

REPORT OF AN INTERNATIONAL SEMINAR AT THE COMMUNITY LAW CENTRE  
OF THE UNIVERSITY OF THE WESTERN CAPE 14-16 MAY 1993



**CUSTOM AND  
RELIGION IN  
A NON-RACIAL  
NON-SEXIST  
SOUTH AFRICA**

**COMMUNITY LAW CENTRE  
UNIVERSITY OF THE WESTERN CAPE**



**Custom and religion  
in a non-racial, non-sexist  
South Africa**

*R*eport of the  
international seminar of the  
Community Law Centre at the  
University of the Western Cape  
14-16 May 1993

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## DEDICATION

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This report is dedicated to the memory of Amy Biehl, a Fulbright scholar attached to the Community Law Centre, at the University of the Western Cape. She met with her brutal and tragic death in Guguletu on 25 August 1993.

## **ACKNOWLEDGEMENTS**

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The proceedings of the Conference were edited by Lawrence Hoepner.

## EXECUTIVE SUMMARY

*by Amy Biehl*

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The Gender Programme of the Community Law Centre at the University of the Western Cape, sponsored an international seminar, "Custom and Religion in a Non-Racial, Non-Sexist South Africa," 14–16 May 1993. The purpose of the seminar was to bring women of South Africa together to debate issues of custom and religion in the context of a future democratic constitution and government, and to take these issues forward into the negotiations process.

Women from the international network Women Living Under Muslim Laws related their experiences in pursuing women's human rights under fundamentalist governments who have resisted change. The experiences of the African countries of Nigeria and Zimbabwe were discussed with regard to the uneven evolution of African traditions under colonialism, and the practical impact of these traditions on women's lives. South African presenters discussed the present situation of women under customary law in South Africa and a representative of the Congress of Traditional Leaders of South Africa (Contralesa) presented the position of this organisation during the period of transition.

The three-day seminar included presentations by South Africans and international participants, workshops to strategise around specific issues, and a session on "the way forward". A resolution was drafted to be presented to negotiators and technical committees and a commitment was made to maintain a dialogue between women's organisations and Contralesa. Women's organisations of the Western Cape also pledged to encourage awareness and discussion of issues of customs and religion and to lobby the appropriate structures for reform.

Brigitte Mabandla, Senior Researcher at the Community Law Centre and Director of the Gender Programme, introduced the key concepts for the seminar. She described the history of non-sexism within the ANC and explained that a process had occurred both within the country and inside the ANC in exile, which identified women's human rights and women's substantive equality in a democratic constitution as a top priority. She expressed her concern about the rise of a conservative ethnic and fundamentalist lobby in the negotiations process, in the form of the Concerned South Africans Group (COSAG). This lobby uses issues such as regional autonomy, custom and religion to maintain its power and to pursue a fundamentalist and traditionalist agenda.

She explained that the growing influence of this lobby affects women's

practical concerns, such as access to land, which is at the crux of their empowerment. She said she had convened the seminar in order to assist in countering the efforts of the COSAG lobby. She added that the increased role of traditional leaders in the negotiations process necessitates that women enter into a dialogue with progressive traditional leaders in order to ensure that their voices are heard. She said that the international guests at the seminar had contributed to a new international human rights discourse which seeks to re-characterise women's rights as human rights and to confront discrimination against women in the form of religious fundamentalism and traditionalism.

The first part of the seminar focused on the position of women in traditional society in South Africa and their legal status under customary law. Thandabantu Nhlapo, of the Department of Roman Dutch and Family Law at the University of Cape Town, outlined the traditional and cultural constraints on women as South Africa approached a democratic transition. He presented an idea, which he called a "work in progress" that would acknowledge traditional values in the formulation of fundamental human rights in South Africa. Central to this debate is the notion of dignity in African society. He felt that if this notion of dignity could be re-claimed by women, some common ground could be found between the traditionalists, and those who argue for a purely "Western" notion of human rights.

Sbongile Nene, of the Urban Foundation, spoke on the structural location of black women in South African society. She agreed that African women must reclaim the dignity which they had experienced in pre-colonial society. She felt that the perversion of traditional systems by migrant labour and apartheid had destroyed this dignity. While certain traditions, such as lobola, polygamy and trusteeship had worked for women in pre-colonial society, maintaining practices such as communal land tenure in modern society would only perpetuate women's disadvantages. With regard to religion, she believed that enormous potential for women's power existed in the church, but that the oppressive structures of the mainstream churches had prevented this. She felt that both custom and religion combined to contribute to the disadvantages of black women.

Yvonne Mokgoro, of the Law Faculty of the University of the Western Cape, described the legal framework for women living under customary law in South Africa. Central to this framework is the "frozen" status of customary law as enacted by a white government in 1927. She explained that while African custom has continued to evolve, customary law as enacted in 1927, and as interpreted by white magistrates over time, has remained static. Mokgoro said that a woman married under customary law is a perpetual minor; cannot enter into contracts; and does not have guardianship of her



children. However, in reality, she must enter into contractual agreements because her husband is often absent, even though under customary law she has no legal protection in these agreements. While acknowledging that customary law can not be abolished without education and sensitisation, she felt that the status quo is unacceptable to women.

Beauty Mkhize, Chairperson of the Rural Women's Movement, gave a frank presentation of how customary law has affected rural women's lives. She said that polygamy has not worked – rural women accept polygamous relationships because they have no access to land. A major problem faced by rural women is the migration of their men to the cities, where these men take civil wives and abandon the rural women. She said rural women had debated lobola and concluded that it must work to the benefit of both families. She urged immediate action on the part of those attending the seminar because rural women are eager to alleviate the burden caused by customary law. She was concerned about who would speak for rural women in the negotiations process, and hoped that they would be able to speak for themselves.

David Malatsi, of Contralesa, said that Contralesa had examined the changing situation and had realised that traditional leaders must also change. He explained that the homeland system had co-opted some leaders, had replaced those who resisted, and had blurred the distinction between "traditional leader" and "politician". While this reality puts Contralesa in a difficult position as an organisation that seeks to fight tribalism and unite traditional leaders, the influence and power of traditional leaders cannot be ignored in discussions of change. He said that Contralesa believes in a Bill of Rights that will cater for all South Africans. In acknowledging that customs are continually evolving, he said that Contralesa is prepared to listen to and consult with women.

Jack Simons, a professor who has been writing on the position of women with regard to custom and religion since the 1960s, argued that the patriarchal, polygamous, joint family structure of traditional society has undergone an irreversible change to a conjugal, monogamous single family unit. He said that this had been the result of the combination of industrialisation, urbanisation, increases in education, the spread of Christianity, and the impact of apartheid. He added that, while the traditional family unit has largely been transformed, both patriarchy and apartheid language have been used against women under the guise of custom and religion.

During the second part of the seminar, several of the international participants related their experiences to the international rise of fundamentalism and nationalism. Marieme Helie-Lucas spoke of the experience of Algeria and of fundamentalism in general. She said that after Algerians had

won their liberation from French colonialists there was a move in the country to "go back" to an authentic Algerian identity. Islam was perceived as central to this identity. She explained that the political manifestation of an Islamic identity had resulted in Islamic fundamentalism. The imposition of "family" or "personal" law and its interpretation by fundamentalist governments has seriously impaired the human rights of women.

Helie-Lucas explained that it is not Islam, but fundamentalism, which has been used negatively against women. Fundamentalism is a right-wing political movement that bases its legitimacy on the fact that its laws are "god-given". It seeks control of the state apparatus and the media, so it is a very modern movement. She said it is important that women challenge this movement.

Sultana Kamal of Bangladesh described a similar situation in her country. She warned South African women that the 1972 Constitution of Bangladesh had given equal rights to women but that a system of personal laws was also adopted at this time, effectively undermining women's equality in the private sphere. She explained that women's human rights have suffered as a result of this contradiction between the public and private spheres.

Ayesha Imam described how fundamentalism and traditionalism have combined to oppress women in Nigeria. She explained that Nigeria is a country of many languages, religions, cultures, traditions and identities. Fundamentalists and traditionalists have sought to impose a single identity on people which may have nothing to do with their historical background. She reminded the seminar that the evolution of culture has been characterised by struggle. Those who win the struggle generally write its history.

Nira Yuval-Davis, an Israeli Jew living in Britain, said that she works in the field of gender and ethnic studies because it is important to recognise that women are affected by differences in ethnicity and culture in the same ways as men. She emphasised that fundamentalism is a political movement and that, while often associated with Islam, has been equally powerful when used by Jews, Christians and many other religions and beliefs. She described a new Christian fundamentalism which has emerged in post-Cold War Europe. Christianity became the only thread uniting people after the fall of communist governments and led to a movement which was "anti-anything un-Christian". Because "un-Christian" generally meant people of different races, this fundamentalism has contributed to the re-emergence of racism in Europe.

Yuval-Davis said that women have been victims of fundamentalist movements, which see the family as the most important unit of control. She believes that fundamentalism, universalism and essentialism, all which aspire to sameness, must give way to a politics of transversalism, or dia-



logue, which seeks to accommodate the differences among people.

Petronella Maramba said that, at independence, women were not guaranteed equality in Zimbabwe's constitution, and that a dual system of civil law and customary law was enshrined. Customary law has discriminated against African women in the areas of inheritance, maintenance and citizenship among others. Zimbabwe has made several important legal changes, such as the 1982 Legal Age of Majority Act, which made women full adults at the age of eighteen, but these changes have not been without controversy. She felt that women in Zimbabwe had made a mistake by entrusting their nearly all-male Marxist government to ensure women's equality, even though leaders of the revolutionary movement had recognised women's contribution to the struggle. She felt that lobbying efforts by women were one of the most effective vehicles for achieving change.

The third part of the seminar involved small workshops in which groups identified and discussed issues to be taken forward by South African women. The first series of workshops focused on: identifying the practical issues of women's oppression under customary law; the current state of women's organisations in South Africa and their ability to effect change; and a discussion of traditional institutions, with particular attention to their operating structures and their impact on women. The second series of workshops included: a critical review of the various constitutional proposals with regard to custom, religion and the impact of apartheid; strategies to effect change through changing attitudes, lobbying the transition process and influencing policy-makers; and using the Women's Charter Campaign as a mechanism to ensure women's equality. After each series of workshops, the groups reported back to the plenary, which discussed the issues.

Following an address by Community Law Centre Director, Dullah Omar, the seminar drew up a plan for the way forward.

Participants from the National Association of Democratic Lawyers (NADEL) proposed a resolution to be presented to negotiators. Sultana Kamal read a statement from the international participants which urged South African women to avoid identities and ethnic divisions, which are the tools of the far right, and to seek a constitution that guarantees women's human rights with no exceptions.

Gertrude Fester and Nobom Sonto presented a programme of action which involved a three-pronged approach of: 1) working in women's organisations, such as the Women's Alliance of the Western Cape, to take up issues of custom and religion; 2) initiating forums where men and women can work together to develop proposals and strategies; 3) increasing women's democratic participation at all levels, by making themselves available to hold office and sit on committees. It was agreed that women must maintain and

strengthen the dialogue with Contralesa initiated at the seminar and utilise organisations, such as NADEL, to look at the legal implications of various proposals for women.

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## KEYNOTE ADDRESS

### Brigitte Mabandla

For decades South Africa's women have suffered an unequalled combination of race, class and gender oppression. The most oppressed and disadvantaged are rural and working-class women. A survey of conditions under which these women live indicates the degree of poverty and under-development they suffer. Seventy per cent of people living in the rural areas (including Bantustans) of South Africa are women and the majority of these are single parents (59%). Like in most poor countries, rural areas are under-developed and families live in conditions of abject poverty. The majority of black women are also illiterate (they fall mainly within the category of employable persons aged 20-35 years) and this lack of education and skills diminishes their chances of employment. Statistics indicate that the majority are employed in the service sector – for example, 96% of domestic workers are women and 25% of agricultural workers are women. These are the most exploited employees in the workforce, working long hours for low wages with hardly any protection.

Customary law and practice compound the problems of rural and poor African women. This system is mainly administered by chiefs in rural areas. The Transvaal Rural Women's Movement has identified customs that are particularly oppressive to women and these relate particularly to marriage under customary law. Under this system a woman is essentially a minor and the man is regarded as the head of the household. There are some rural women who object to the practice of polygamy, which they regard as the hallmark of patriarchy in African society. Under customary marriage, women are expected to provide their productive and reproductive labour without question. Upon the death of the husband, custom requires that the male relative of the deceased or the first male issue inherits the property of the deceased. Invariably, this creates hardship for the surviving spouse as it diminishes her management capacity in the family. Chiefs also administer tribal land and allocate such land according to customary law and women have no ownership rights under this system. The above description of conditions of rural and working-class women is an indication of the extent of the problems which need to be addressed in a democratic South Africa.



## **MULTI-PARTY NEGOTIATIONS – IMPLICATIONS FOR RURAL WOMEN**

The current negotiations are set to determine a new dispensation and the majority of the people oppressed under the present and past regimes hope for a better life. The challenge facing South Africa is whether the legitimate needs of the people will be addressed in the new dispensation. Negotiations have occurred in stages. The first phase of multi-party negotiations was the Convention for a Democratic South Africa, and it was divided into two stages – Codesa 1 and Codesa 2. The latter has deadlocked and there is talk that there will be a resumption of multi-party talks under a new name.

The major issues confronting negotiators relate to the nature of the future state and the constitutional protection of fundamental rights. With regard to the nature of the state, the debate is about the distribution of powers between the centre and the regions, and the debate on constitutional rights relates to the substance of these rights. These discussions are pertinent to women, in particular, the poorest. The concerns of the most affected women should inform the constitution-making process; these needs should provide the baseline for women's demands. However, this is not the case. A close examination of the process of negotiations illustrates that the concerns of women were reflected in the substantive deliberations at negotiations, but beyond that women were essentially excluded from participation and only attained an advisory capacity (the Gender Advisory Committee) during the second stage of Codesa. We need to ensure that in future negotiations women do not only participate in an advisory capacity but make a meaningful intervention in the negotiations. We can achieve these goals by being better prepared for participation. We should therefore plan strategically for negotiations. In connection with this it is important to note that in the past months there has been an increase in the lobby of traditional leaders seeking constitutional recognition of the institution of chieftainship. We must therefore determine the implications of this demand. It is hoped that in the second phase of negotiations, women will be better placed to make a meaningful impact on the process. This conference is of strategic importance as it provides an opportunity for rural women to articulate their concerns and define strategies for negotiations.

I would like to conclude by thanking all our international guests for agreeing to come to this conference at short notice. It is your commitment as human rights activists which made you recognise the importance of this day.

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## THE SOUTH AFRICAN EXPERIENCE

### 2.1 WOMEN IN SOUTH AFRICAN SOCIETY – TRADITIONAL AND CULTURAL CONSTRAINTS

*Thandabantu Nhlapo*

Dr Nhlapo said that he would attempt to tackle a small corner of the vast topic of custom and religion. He said that he would explore ways in which traditionalism blocks the advancement of women's issues. He felt that, because of this, traditionalists will have to put forward a very strong argument that a role for traditional values is desirable in a democratic South Africa. However, "the threat emerges stronger than we realise," he said.

He provided a working definition of traditionalism as "an ideology which resists reform or change on the basis of the argument that it would be contrary to the traditional practices of people." He said the difficulty with such a definition is that it assumes that there is no controversy over African traditional values – do they in fact exist?

"Some believe that change and Western influences have made it improper to speak of traditional values," he said. It was hard to deny that almost every community had been influenced by the dominant world capitalist mode. He gave the example of the "global village" ideology, which assumes an interaction of everything with Western capitalism, including culture. For these reasons, "consideration must be given to the possibility that we will discuss something which some people claim does not exist," he said.

In his opinion, however, traditional values do exist. Objections relate to peripheral issues, although it would be difficult to contend that any culture is completely "untouched" by outside influence. "I base my belief on the fact that people believe that they are part of a particular community which motivates their actions in their daily lives. A stronger reason is that there is a clear link between the African family and the traditional value system."

He explained that tradition had emerged in the pre-capitalist, organisation-oriented societies where a communal imperative had existed for family life. "The role of marriage was that of a vehicle for attaining ends

and interests superior to what we generally think of as marriage. It had to do with survival." Decisions in the traditional community are made by elders, who are male. "Thus, tradition because of its methods of decision-making does start off with an inherent bias against women," he said.

"Is it possible for us to accept an anachronism which calls for traditional values when society itself has changed?" He explained that the first to resist social change were the elders of the community because they were losing power and resources to the young. "They fought back under the label of traditionalism," he said. "We must accept that traditionalism is something that is sophisticated in its ability to fight change."

Dr Nhlapo explained that he could approach the issue in two ways: 1) he could go through an analysis of the detail of traditional practices; or 2) he could examine the role of traditional practices within the current constitutional debate, with less attention to detail. He felt for the purposes of the conference, the second proposal would be more appropriate.

"There is a primary, practical reason why the traditionalists' argument is so persuasive," he said.

"Decades of repressive rule have led to mistrust coupled with the need to restore dignity. In other words, it is going to be difficult to resist the claim that culture should play a role." This was visible in the constitutional debate, where parties were either arguing for the preservation of culture, or they were leaving it to the status quo by ignoring the issue. "Neither approach bodes well for women," he said. "But that does not mean that we shouldn't try to make a contribution to this debate."

He put forth a theoretical proposal, which he called a "work in progress" and of which he said, "I wouldn't be surprised if you expressed your doubts." He proposed that one could "strengthen the hand of the reformer by employing tactics that can not be easily shaken by what is regarded as an ethno-centric argument against standard human rights." He said that the human rights argument had not worked up to that point due to mistrust on the African continent of the foreign origin of human rights instruments. He gave the example of many traditionalists saying, "those codes aren't our codes."

He explained that arguments against Western human rights instruments were successful when it was pointed out that these instruments were expected to be applied/interpreted literally in the African context.

Rather than concentrate on the detail of human rights instruments and how they relate to the details of different African traditional practices, he proposed to focus on the basic concepts which are common to both. He examined the concept of dignity within this framework. "There is a strong school of thought which suggests that notions of dignity in non-Western



societies are incompatible with widespread repression of women," he said. "(Western) Human rights principles rely on the concept of autonomy and liberty, but some societies are neither free nor autonomous. However these societies do subscribe to the principle of human dignity."

He explained that dignity, in some societies, is determined by how well an individual performs his or her social role. He gave the example of women, which was "if you are a good wife, a good daughter, society recognises that." As this notion of dignity will not liberate women, he made the point that "if we can find a way of freeing the notion of human dignity from this attachment to social roles, then we will have a better concept of dignity."

He said that dignity is a common theme in non-Western societies. He offered some examples of how the concept is consistent with modern society and even Western human rights principles. Thus, queuing up to receive unemployment benefits, though undignified for someone who wants work and not receive handouts, can be justified on the ground that hunger or destitution is even more undignified. "In other words," he explained, "Western notions of dignity are not different to African notions." He felt that arguments for the reform of traditional society which are based along the lines of such examples, stand a better chance of succeeding than conventional human rights arguments.

## Discussion

A participant asked for clarification of Dr Nhlapo's point about employment and dignity. He said that he felt that, under African tradition, a person who went to collect unemployment benefits – if such benefits were a part of the state's social package — would not be considered undignified.

Nira Yuval-Davis of Israel and Britain gave an example of a banner used by a particular group of women which said, "our tradition — struggle not submission." She said it captured the idea that historical interpretations of tradition vary according to who interprets them. Thus it could be debated whether the social constructions from which Dr Nhlapo had proposed to release the notion of dignity did not in fact form part of a particular tradition. "Wouldn't it be better to reconstruct rights by looking at traditions and reconstructing them as well?" she asked.

Dr Nhlapo said that calling his proposal a "work in progress" enabled him to "slide out from under difficult and valid questions" such as that proposed by Ms Yuval-Davis. He responded that tradition should be reconstructed, but that in his view consideration should be given to reconstructing tradition by applying a "newly constructed definition of

human dignity instead of the Western human rights argument." He said, for example, "under a new definition of dignity, wives should not be beaten." The reason why wives should not be beaten would be derived from the new definition of human dignity.

Ayesha Imam of Nigeria agreed with both points, but added a third point, that tradition is not ever static. It changes over time. "Traditions reflect the interests of a particular society," she said. "If we identify a particular interest of non-sexism, we can change tradition."

With regard to the discussions of social constructions, Brigitte Mabandla felt that in Zulu, Sotho and other societies, hunger is viewed as degrading. Thus, if one were to construct a new definition of human dignity, one would have to look critically at existing traditions.

## 2.2 THE STRUCTURAL LOCATION OF BLACK WOMEN IN SOUTH AFRICAN SOCIETY

*Sbongile Nene*

Ms Nene began her presentation by expressing the urgent need to find a way of conveying what was said at forums such as this seminar to women on the ground who were "non-political". "There is no such thing as a typical 'South African woman' because we all have different backgrounds and experiences," she said. She said that the Women's National Coalition had struggled to address the issue of difference. Furthermore, she added that while it is important to address issues of "women" it is also important to address issues of "gender" so that "we do not ghettoise ourselves."

"Fate did an injustice to all colonised populations," she said. "Colonialism has interfered with an organic process of unfolding systems and beliefs." She said that she had been involved in examining the legal status of Zulu women, who had been subordinated under an entrenched code of traditional laws. However, she gave an example of research done on certain groups of traditional women which had revealed that these women "were highly empowered in deciding the fate of families and had amassed personal properties."

"Women in many traditional societies had one buffer," she said. "The husband could not dispossess them of one head of cattle." Because cattle represent "property" in the traditional sense, she argued that it is not true that women have no property rights under customary law. In practice, however, the principle of cattle as property no longer applies. She added that in traditional society, "a man never referred to his home as his own. It was always his father's home." In order to make a claim that the home was his own, the man would have to appeal to the entire clan.



Other traditional issues of concern to Ms Nene included polygamy and trusteeship. She gave an example of her former boyfriend, who is literate, being asked to read letters from the wives of an illiterate village elder. The wives' letters actually encouraged the elder to take a younger wife, and said that the other wives would help in the negotiations process. She said that the concepts of trusteeship and ubuntu are at the core of traditional African society. "As we struggle for answers to this dilemma we must develop an entity which recaptures the dignity of those women in those traditional societies," she said.

Ms Nene explained that she was a member of a technical committee which was examining the constitutional proposals of different parties and organisations. She spoke of the constitutional proposals of kwaZulu/Natal. She remarked that the proposals took a "pro-choice" position on abortion, but on the other hand were in favour of retaining the communal land tenure system. The proposals were also based on a prominent role for chieftainship.

Other proposals, she said, were not sensitive to women in the religious sphere. She felt that this was problematic because "it is the mainstream church groups which have structures which are most oppressive to women." She argued that while the independent churches which exist outside of the mainstream structures appear to be more conservative in terms of their family-orientations and their support for the preservation of traditional practices, they actually give more freedom and independence to women. She expressed her belief in the enormous potential for power which exists for women in the churches, but which has yet to be tapped because of their oppressive structures.

She described the destabilisation of society by the migration of males to the cities for work. "In traditional society, land to African families was paramount to their position and livelihood in society" she said. But then this system was disrupted by colonialism and migrant labour. The result was a sense of insecurity in African males. She described how, when in traditional society African males went to war, they "put a chastity belt around their women." She asked, "what kind of chastity belt could men put around their women when they went to the mines and only returned once or twice a year?" However, "men did so vigorously because it was the only way of restoring their dignity. This perversion of the systems of their cultures requires us to be sensitive to these factors," she said.

"Black women are more numerous than any other group of women in South Africa but they have the least access to education," she said. "When we talk of where women are located, we must take this into account." She spoke of the difficulties of obtaining education in rural communities. She

said "the bulk of women are located in the most disadvantaged sectors of the community. Thus we must capture that experience."

She said that this is true even within the family structures of different South African cultures. "Most of our cultures are still intolerant of single women, and particularly single women with children." She explained that society has only reluctantly sought to accommodate these women but that their status remains very low. According to her statistics, 66% of South African women had never been married. "The bulk of the women are on their own," she said. "They don't have husbands who share responsibilities."

She added that only 248 black women in all of South Africa were in managerial positions.

"The bulk of our women are in a situation where both culture and religion combine to be disadvantageous to them," she said. She pointed out that the government's proposed Charter of Fundamental Rights excludes women living under indigenous and customary law. "Indigenous women are given the least choice," she said.

She spoke of some of the practical problems of women living under indigenous and customary law. "Women who have been lobola'd have no rights, but their families are actually enriched by the transaction," she said. "Women are merely transferred." However, she explained that spiritual forebearers can be female or male. Research on Sangomas in the Valley of a Thousand Hills had shown that the power that these women accumulate is actually extremely liberating — both in the material and in the personal sense. They accumulate massive wealth, and they have control over their own sexual affairs. She gave as an example the fact that the husband of a Sangoma would not dare to force her to have sexual intercourse if she told him it was interfering with her spiritual processes. Her power in this sphere is reinforced by the fact that her "career" enables her to accumulate wealth for her family.

## **Discussion**

Marieme Helie-Lucas of Algeria said that she was concerned about the dichotomy between the Western notion of human rights and those non-Western traditions which are considered good and worth maintaining. She did not believe that this could be an "either/or" argument. She described a situation where many migrant workers from North Africa who had gone to Europe had given their daughters back to North Africans for marriage. She explained that the brutalisation of North African migrant workers in Europe was quite similar to the South African experience described by Ms Nene in that the men were using their daughters to

reclaim their own dignity. However, she said "there is no justification for the brutalisation of women in this process."

### 2.3 A LEGAL FRAMEWORK

*Yvonne Mokgoro*

Ms Mokgoro provided the seminar participants with a legal framework for customary law. She said that the current status of customary law is that it is subordinate to civil law. She described some details of how this subordinate situation evolved.

She defined customary law in the legal sense as "the enactment of African customs which find their basis in African traditional society." Conflict arose from the fact that customary law had been enacted in 1927 by a white government that excluded Africans and had been "frozen" with few changes since then. But customs and traditions are not static. They are continually evolving.

Because Africans were not a part of that process of enactment, nor had been a part of the court system which interpreted customary law, it had failed to reflect the contemporary values of Africans.

She described the legal status of a woman under customary law: she is a perpetual minor; she cannot enter into contracts; and she does not have guardianship of her children. But in current practice, as a result of migrant labour and high unemployment, she often has to enter into agreements because her husband is away. Because of her status under customary law, she has no legal protection in these agreements.

Ms Mokgoro asked the question, "what then do we do about customary law?" She said it cannot be abolished without education and sensitisation and it may not even be desirable to abolish it completely, as many people live according to these traditions and values. She felt that it must be reformed in a way which eliminates women's disadvantages and takes into consideration the fact that custom is a continually changing process.



## 2.4 RURAL WOMEN'S MOVEMENT — THE POSITION OF RURAL WOMEN

*Beauty Mkhize:*

*[Note: Mkhize spoke Zulu. The text reflects the English translation of her remarks.]*

"Rural women in South Africa are in a difficult situation. We always complain that we cannot solve our problem if we are allotted a limited amount of time on a conference platform.

"Rural women want to lead a better life. We have been victims – it is difficult to cope with no resources. Rural women have no access to land and this is one reason why they accept polygamy — because they need a roof above their heads. Only married women can have access to land. When her sons get married, the rural woman becomes homeless.

"How is the new government going to address rural women's problems? Do they even think about us? We need energy for cooking facilities. We have problems in customary marriages. It has been the experience of rural women that our husbands go to town to work and they stay in hostels. Then they go out to get the women from the cities and marry them under civil marriage. After this happens the rural woman does not even receive the few benefits of customary marriage.

"In 1986, rural women made an appeal that hostels must be abolished. They cannot visit their men in these hostels because there is no privacy.

"Rural women have debated, and rejected, lobola. They have concluded that as long as it continues to be part of custom, then it must be to the benefit of both families. There are very serious problems with the situation of husbands and their civil marriages. We are concerned as rural women about how best to address this problem. We are abused and troubled by our husbands. We are troubled by our own sons. We are also troubled and abused by employers at the farms on which we reside. We are troubled by our 'in-laws'.

"We are enslaved by our husbands because, at the end of the day, we are the ones who suffer. We look after the families and the husbands are not available to help. Because of the marital power over the woman under customary law, we have no access to the use of property for the benefit of the cattle.

"In such circumstances, the husband who has migrated finds a partner in town (under a civil law marriage) and rural women must bring up their children without resources. The problem is compounded when such a man dies because the customary marriage is not recognised by law. The civil marriage is recognised. The hardships of life for rural women are illustrated by the story of a woman who married a migrant worker under

civil law and who, on his death, travelled to the rural area to take all the property of the rural woman, his customary law wife. The civil law wife sold the property, leaving the rural woman to bring up her family with nothing. The same rural woman was saved from suicide by her children who found her in despair.

"What will be the real position of the woman living under a customary law regime in the new South Africa? Will the elders of the community still control the decision-making? Who is going to control the destiny of the rural woman? Is it going to be the conservative male elders? Who will articulate the demands of rural women? I had hoped that there would be men at this conference so that we could address this serious problem together. Unfortunately there are only two or three.

"However, it is not only men who are the problem. Customary law and the situation of rural women have led to problems with 'in-laws' — the womenfolk in the men's household.

"There are also mostly younger women present at the conference. We have to discuss these problems with older women.

"Conferences of this nature must result in a programme which can be implemented — a way forward. We meet and we talk, but we cannot go on having meetings without taking action to change the situation in the rural areas.

"We rural women are becoming convinced that urban women do not care about us. Urban women have light and we walk in darkness."

## 2.5 THE POSITION OF CONTRALESA

*David Malatsi*

Mr Malatsi said he was honoured to be given the opportunity to present the view of the Congress of Traditional Leaders of South Africa (Contralesa). He pointed out that "complaints against some of our members have often been put to all, but I would like to present the platform of Contralesa for the transition period. Contralesa is looking at the changing situation and recognises that the role of traditional leaders must also change."

He said that currently traditional leaders can be divided into two types: 1) those actively engaged in politics; and 2) those actively engaged in promoting purely traditional values. He provided examples of certain homeland leaders who are currently political leaders. He added that Contralesa members would like to be called traditional leaders — not chiefs or kings — since those were terms which had been used to co-opt traditional leaders.



"Traditional leaders are men and women, young and old," he said. "Contralesa is designed to unite all traditional leaders. It is actually against tribalism, although it is tribal." He said that the irony had been the "ignorance of urban-based political leaders about the institution of traditional leaders."

"Contralesa believes that traditional leaders are very influential and powerful in their particular areas," he said. "A traditional leader is the leader of that community — he is the custodian of the traditions of his people." He said that he was not talking about traditional leaders in a male context only.

"While some traditional leaders are in favour of change, we need to realistically examine the position taken by other leaders," he said. He explained that the colonial powers understood the power of these people and used it, recognising only the traditional leaders of their choice. This was done to "bring in line" traditional leaders who dissented against colonialism. As a result, many young men, like himself, were removed because colonialists felt a need to "soften" the leadership of tribal people.

Mr Malatsi said, "this colonial manipulation resulted in the promulgation of laws such as the Black Administration Act of 1927, which took everything from the traditional leaders and placed it in the hands of the white judicial system." He felt that the judicial system in itself contradicts the practices of traditional society since one cannot "appeal" against the word of the traditional leader. "The chief's word is final," he said. "He announces a democratic consensus after listening to arguments and questioning and deliberation. The chief merely pronounces the finding of the house. This is why his word is final."

He said in some cultures women are not allowed to participate in the tribal court system. He explained that he was the head of a tribal court. "In my particular court there are no women, but there is a law against women participating." He said that Contralesa accepted there should be changes. However, he added, "Contralesa believes that replacing 'legislation' (the Black Administration Act and Homelands and Self-Governing Territories Act) with legislation which may not serve the intended purpose is not the best strategy to pursue."

He distinguished between the homelands, which are primarily African, and farms, which are a white versus black situation. Under the homeland system all land is communal. Even men cannot "own" communal land. In his area they had changed that situation. However, he explained that the Cape had not accepted such a change.

"Membership of Contralesa is open to all traditional leaders, many of whom have been divided by apartheid," he said. "Reform of customary

practices must consider the differences and commonalities of groups without discriminating. Africans of different ethnic groups inter-marry and we know each other's customs. For this reason, it is important to promote an exchange of traditional leaders."

Mr Malatsi explained that the role of traditional leadership had been used by some for political gain. "Leaders have used tradition to infringe upon peoples' rights for selfish gain, but this is not the true evolution of custom within a community," he said. "Some say the institutions of traditional leadership have outlived their usefulness. Rather some traditional leaders have allowed themselves to be abused – it is not tradition that has outserved its purpose. Contralesa is non-partisan. It wants to listen and act wisely. Contralesa is trying to expose people to the thinking of various political players."

He said that academics spoke of 68% illiteracy in South Africa, although this figure was contentious because it assumed that people who didn't speak English or Afrikaans were illiterate. He emphasised that "when people are illiterate, then the closest thing to them is their culture and tradition. Thus we must come down to the level of the people and cross-consult. There should be equality of all people before the law." He said that it had been the system of apartheid which had subordinated customary marriage to civil marriage. "Contralesa believes that all rights of marriage should be recognised," he said.

"We as traditional Africans have a culture we need to protect," he said. "We want a bill of rights that caters for all of us — not a separate system of customary law, but that which allows these customs to evolve."

## **2.6 GENERAL COMMENTS ON THE SOUTH AFRICAN EXPERIENCE**

If customary law were changed, how could it be ensured that the changes would actually benefit women? Civil laws passed to benefit women were interpreted by courts in such a way that they worked to the disadvantage of women – maintenance being an example.

Customary law has to be situated in a political context favourable to women. Women have to lobby to ensure that customary laws favourable to women are implemented. The judiciary, which is predominantly white and male would have to change, would have to include women sensitive to women's issues. These women would have to be involved at every level, from judge down to the magistrate who dealt with maintenance, wife-beating, child abuse etc. The politicians would have to be pressurised to bring this about.

A question was put: How can polygamous marriages be legitimised? That is to say, how can wives married to the same man be guaranteed that

each marriage is equal in law?

A response to this was that marriage laws in South African society do not carry equal weight: civil law subordinates customary law. The representative from Contralesa said they wanted to see a system which recognises "a marriage as a marriage". Men should be able to register other wives. This would preclude furtive, secret marriages taking place. In addition, second marriages, if done in accordance with customary law, should only take place with the consent of the first wife.

Prior to 1984 customary marriages were regarded by civil law as relationships only. However in 1984 the Registration of Customary Law Marriages Act introduced protection for "discarded" women whose husbands had remarried under civil law, thus effectively nullifying the customary law marriage. This law required that every customary marriage should be registered. This law would protect children born out of customary marriage in that they would be seen as inter-marriage children and not extra-marriage children.

Mr Malatsi of Contralesa was asked whether there were women members of his organisation. He responded that there were female chiefs in Contralesa but that membership was open to people of royal descent only. When asked whether Contralesa allowed these women members the opportunity to examine women's issues, such as the acute problems of rural women, he stated that Contralesa had a woman representative in the negotiations council. Some traditional chiefs were very conservative and Contralesa wanted to liberate them.

Mr Malatsi was further asked whether traditional leaders helped in the process of certifying customary marriages and protecting the property of customary law wives. He replied that lobola is a private exchange among families and that, in addition, starting with colonial governments, chiefs had gradually had real power stripped away, leaving them with nominal power.

He was then asked to clarify the relationship between chiefs and political leaders in traditional areas and the intersection of both in the homeland system. He replied that as long as the homeland system was in place, chiefs as political leaders would continue to be a reality. A distinction had to be made between politicians who are quasi-chiefs and genuine traditional leaders who had been stripped of power by colonial governments and, of late, homeland governments. One of the consequences of chiefs being part of homeland political systems is that rebellion against those systems is often misinterpreted as rebellion against traditional structures, which it is not.

Ms Beauty Mkhize then made the point that, amidst all the discussion



about aspects of customary law and its application, a central truth was being overlooked: customary law *subordinates* women. A Zulu woman, no matter where she lives, is oppressed by the traditions of Zulu custom. She denied that in reality the first wives in polygamous marriages are asked to consent to husbands taking second wives – they simply take them and only later inform their first wives of the fact. She said she had no choice in where or how she and her husband lived – that was his prerogative. He could actually bring a second wife into their home and she, the first wife, irrespective of her feelings, was expected to welcome her. Second wives are usually favourites. The whole system creates animosity among children who have to compete for love and attention in the presence of two wives.

A response to this was that many of the negative aspects of customary law marriages are linked to the political and socio-economic circumstances of South African society – migrant labour and the hostel system, for example. However women at the seminar had to realise, as feminists, that women are victimising women under customary law when a second woman agrees to marry a man that already has a wife.

A Muslim participant pointed out that women under Muslim traditional marriages are subject to many of the same traditions and rules inherent in African customary law marriages. The first wife is supposed to consent to the marriage of the second wife but in reality she is usually not taken into consideration. In addition, the economic effects of a polygamous marriage are very serious in modern society. Traditional marriages have to be re-evaluated by women with a view to emphasising those aspects that really impact upon their lives.

## 2.7 CUSTOMS AND RELIGION IN THE TRADITIONAL SOCIETY AND TODAY

*A paper presented by Professor H J Simons*

### *Patriarchy*

All peoples throughout the world practise patriarchal rule in which men dominate. When married, they are heads of their families. They also control the government and the State which consists of the whole population included within the recognised boundaries and subject to the government. It is the only lawful authority and exercises supreme power in the State.

### *Population*

South Africa's population in 1992 was 40 million of whom 30 million were



Africans, 6 million whites, 3.5 million Coloured and 1 million Indians. About 58% of the Africans were settled in ten bantu homelands which contained less than 1% of the country's white, Coloured and Indian population.

### *Male domination*

The patriarchal system in South Africa goes hand in hand with white supremacy.

### *Voting rights*

After the war between Britain and the Boer Republics in 1899-1902 the Milner administration gave the vote to white men only in the defeated republics. In the Cape all men, black and white, could register on a common voters' roll introduced in 1854. In 1930 the government headed by General Hertzog gave the vote to white women and in 1931 to all white men. African men in the Cape lost their right to vote in 1936 under the Native Representative Act which created a Native Representative Council, an advisory body without power.

Africans, men and women, have never been allowed to be elected to or sit in the South African parliament. Whites, Coloureds and Indians are elected and appointed members of the three-chamber parliament introduced by P W Botha, President of the Republic, in 1983/4. His place was taken by F W de Klerk on 20 September 1989 who unbanned the ANC, PAC, SACP and their allies on 2 February 1990, saying that the country was on the edge of a revolt against apartheid and international isolation.

### *Before colonial rule*

There was enough land for every family before the wars of conquest fought by white colonists and settlers. Every umzi had a plot for its house and gardens. Cattle grazed on the unallocated land. All adult men wanted to marry more than one wife. They were polygamists by law and custom, but only a minority managed to marry more than one wife.

The earliest record of African customary marriages was published in Natal, where in 1871-80 polygamists constituted 43 out of every 100 customary marriages. Ten years later, the proportion had dropped to 36%. In the Transkei, only 22% of married men in 1900 had more than one wife.

### *The passing of polygamy*

In 1968 I wrote (*African women: Their legal status in South Africa*, p.79) that polygamy has declined because of land scarcity in the bantu homelands; the hut tax; the use of ploughs instead of female labour; the migrant labour system; the high cost of marriage due to inflation of lobolo and expensive

wedding feasts; low incomes; the cost of bringing up and educating children; the shortage of housing on farms and in towns; the spread of Christianity and school education; and the changes in the positions of women.

The Minister of Bantu Administration and Development told parliament in April 1962 that African women, because of past mistakes on the part of the government, had not been given their proper place in social life. It was time to give back the status they used to have in traditional society. He was talking apartheid language. Women cannot go back to the old system when they were junior partners in a joint family. It has ceased to exist. Enlightened, progressive women want to take their place on equal footing with men in building a new life.

I wrote in *African women: Their legal status in South Africa* that the "African family is undergoing a revolutionary change from the patriarchal, polygamous, joint family organisation of the tribe to the conjugal, monogamous, simple family of contemporary civilisation. The absorption of peasants into an industrialised market economy, urbanisation, education and religion are major determinants of the change. It cannot be halted, let alone reversed, if people are looking to maintain their progress to more advanced social forms."

### *Religion*

Before the colonial conquest Africans believed in a supreme being, life after death, the power of ancestral spirits and the use of magic for good or evil. The custom of praying to ancestor spirits and showing them respect by offering food is based on the belief that the soul of a person leaves the body at death and becomes a spirit able to influence the lives of his relatives who remain on the earth. Accidents, sickness, crop failure and other mishaps were said to be the work of ancestral spirits with a grievance or witchcraft or sorcery.

The spread of Christianity caused splits and confusion among people. Some stuck to the old ways; others became converts. Missionaries who brought the message of salvation were also agents of colonialism, like magistrates, traders and labour recruiters, but they came with the Bible, translated it into local language and taught the converts to read and write. This was of great assistance on the long road to Western values and life-styles; and particularly effective when the chief accepted the new religion, as did Khama in Botswana and Moshoeshoe in Lesotho.

## *Conclusion*

Many African women have followed the example of such famous leaders as Charlotte Maxeke Menye, Lilian Ngoyi, Dora Tamana, Florence Matomela, who spent their lives working for freedom, together with men, in the struggle against apartheid, race discrimination and oppression. This was their immediate aim; the struggle against male domination took second place!

In his comments following the presentation of his paper, Mr Simons said, "Men and women form one society linked by descent, marriage, children and their offspring." He said that while men and women have common interests they have also conflicts arising from gender differences, values and ambitions. "Lilian Ngoyi, one of the great women leaders in South Africa once criticised the men for exploiting their wives and girlfriends, holding them back from full development and participation in public life – including the struggle for liberation from white supremacy and for freedom," he said. "She said that only a revolutionary would break the chains that bind women in servitude to fathers, husbands and lovers."

He said that he wanted to apply this theme to some of the current events taking place in South Africa. He asked where women stood with regard to their children and white domination in the education places. "Do mothers encourage their boys and girls to defy, throw stones, and shoot guns against people? What do you mothers think about the current crisis in education?" He read extracts from an article by the editor of South regarding the current education crisis.

He also asked women about their plans to win representation in parliament. He asked, "How many women are sitting in parliament today? – not more than ten out of the hundreds who are members. How many women will be present in the new parliament of a democratic South Africa? And what will women do to make themselves available for election?" He said, "54% of African women are illiterate and that in itself forms an obstacle to their participation in the election." He asked, "What are we going to do to overcome this obstacle?"

He noted that the seminar emphasised women's rights and the integration of women's human rights into the ongoing work of the United Nations. He asked that the participants consider not only the theoretical position of women's human rights, but also how these arguments could be linked to organising the ongoing struggle for liberation.