law in which tribal law may be applied.\textsuperscript{159} The authority

\textsuperscript{149} Rebecca Tsosie, \textit{Native Americans and the Constitution: Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?}, 5 U. PA. J. CONST. L. 357, 358 (2003) (The fact that Indian nations are not guaranteed the rights afforded by the Bill of Rights has significant implications for female members of certain tribes with regard to combating discrimination).

\textsuperscript{150} CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 14 (Yale University 1987).

\textsuperscript{151} Resnik, supra note 11, at 697.

\textsuperscript{152} Resnik, supra note 11.

\textsuperscript{153} \textit{Cherokee Nation v. Georgia}, 30 U.S. 1 (1831).

\textsuperscript{154} \textit{Worcester, supra} note 144, at 515.

\textsuperscript{155} \textit{Id.} at 519.

\textsuperscript{156} Cooter & Fikentscher, supra note 142, at 292-293.

\textsuperscript{157} \textit{Id.} at 293.

\textsuperscript{158} Tsosie, supra note 149, at 358.

\textsuperscript{159} See Cooter & Fikentscher, supra note 142, at 295-300 (The historical and legal bases of contemporary Indian courts vary. A few courts existed before contact with
of tribal courts over Reservation affairs was emphasized by Justice Black in *Williams v. Lee,*\(^{160}\) a milepost for Indian legal self-determination.\(^{161}\) In response to a non-Indian disputing the authority of a tribal court, Black noted that “[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since.”\(^{162}\)

More than 200 federally recognized tribes have a type of judicial system that qualifies as a "court."\(^{163}\) These courts apply Indian tribal law, which, like most traditional law, recognizes custom as its source.\(^{164}\) Indeed, not only is custom considered the source of law, it is even believed to dominate written law in many disputes before tribal courts.\(^{165}\) The jurisdiction of tribal courts includes, *inter alia*, civil law, family law, regulations, and minor crimes committed by Indians. In addition to applying Indian law in specific areas, tribal jurisdiction has the scope to develop Indian norms in these domains.\(^{166}\) Cases involving issues that fall outside the jurisdiction of tribal courts are adjudicated by federal courts.

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160. *Williams v. Lee,* 358 U.S. 217 (1959) Tribal courts developed from an interaction between federal regulation and Indian tribal customs. Consequently, many aspects of Indian tribal courts, e.g., tribal councils that influence tribal court decision making and that may serve as appellate bodies and executive decisionmakers, are unfamiliar to those schooled in U.S. court practices. Resnick, *supra* note 11, at 737.


165. The story of how Mrs. Correla became a judge illustrates this point. (The story is based on an interview by Cooter and Fikentscher, *Id.*) She worked for several years as a secretary in the Tohono O'odham tribal court where she gleaned some knowledge of law. The Tohono O'odham tribal court consists of three judges appointed for two year terms. A judge sometimes resigns before his term expires. One day a judge quit who was supposed to decide a controversial case involving a stabbing. He said to Mrs. Correla, “You have been around here longer than anyone else. You decide this case.” So she did. After she heard the arguments on both sides, she looked at the Tohono O’odha code, but did not find it very helpful. She decided the case according to her own beliefs about right and wrong. Mrs. Correla was subsequently appointed formally to the court, and she eventually became its chief judge. Cooter and Fikentscher note that their interviews revealed that customs, like that illustrated by the story of Mrs. Correla, are thriving in the practices of courts. This has serious implications for those subject to tribal courts, particularly if they have no right to appeal to a federal court.

3. Indian Tribal Law and Marriage in the United States

Indian tribal law is not unified and consequently, tribal law as it relates to marriage also varies depending on the particular tribe in question. Since many tribes do not have important traditional ceremonies for marriage, they differ in determining what sort of conduct constitutes a marriage. Despite the lack of consistency vis-à-vis Indian marriage laws, the federal government generally recognizes Indian marriages that are recognized by tribal authorities since marriage laws implicate cultural values which are the domain of Indian tribes. Indeed, tribes tend to view the regulation of family relations, including marriage, as central to tribal sovereignty. Consequently, American Indian customs that recognize marriage through cohabitation are valid according to U.S. federal law even if the marriage would otherwise be invalid under state law.

a. Establishment of a Marriage Contract

Indian families differ markedly from non-Indian families. Accordingly, Indian family law, especially in terms of marriage, reflects this difference. While some Indian tribes have important traditional ceremonies for marriage, many do not. In fact, each tribal court has different standards for determining whether a union between two people has been accomplished according to custom. Many Indians consider people married when a man and woman begin living together publicly as a couple. Thus a couple may be considered married in a matrilocal society when the man goes to live with the woman's family, or vice versa in a patrilocal society. Other tribes do not consider a union between two people permanent until there is a long-term process of transferred rights and

167. Id. at 536.
168. Id. at 537-41 (Cooter and Fikentscher provide examples of different customs relating to marriage. In many tribes, couples may be considered married when a man and woman begin living together publicly. In the Zuni tribe, a marriage is held valid when prayers to bless the union are held in Zuni. In Acoma, union prayers need only be spoken in English. Navajo courts require a common law marriage to meet three criteria: consent, cohabitation, and publicity.)
169. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (The federal government recognizes that Indian tribes, as distinct, independent political communities, have the power to regulate their internal and social relations. This includes making their own substantive law in internal matters and the right to enforce that law in their own forums).
170. Atwood, supra note 163, at 582.
171. Lona N. Laymon, Note: Valid-Where-Consummated: The Intersection of Customary Law Marriages and Formal Adjudication, 10 S. CAL. INTERDISC. L.J. 353, 374 (Spring 2001), noting that 25 U.S.C. 371 (1999) validates the rights of heirs to a deceased Native American to be recognized even if the individual was married or born from a marriage that is only recognized in the Native American culture.
172. Cooter & Fikentscher, supra note 164, at 536.
173. See id. at 537-541 for an informative discussion of marriage among assorted Indian tribes, based, in part, on field research.
174. Laymon, supra note 171, at 358.
While the formalities for entering into a marriage contract vary or, in many instances, are nonexistent, once they are considered married a couple faces significant legal consequences.

b. Rights in a Marriage

Just as individual tribes vary in terms of establishing marriage contracts, so, too, do individual tribes apply their own distinct tribal law with regard to the rights afforded spouses in a marriage. Accordingly, unlike marriage rights under Shari'a in Egypt and customary law in South Africa, marriage rights under Indian tribal law do not constitute a coherent, uniform body of rights.

Despite the variation of marriage rights under Indian tribal law, the import of tribal law in this regard is significant since it directly affects the rights and status of Indian women. In order to gain a clearer understanding of the impact of marriage rights under Indian tribal law, this essay will focus primarily on one tribe: the Santa Clara Pueblo. In particular, the case of Santa Clara Pueblo v. Martinez will be examined. Santa Clara not only illustrates the discriminatory nature of tribal marriage rights, presented in the guise of tribal membership rules, but it also reveals how the system of legal pluralism in the United States results in the federal law's tacit support of such discrimination.

Martinez, a female member of the Santa Clara Pueblo, and her daughter "alleg[ed] that a Pueblo ordinance that denies tribal

175. Cooter & Fikentscher, supra note 164, at 537.
176. See, e.g., id. at 536-541.
177. See generally Francine R. Skenandore, Revisiting Santa Clara Pueblo v. Martinez: Feminist Perspectives on Tribal Sovereignty, 17 WIS. WOMEN'S L.J. 347 (2000). Skenandore discusses the contrary perspectives of Indian feminists and mainstream feminists with regard to tribal sovereignty vis-à-vis equal rights. A tribe’s right to make its own laws and enforce them against its members, without regard to whether an external authority considers those decisions wise, has allowed for a greater focus on tribal identity rather than gender equality. This, in turn, has resulted in gender discrimination against women exercised under the guise of tribal tradition and custom.
179. While Santa Clara Pueblo v. Martinez is generally described as a case about tribal membership, it is important to note that the right to tribal membership emanates directly from marriage rights. Consequently, this case will be discussed from the viewpoint of marriage rights.
180. Carla Christofferson, Note, Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act, 101 YALE L.J. 169, 174 (1991) (Since Congress did not specifically include the remedy of judicial review for civil actions, federal courts have no right to interfere with the tribes’ internal and social relationships. Consequently, by denying Martinez judicial review of her case, the Court, effectively, sanctioned a tribal marriage law that discriminates against women).
181. Respondent Julia Martinez was certified to represent a class consisting of all women who are members of the Santa Clara Pueblo and have married men who are not members of the Pueblo. Martinez v. Romney, 402 F. Supp. 5, 12 (D. N.M. 1975).
182. Respondent's daughter, Audrey Martinez, was certified as the class representative of all children born to marriages between Santa Claran women and men who
membership to the children of female members who marry outside the tribe, but not to similarly situated children of men of that tribe, violate[d] Title I of the Indian Civil Rights Act of 1968 (ICRA)."\(^{184}\) Martinez claimed that this rule discriminates on the basis of both sex and ancestry in violation of Title I of the ICRA, which provides in relevant part that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws."\(^{185}\)

Martinez is a full-blooded member of the Santa Clara Pueblo and resides on the Santa Clara Reservation in northern New Mexico. In 1941 she married a Navajo Indian with whom she had several children. Two years before this marriage,\(^ {186}\) the Pueblo passed a membership ordinance barring admission of the Martinez children to the tribe because their father was not a Santa Claran.\(^ {187}\) The children were raised on the reservation, speaking the Tewa language, and were, culturally and for all practical

are not members of the Pueblo. \textit{Id.}

183. \textit{See Martinez}, 436 U.S. at 53 (The ordinance, enacted by the Santa Clara Pueblo Council pursuant to its legislative authority under the Constitution of the Pueblo, established a rule that "[children] born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo" while "[c]hildren born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo."); Leila Reem, \textit{Their Mother’s Country}, AL-AHRAM WEEKLY ONLINE, Jan. 2002, http://weekly.ahram.org.eg/2002/568/li5.htm (Egypt, as well, has a similar rule. Nationality law 26/1975 in Egypt grants automatic citizenship to children born of Egyptian men and their non-Egyptian wives, while Egyptian women married to foreigners are precluded from passing on their nationality to their children, or anyone else for that matter).

184. \textit{Martinez}, 436 U.S. 49; ICRA, 25 U.S.C. §§ 1301-1303; "The Indian Civil Rights Act represents a congressional decision to limit Native American sovereignty by setting forth an Indian Bill of Rights that applies to Native American tribes. It is Congress’ effort to protect individuals from tribal abuses. By designing a special Indian Bill of Rights, Congress recognized that Native American tribes were distinct sovereigns, but it placed limits on how they could exercise such sovereignty." While the ICRA is substantially similar to the federal Bill of Rights, it is unlike the Bill of Rights in one important aspect: the ICRA gives tribal courts, as opposed to federal courts, the authority to determine whether rights have been violated. The Court in \textit{Martinez} emphasized this authority when it stated that “providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government . . .”; see Christofferson, \textit{supra} note 180 (quoting \textit{Martinez}, 436 U.S. at 59).


186. It is significant to note that between 1935 (when the Santa Clara Pueblo was organized under the provisions of the Indian Reorganization Act, 48 Stat 984 (1934)), and 1939, tribal membership was extended to, among others, all “children of mixed marriages between members of the Santa Clara Pueblo and nonmembers, provided such children have been recognized and adopted by the council. See Resnik, \textit{supra} note 11, at 705 (citing Constitution and Bylaws of the Pueblo of Santa Clara, New Mexico, approved Dec. 20, 1935, reprinted in Supreme Court Brief of the Petitioners, \textit{Santa Clara Pueblo v. Martinez}, No. 76-682, Appendix at 1-2 (Oct Term, 1976) ("Petitioners’ Brief")). Since the membership rights of children from these mixed marriages were heretofore recognized and only later extinguished in 1939, the role of custom as the purported basis for tribal law must be questioned.

purposes, Santa Claran Indians. At the time of the lawsuit, the Martinez children continued to reside on the Pueblo as adults.

Like Martinez, Indian women who are discriminated against because of gender-biased tribal laws concerning marriage and its affiliated tribal membership rights suffer both financially and psychologically. In many instances, these women no longer receive federal Indian benefits, such as annuities from the tribe, access to education and health programs, and housing. They also suffer from a loss of cultural identity, since by marrying outside of their tribe they often lose their right to live on the reservation with family and friends.

For Santa Claran women the discrimination they face because of gender-biased tribal membership rules based on marriage extends to their children as well. For instance, as a result of their exclusion from tribal membership, for instance, Martinez's children may not vote in tribal elections or hold secular office in the tribe. Moreover, they have no right to remain on the reservation in the event of their mother’s death, or to inherit their mother’s home or her possessory interests in the communal lands. These consequences also cause adverse psychological effects to nonrecognized children. Indian women’s loss of the right to “pass their band membership to their children...[is] very harmful to the children’s sense of identity... [Children] cannot easily endure the rejection of their identity by an entire band.”

Not only does the Santa Claran law concerning tribal membership deny women and their children assorted rights as tribe members, but it also violates the equal protection guarantee of the ICRA. Section 1302 (8) of the ICRA states: “No Indian tribe in exercising its powers of self-government shall... deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.” Despite the gender-discriminatory nature of the Santa Clara Pueblo's membership rules as they relate to marriage, the Supreme Court determined that “providing a federal forum for issues arising under section 1302 constitutes an interference with tribal autonomy and self-government...” and “may undermine the authority of the tribal [court]... and hence... infringe on the right of the Indians to govern

189. Martinez, 436 U.S. at 52.
190. Christofferson, supra note 180, at 169.
191. Id. at 184.
192. Martinez, 436 U.S. at 52.
193. Id. at 52-53.
194. Christofferson, supra note 180, at 184 (quoting Pam Paul, Report prepared for the Native Women's Association of Canada (1989) (unpublished manuscript on file with author)). See Christofferson at note 10 (the practice of denying women the right to live on the reservation also occurs in the United States).
196. Martinez, 436 U.S. at 59.
themselves."

Consequently, the Court applied an exclusive forum doctrine whereby federal courts were to defer to the tribal courts’ adjudication in civil matters. In essence, the Court concluded that federal courts could not hear Martinez’s discrimination claim since “the ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of [the ICRA].”

Despite the fact that “a central purpose of the ICRA and in particular of Title I was to ‘secur[e] for the American Indian the broad constitutional rights afforded to other Americans,’ and thereby ‘protect individual Indians from arbitrary and unjust actions of tribal governments,’” Indian women were left a right without a remedy as a result of Santa Clara.

The consequences of this ruling have left Indian women virtually paralyzed within a system that subordinates women. Although they hold simultaneous membership in two political entities, an Indian tribe and the United States, each of which affords equal protection of the law, Indian women are denied this right by both entities. As a result, they remain subject to discriminatory laws that rob them and their children of their cultural identity as well as material benefits such as land use rights and federal health and housing assistance.

c. Polygamy

Traditionally, many Indian tribes allowed a man to have more than one wife. In some circumstances, a man was encouraged or required to marry sisters. This occurred, for example, when the husband of a wife’s sister died. In this instance, tribes encouraged a man to marry his wife’s widowed sister. In other tribes, sisters could demand that a man who married one of them should marry the others so they could continue living together. Despite the traditional practice of polygamy among some tribes, today tribal courts do not recognize polygamous marriages.

While Indian women are in many respects equal to men, e.g., they have the right to decide whether to enter into a marriage contract and are, like men, obliged to comply with the official prohibition against polygamous marriages, they are discriminated against with regard to Indian law that favors men over women with respect to tribal membership. By increasing

197. Id.
198. Christofferson, supra note 180, at 173.
199. Martinez, 436 U.S. at 70.
200. Id. at 61, quoting S. REP. No. 841, 5-6 (1967).
201. Christofferson, supra note 180, at 174.
202. Id. at 169.
203. According to the Indian Citizenship Act of 1924, all Indians are United States citizens. See Resnik, supra note 11, at 674.
204. See Resnik, supra note 11, at 721; see also Christofferson, supra note 180, at 184.
205. Id. at 539-40.
206. Id. at 540.
Indian women's economic vulnerability, denying them their property rights (since they are precluded from legally bequeathing property to their children) and robbing their children of the right to official recognition of their Indian heritage as well as their cultural identity, this sort of law reflects an obvious gender bias against women. Moreover, the lack of federal judicial review in Santa Clara effectively denies Indian women their constitutional right to equal treatment. Despite the relative equality of women and men under Indian law, the effect of the Santa Clara ruling significantly weakens Indian women's status by implicitly condoning Indian tribal law that fails to afford women the same rights, both tribal and federal, as men.

III. CONCLUSION

Legal pluralism seeks to satisfy and incorporate the world view of assorted segments of society, in particular, traditionally marginalized cultural communities, by permitting the use of diverse, and often conflicting bodies of law. While dual legal systems may be seen as protecting a cultural minority in the case of the United States, reflecting cultural diversity in South Africa, or endorsing fundamental religious beliefs in Egypt, they also allow for the systematic maltreatment of women.

By discriminating against women, traditional law generates assorted injustices. It not only explicitly infringes on the rights of women, but also serves to diminish women's overall status by treating them as less than men. Moreover, many of the implicit notions underpinning traditional law, such as the dominance of patriarchy, make it susceptible to further breaches of women's rights.

While various inequities flow from traditional law, this body of law nevertheless serves an important function in society. In South Africa, for instance, traditional law guides a large proportion of the population that has little knowledge or understanding of national law, making it the only source of law for many. In Egypt, the principles of traditional law serve as the basis for all law and consequently influence society as a whole. Traditional law in the United States is not as far-reaching as that in South Africa and Egypt since it directly applies to only one segment of the population: Indians. Nevertheless, this body of law is significant in that it purportedly protects the sovereignty and cultural integrity of Indians and, more importantly, governs Indians' internal matters without for the most part being subject to the judicial review of federal courts.

Since traditional law is an integral and valuable element of many legally pluralistic societies, it need not be wholly renounced because of its discriminatory aspects. Rather, traditional law can and should be applied so long as it meets recognized international human rights standards. This would allow traditional law to satisfy the particular needs, preferences, and beliefs of distinct populations while simultaneously ensuring that women
are treated as equally and fairly as men. On the other hand, specific traditional laws that discriminate against women, either directly or indirectly, should be prohibited.

In this regard, countries with dual legal systems that include traditional law would be well-served in noting South Africa's handling of this situation. By unambiguously recognizing the supremacy of the Constitution — both in terms of the rights it guarantees, e.g., the right to be treated equally before the law and be afforded equal protection of the law, as well as the values it promotes, e.g., human dignity, the achievement of equality, and nonsexism — South Africa makes a laudable attempt to protect women from discrimination. While not flawless, compared to Egypt and the United States, the South African system of legal pluralism more effectively protects women from bias in traditional law by subjecting this body of law to the Constitution. Accordingly, traditional law must comport with the Constitution's underlying ideals as well as the values inherent in the Bill of Rights. In this way, the status of women under traditional law is brought into line with the constitutional equality provision.

It is evident that traditional law in its myriad forms discriminates against women based on biological characteristics as well as social and cultural stereotypes. It is also apparent that this type of law is an integral element of many societies and their legal structures and therefore not likely to be abandoned. Consequently, in order to protect women's rights and thereby afford them a status on par with men, only traditional law that reflects international human rights norms and international standards for equality between men and women should be retained. Traditional law that does not accord with such standards should either be modified accordingly or done away with.