Comparing and Contrasting Liberal, Communitarian and Feminist Approaches to Resolving Tensions between Customary and Constitutional Law: the Case of Polygamy in Swaziland.

Katherine Elizabeth Manson – 607M0093
Department of Political Studies

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Abstract

Tensions between the individual rights and freedoms found in constitutional bills of rights and the traditionally prescribed social roles and positions articulated in African customary law systems have often been characterised as tensions between communitarian and liberal philosophies.

In particular, the notion of gender equality, which is often a feature of the protections offered by constitutional bills of rights, is seen to be in direct opposition to the overtly patriarchal character of many African customs and traditions.

This thesis looks specifically at polygamy, long and widely considered in the West to be an oppressive practice premised on the assumed inferiority of women. The analysis considers the implications of polygamy in a particular cultural context, that of the Kingdom of Swaziland, where the newly instituted constitution is often seen to be incompatible with many aspects of Swazi customary law.

Here, the tension between the constitutional commitment to gender equality and the persistence of polygamy as a seemingly discriminatory cultural practice forms a lens through which to view the debate as a whole. The theoretical analysis is supplemented by empirical research sourced from local media archives and in-depth interviews conducted with twelve Swazi women, both unmarried and married in polygamous relationships.

Communitarian and liberal approaches to resolving this tension are compared, contrasted and finally critiqued from a feminist standpoint. The feminist critique of both communitarianism and liberalism implies that neither ideology promises much for women and affirms the relatively recent feminist suggestion that the key to resolving tensions between constitutional and customary law in general, and to uplifting the social/legal status of women in particular lies in the enhancement of women's democratic participation and the improvement of women's decision-making powers.

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Preface

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Note on the Cover Photograph

The photograph used on the front cover of this work was taken by the author at the Swazi Cultural Village in Mantenga, Swaziland in 2007. The scene, depicted by actors at a public performance, is that of a traditional Swazi wedding.

Introduction

Tensions between constitutional and customary law have been a prominent centre of debate in Southern Africa since independence and today the issue remains both extremely complex and largely unresolved.

Some critics have argued that it is an impasse between liberal and communitarian ideologies that underlies this conflict.[1] Constitutions that contain a bill of rights stress the 'universal', 'fundamental' and 'inalienable' rights of every individual, the principles of which are derived from liberal foundations. Communitarians have construed these liberal principles as being primarily 'Western' ideas, and argue that the individualistic emphasis, embodied in the legal and ideological framework of liberalism (and, by extension, human rights), fails to recognise individuals as socially constructed beings and does not, therefore, accord due recognition to the role of group life (Sheleff 2000: 140). To premise the means of achieving human dignity on the individual, without due consideration to their social environment and culture, is to deny, or fail to sufficiently recognise, that community is the defining factor in a person's identity.

As such, some communitarian critics have construed human rights as a source of social breakdown, as they can be used to advocate individual freedom from ascribed social roles (Howard 1990: 170). Customary law principles, it is argued, endow respect and a sense of worthiness through the fulfilment of one's socially approved role and one's behaviour, and thus ensure the security and protection of the community (Howard in Bennett 1991: 31). Furthermore, from the communitarian's perspective, customary law's centrality to African 'culture' and 'tradition' makes it more suitable and legitimate in an African context. Accordingly, communitarians place more emphasis on the worth of respecting public sovereignty and group rights, than they do on the value of constructing universally applicable principles.

Liberals have responded by arguing that without any universal standards to appeal to, communitarianism seems to lead inevitably to cultural relativism and a complete inability to critically evaluate the practices of other cultures (Mulhall and Swift 1992). Furthermore, the communitarian assumption that communities are homogenous is misplaced; a nation does not necessarily have a set of common understandings simply due

[1] For discussions of the association between liberalism and constitutional law, and communitarianism and customary law see, for example, Sheleff (2000), Bennett (1991), Chanock (1991), Donnelly (1990), Howard (1990), Leary (1990) and Lehnert (2005).

to their having a political unity (Fisk 1993). Within any community there may be disadvantaged sub-groups that are excluded from the process of cultural construction. Accordingly, because communitarianism entails the normative assumption that ascribed social roles and positions are good or beneficial, it cannot rectify inequality, oppression and disadvantage. It also runs the risk of privileging a social order that benefits an elite, and results in respect and freedom being limited to a subsection of the population (ibid).

Therefore, while most modern liberals acknowledge the importance of communality in the lives of individuals, they maintain firstly that universal principles are still needed and secondly, that group rights must remain subordinate to the rights of the individual.

Furthermore, as Bennett (1991) notes, because customary law deals primarily with family law, and because customary law in Africa is perceived to be fundamentally patriarchal, a great deal of debate has surrounded the role and status of women in 'traditional' societies. And although critics have employed both communitarian and liberal arguments to both defend and attack aspects of customary law, feminist theory has critiqued both liberal and communitarian philosophies. Liberalism refuses to embody its subjects, and thus cannot properly take into account the importance of differences and the role of social relationships characterising the lives of those subjects. Because women have traditionally been relegated to the private realm, and excluded from the public realm, liberal thought has failed to rectify inequality by refusing to recognise the unequal terms on which subjects enter negotiations on both public and private life. Communitarianism, on the other hand, does acknowledge difference and the importance of group life, but grounds the principles of justice in a romantic idealization of pre-modern community traditions. By failing to recognise the fact that pre-modern traditions are almost all inherently patriarchal, communitarian theory has also failed to deal sufficiently with the issue of gender inequalities.

This thesis examines the relevance of the communitarian/liberal debate, and the implications of the feminist critique of that debate, for a particular cultural practice, in a particular context.

The specific practice examined is that of polygamy.[2] As a global phenomenon, most of the research literature on polygamy concerns Mormon polygamy in nineteenth

[2] For the purposes of this thesis, polygamy refers to polygyny – 'marriage in which one husband is simultaneously married to more than one wife' (Kilbride 1994: 30), rather than polyandry – 'marriage in which one wife is simultaneously married to more than one husband' (Ibid). Although I use the terms polygamy and polygyny interchangeably, I continue to use the general term 'polygamy' as this is the term

century America, which was widely decried as being, along with slavery, one of the 'twin relics of barbarism' (Iversen 1990: 8). Polygamy in the West then, was associated with and likened to slavery and consequently was 'tinged by the ideology of abolitionism' (Gordon 1996: 832). The American anti-polygamy campaign portrayed women living in polygamous marriages as being 'degraded, depraved and debased victims' and abolitionists demanded a legal solution (Iversen 1984: 502).

The discourse surrounding polygamy in the West has impacted on the discourse involving polygamy in Africa. Critics have pointed out that Westerners tend to see polygamy as 'an attribute of primitiveness' (Maillu 1988: 1) and as being primarily for the sexual satisfaction of men (Kilbride 1994). The conventional Western view of polygamy is that the practice relegates women to a subordinate role in society, 'as an appendage to the husband, with the wives in possible competition with each other for the favors, sexual and otherwise, of an all-powerful husband' (Sheleff 2000: 331). Polygamy, based on these assertions, seems to be *prima facie*, a 'blatant example of denigration to the value of women' (Sheleff 2000: 330).

However, recent analysis of the Mormon polygamy saga has suggested that the effort to abolish polygamy in America had relatively little to do with concern for the status of women, and far more to do with privileging Christian monogamous marriage and family values.[3] Cannon (1974), for example, argues that the American anti-polygamy campaign was premised on a fear of unrestrained sexuality and came about as a result of highly-strung Christian morals concerning the control of desire and sexual impulse. The argument that polygamy repressed women's femininity or womanhood was really a mask for a society that wanted to see women put back in their place in the monogamous, nuclear family – a place that would see them tied up at home and more dependent on their husbands (ibid).

Similarly, African critics are now arguing that the case against polygamy stems more from religious mores rather than a concern for the status of women.[4] Thus, Murray (1994) argues, analysts must be careful not to engage in a cultural imperialist project of arbitrarily favouring one particular family form over another, and ensure that any analysis of polygamy concentrates on the implications for women in their particular cultural context.

Bearing this in mind, the particular cultural context examined here is that of the Kingdom of Swaziland, where tensions between constitutional and customary law are

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used by both the media and the interview participants when discussing polygyny. It is also used in this way in a significant proportion of the published research literature.

[3] See Gordon 1996, Cannon 1974, Dunfey 1984, Iversen 1984

[4] Sheleff 2000, Murray 1994, for example.

particularly pronounced. In 2006, the Kingdom instituted a new constitution, comprising a Bill of Rights that includes a section dedicated to the rights of women. The rights and freedoms contained within the Constitution of the Kingdom of Swaziland are, however, often in stark contrast to the roles and duties imposed on individuals by customary law. Adding complexity, in Swaziland the traditional leader, the King, is also the head of state, and the national system of governance is premised on the ideology of traditionalism. In a country famed for the maintenance of its traditional culture, customary law retains an enormous amount of credibility and often trumps constitutional law in practice. Polygamy remains a prominent feature of Swazi customary marriage, and is still fully recognised and publicly endorsed.

I believe that this study is important because the tensions between these two legal systems, and the political ideologies associated with them, are still very relevant to the discussion on gender equality in the Southern African region. Furthermore, as Sheleff has noted, most anthropological studies in Africa 'contain no real references to polygamous lives beyond a passing reference to jealousy among wives or their capacity to co-operate' (2000: 339). Similarly, Falade doubts whether any serious attempt has been made to measure the implications of polygamy for women, aside from material problems (in Sheleff 2000: 340). I also hope, therefore, that this study will be able to provide a more thorough consideration of a practice that is rarely written about academically. Lastly, as Nhlapo (1990) has noted, there is a dearth of published academic material addressing the situation of women in Swaziland. The nation's unique political circumstances have had, and continue to have, an extraordinary effect on the attempts to promote gender equality in the Kingdom and I hope that the empirical research undertaken here will shed some light on the lived reality of the theoretical tensions discussed as they play themselves out in the Swazi context.

Focusing on polygamy's place in the relationship between the constitution and the customary relations of Swazi society highlights the way in which gender relations are subject to the powerful ideological and political forces surrounding legal systems, systems of governance and national identities. This discussion aims to show that while both communitarian and liberal attitudes characterise the debate, the key to resolving tensions between constitutional and customary law lies not in trying to resolve the impasse between communitarianism and liberalism, but in empowering women through the enhancement of their decision-making powers and political participation.

The Study

In this paper, in addition to standard methods of interpretation employed with regard to the theoretical debate between liberalism, communitarianism and feminism, I use two main methodological techniques: discourse analysis and interviewing.

The textual research is compounded by discourse analysis of how the public response to the constitutional commitment to gender equality has played out in the Swazi media over the last twelve years, and by both formal and informal in-depth interviews, the former with 'experts' in the fields of constitutional and customary law in Swaziland, and the latter with Swazi women, both unmarried, and married in polygamous relationships. Both the media archive research and the interviews were conducted between March and July 2008.

The media research was conducted at the archives of the *Times of Swaziland* in Mbabane and involved scanning through 'books' chronologically for relevant material (at the end of every month, the papers are collated and bound into a 'book'). The research covered the period beginning June 1996 (the start of the constitutional review process) and continuing until June 2008.

I analyse the findings of the media research using deconstructive discourse analysis. Fairclough suggests that discourse should be analysed according to a three-dimensional framework, that is, as 'text, discursive practice, and social practice' (1992: 62). Fairclough sees discourse as constituting and constructing the world, contributing to society's transformation (ibid: 64-5). As such, discourse can be seen as a political practice in the sense that it 'establishes, sustains and changes power relations, and the collective entities (classes, blocs, communities, groups) between which power relations obtain' (ibid: 67). Analysis aims therefore, to highlight ambivalence and seek out different interpretations inherent in texts, to engage in both 'micro-analysis' and 'macro-analysis' of the discursive practice (the former dealing with how texts are produced and interpreted on the basis of available resources and the latter dealing with how those resources are drawn upon in normative or creative ways) and to analyse the ideological investments of the discourse (ibid).

Criticising the fact that men's information is too often presented as a group's reality rather than as part of a cultural whole, Reiter notes that most of the information on women living under customary law comes from questions asked of men about their female

relatives, rather than from the women themselves (in Sheleff 2000: 339). Similarly, the published research material on polygamy is characterised by a conspicuous absence of any direct information from women living in polygamous marriages. Proponents of polygamy appear to draw their conclusions based on what life *could* be like in polygamous marriages, and how polygamy *might* provide respite from some elements of a patriarchal society. Missing from the research are the voices of the women actually living in cultures where polygamy is practiced.

I have, therefore, also included the findings of interviews undertaken with a variety of Swazi women.[5] Six of the participants were young, unmarried women living in Msunduza, an urban area in Mbabane, Swaziland. The other six participants were Swazi women who are living or who have lived in a polygamous marriage and came from a variety of locations in the country. The aim of interviewing a variety of Swazi women was to contrast opinions and attitudes towards marriage, polygamy and 'culture' in general. The interviews therefore allowed me to look at contrasts between younger and older generations, urban and rural dwellers, rich and poor, married and single women. The data collected is qualitative in form and consisted of twelve semi-structured, in-depth interviews. Participation was sought on a voluntary basis and confidentiality and anonymity were assured; the participants each signed a consent form, which was read aloud and fully explained to them before the interview started. An example of the form is attached at Appendix A. Interviews were conducted in both siSwati and English (a female siSwati interpreter was employed for the former) and lasted for between half an hour to one and a half hours. The interviews were tape-recorded with the expressed consent of the participants and later fully transcribed. The women were also offered the opportunity to choose pseudonyms for themselves in order to protect their anonymity. Some women opted to change their names, whilst others preferred to use their real names. The unmarried women are referred to by their first names (or pseudonyms), and the married women are referred to by their maiden surnames, prefaced with 'La' (the customary way of referring to a married woman).

[5] Conducting interviews in Swaziland is, as Nhlapo notes, very difficult, firstly because of the troubles involved in obtaining permission from the relevant authorities (e.g. chiefs or, for some married women, husbands) and secondly because participants often fear engaging in activity that 'may inadvertently turn out to be 'disrespectful' to the King or the nation' (1990: 137). As such, 'there appears to be a general suspicion of people 'going around asking questions'' (Ibid). The sensitivity surrounding the matter of polygamy, particularly given the King's own polygamous lifestyle, made these factors particularly pertinent for this researcher. Also, despite assurances of anonymity and confidentiality, many women declined to participate in the research because of the sensitive nature of some of the questions (which involved their marriage) and because they believed their husbands would not approve.

The aim of the in-depth interview is to let the respondent do the talking and direct the conversation as much as possible (Gordon 2003). This is because, as feminist researchers have argued, researchers should aim to uncover what is most important to the respondent and not simply to encourage answers that the researcher feels should fit the research (Kasper 2003: 171). Therefore, while the interviews introduced two main themes (feelings towards, and experiences of marriage and polygamy, and the role and importance of 'culture'), the interviews were not strictly structured.

It seemed appropriate to analyse the interview transcripts using the same method as was employed with the research findings from the media. This involved reading the transcripts and newspaper articles and then categorising them according to the themes teased out in the analysis of the media research. I situate the interview accounts in a framework of the social construction of gender and ethnicity of which the respondents may or may not have been aware. I try to grasp the participants' experience as they expressed it but also interpret their experience in light of a conception of ethnic identity at work in the repertoires available to them.

Lastly, I conducted four formal interviews with various 'experts' in their relevant fields. I felt this was necessary because there is very little published research or literature on conflicts involving constitutional and customary law in Swaziland. The experts were Lomcebo Dlamini, Director of the Swaziland branch of Women and Law in Southern Africa (WLSA), Mbongeni Mbingo, Editor of The *Times of Swaziland* SUNDAY, Inkhosikati LaMbikiza, Senior Wife to His Majesty King Mswati III and candidate for LLD (specialising in resolving tensions between constitutional and customary law in Swaziland) and finally, a Human Rights lawyer in Mbabane who asked to remain anonymous (and will therefore be referred to using the pseudonym Dominic Mngomezulu).

Chapter One – Customary Law, Communitarianism and Polygamy in Swaziland

The Kingdom of Swaziland is a small country, with a population estimated to be just over one million. The vast majority of the population is comprised of only one ethnic group and therefore no ethnic conflicts exist in the country. Swaziland has gained international notoriety for being the country with the highest HIV prevalence rate in the world.[6] The current monarch, King Mswati III, has frequently been the subject of international condemnation as he continues to make extravagant purchases at the expense of the nation and whilst his subjects continue to suffer the effects of severe drought, food shortages, poverty and unemployment. The King is polygamous, and at the time of writing, is estimated to have 13 wives and 27 children.

Swaziland is often described as an island of autocracy in a sea of democracy. This description is made in light of the persistence of the absolute monarchy during a time in which neighbouring countries, such as South Africa and Mozambique, were undergoing democratic transitions. This persistence is perhaps due to the fact that during colonial times, the British established a system of indirect rule through the Swazi aristocracy, thus giving the monarchy an influential role prior to independence (Nsibande 1995). Nsibande contends that the system of indirect rule 'created in the minds of the ruled the appearance of changelessness of 'traditional' rule, even as changes actually went ahead' (ibid: 2). This mindset helped maintain a degree of mass consent to royal rule. It also helped sustain the idea that allegiance to the royal family was constitutive of the basis for membership in the state (Nhlapo 1987b).

Swaziland gained its independence in 1968 and after winning both the pre and post independence elections, the monarch at the time, King Sobhuza II, promptly repealed the independence constitution, assumed full executive, legislative and judicial power, and banned political parties on the grounds that they would threaten the peaceful Swazi way of life (Kalley, Matlosa 2003). Soon after, he formally instituted a traditional system of governance, known as the *Tinkundla* system. This system confirms the powers of the King

[6] The debate over whether or not polygamy perpetuates the transmission of HIV/AIDS is ongoing. This thesis will not directly address this particular aspect of the debate however, partly due to the constraints of space, but also because I am wary of allowing concerns about disease to enter a discussion on the moral and cultural legitimacy of a custom (even if the link between high rates of HIV transmission and the cultural acceptance of polygamy is assumed, where would we stand if, say, a cure for the disease was discovered?). The focus on polygamy in this thesis is on how women in polygamous societies feel about the basic premise of the custom, i.e. their feelings about men being able to have more than one wife, while women are expected to have only one husband. Therefore, as a relatively practical concern, I feel that including a full consideration of HIV/AIDS in this work would run the risk of detracting from the focus of the thesis.

and stipulates that candidates standing for election into parliament must be independent of any political parties (Kalley 2003: 4). Because the traditional leader, the King, has such extensive, if not absolute power over the system of governance, his continued rule is legitimised by a strong ideology of traditionalism. The King and the royal family play a crucial role in the maintenance of Swazi customary law as their continued rule depends on its dominance. As such, the prominence of Swazi customary law takes on a much more overt political dimension than customary law in other African countries.

King Sobhuza II died in 1982. His 15 yr old son, Prince Makhosetive was named his successor and assumed the title King Mswati III on 25 April 1986 (Kalley 2003). The new King assumed full executive powers on his 21st birthday in 1989.

Despite the ban on political parties and campaigning, several political groupings emerged and started to put pressure on the government to change the political system in favour of multi-party democracy and to draft a constitution containing a Bill of Rights (Kalley 2003: 4). Anti-government strikes and protests escalated from the early 1990's leading to a severe legitimacy crisis (Matlosa 2003). This crisis, compounded by significant pressure from the international community, in particular from the leaders of neighbouring democratic Southern African countries, resulted in the decision, taken by King Mswati III, to initiate a review of the constitutional system (ibid).

In 1996, the King appointed the Constitutional Review Committee (CRC) whose mandate was to ascertain the views of the Swazi people on the issues of a new system of governance and make recommendations for a new constitution. The committee was chaired by the King's brother, Prince Mangaliso Dlamini and reported that 'an overwhelming majority' of the Swazi people were happy with the *Tinkundla* system, wanted to maintain the ban on political parties, preserve the powers of the King and ensure that the principles of Swazi Law and Custom continued to take precedence over any contradictory human rights obligations (Kalley 2003: 5).

In 2002, the Constitutional Drafting Committee (CDC) was appointed, and chaired by another of the King's brothers, Prince David Dlamini. As such, the interests of the monarchy were firmly entrenched through the royal family's control of the whole process. Much controversy surrounded the drafting process. A particular bone of contention with civil society organisations was that only individuals could make submissions at *Tinkundla* meetings; group submissions were disallowed. This led to a loud denouncement of the constitution, with banned political parties and other civic organisations refusing to acknowledge it as the legitimately supreme law of the land. The mandate of the CDC

included an emphasis on inclusivity, participation, accountability and transparency. All of these principles were arguably disregarded. The proceedings were unavailable to anyone outside the committee, the Attorney General, several constitutional experts and the secretariat (Kalley 2003). This has had a profound effect on the public reaction to the constitution. Mbongeni Mbingo, editor of the *Times of Swaziland* SUNDAY, said that although the public had high hopes for the constitution when the process began, the anticipation declined as the government acted in a way 'that suggested they did not assume that the constitution must be a document by the people. Most people see the constitution as a product by royalty, for royalty' (Interview, 7 May 2008).

Not surprisingly given the circumstances under which it was conceived, the new constitution effectively entrenches the traditional system of governance along with the powers of the King. The Constitution of the Kingdom of Swaziland was ratified by King Mswati III on the 26th July 2005 and came into effect on the 8th February 2006.

While the new constitution may be the 'supreme law of the land', like most countries with a colonial past, Swaziland's legal system continues to operate on a dual basis. The imported system, based on Roman-Dutch law and constitutive of 'civil law', is administered by the Magistrate's court and the High Court. This system operates along side Swazi customary law (widely known and referred to as 'Swazi Law and Custom'), which is enforced through the customary courts or 'Swazi Courts' (Whelpton 1997). Unlike most other African countries however, 'traditional' institutions continue to prevail over 'modern' institutions, in large part because the traditional leader has managed to retain his position as Head of State and government in the new constitutional era (Bukurura 2001). Customary law is, therefore, a vital part of both the legal and social system in Swaziland and is arguably more prominent in the lives of the Swazi population than it is for a majority of citizens in other Southern African nations.

Customary Law in Swaziland: An Introduction

Customary law is generally portrayed as being an inherently adaptable, flexible and dynamic form of social regulation. Its primary strength, according to critics, lies in the fact that it is created, maintained and developed by the people it governs (Bennett 1991). In contrast to law that is produced and enforced by the state, therefore, customary law's principle advantage is to be found in its proximity to its adherents. This endows custom

with a considerable amount of legitimacy as communities are directly involved in the development of the justice system.

It has also been suggested in Africa, where the dual legal system often appears to privilege the civil law system imported in colonial times, that customary law has played a central role in providing the means for citizens to develop, or re-assert, their identity as Africans. Customary law has, therefore, also been associated with the project to expound an African consciousness, and in nation-building projects (Bennett 1991, Currie 1994).

In Swaziland, customary law refers to 'the social relationships and social actions which take as their point of departure age-old customs validated by the ideology of traditionalism and legitimised by the king' (Whelpton 1997: 147). Whelpton stresses the dynamic nature of Swazi customary law, contending that as societal values change, so too does the law (ibid). This, he argues, 'gives expression to the prevalent values or the general moral behavioural code of the community' (Ibid).

The supposed dynamism of Swazi customary law is sometimes viewed as problematic as its fluidity allows it to be manipulated and interpreted differently from place to place (Hlanze and Mkabela 1998). This makes answering the question of whose interpretation is paramount difficult, especially considering the social, political and economic changes that are occurring in the country. The national director of Women and Law in Southern Africa (WLSA) Lomcebo Dlamini, agreed, describing Swazi Law and Custom as being 'nebulous' and lacking in clarity, which allows people to manipulate it for personal gain.

If customary norms are breached, the perceived consequences for the individual are harsh. Whelpton (1997) lists social ostracism, the anger of the ancestral spirits, traditional illnesses, magical evils and the inability to rest peacefully after death as just some of the perceived consequences of transgressing tradition. In the interviews, Phindile said that

> [t]hey always say the ancestors will run away from you if you don't follow the culture. Like you may become poor, or else go mad. And they say that you won't rest peacefully once you're dead, if you haven't followed what they are saying (Interview, 18 March 2008).

When asked if she believed this, Phindile replied 'Yes…I'm a Swazi' (ibid). Her response shows that her identity as 'a Swazi' is intimately tied up with following one's culture and doing what 'they' say. To deviate from custom is to deviate from who you are. The way that 'culture' and identity are so intricately bound in Swaziland also highlights the way that 'culture' can be used to control and regulate the members of a given community.

Traditional African culture is often broadly portrayed as being communal or group orientated, and customary law is similarly characterised as generally emphasising duties and obligations to the group over and above any individual rights or freedoms. Advocates of communitarian thought argue that the communal aspect of human life, and the social relationships derived from families, societies, states, organisations and other groups are fundamental to and constitutive of the identities, values and beliefs of any individual. For communitarians, 'community is a structural precondition of human agency and selfhood' (Mulhall and Swift 1992: 121).

Likewise, the emphasis in Swazi Law and Custom is perceived to be on the community and not the individual. When disputes are addressed though the traditional routes, decisions are made based on the consequences for, and in the best interests of, the wider community (Whelpton 1997: 151). Whelpton argues that because the interests of the community are considered paramount, 'the individual alone has no special part to play' in the eyes of Swazi customary law (Ibid). Instead, 'commitment to the group, uniformity and communality' constitute the overriding principles of Swazi social life (Ibid).

Alund (1999) has suggested that the notion of community is one that allows people to develop a relationship between identity and place, and one that allows people to celebrate difference and uniqueness in the modern world. The interview participants, when asked about 'Swazi culture' in general, all spoke about the sense of identity they derived from 'being Swazi' and spoke in terms that suggested not only an awareness of the 'difference' of their culture, but a sense of pride in that difference. Dominic Mngomezulu, the human rights lawyer who was interviewed for this project spoke about custom as a force for promoting 'unity and togetherness as a nation' (Interview, 10 March 2008). Communality was often spoken about in a positive light, with participants suggesting that it meant 'coming together and caring for one another' (Gugu, Interview, 19 March 2008), 'helping one another at the slightest opportunity' (LaMavuso, Interview, 18 March 2008) and 'helping one another in everything we do' (LaMsibi, Interview, 29 July 2008). Several of the unmarried women also spoke about the sense of identity they derived from communal cultural activities and events, such as the reed dance (*umhlanga*).

While the communitarian emphasis placed on customary law does appear to be important in the formation of women's identities, 'tradition' and 'custom' are often critiqued on the grounds that their explicit patriarchalism contributes to the oppression of women. Bennett has stated that customary norms and rules enforcing gender inequality are 'foremost amongst the offenders against human rights' (1991: 25) and Walker has

described the ‘tradition’ being negotiated in this debate as ‘a legitimised ‘official’ patriarchal domination’ (1994: 347). Family law is ‘made to carry the entire symbolic weight of African culture’ (Chanock 1991: 68), but the customary regulations on marriage, divorce, custody of children, inheritance and land rights are all perceived to discriminate against women. In this way it is women who bear the brunt of a conflict between the improvement of one’s social/legal status and the maintenance of one’s identity.

The interview material highlights the lived reality of this conflict. Of particular relevance is Swazi women’s exclusion from the exercise of effective political power. In the interviews, the women acknowledged a slow change in women’s political participation and representation. Nevertheless, they maintained that men were still responsible for ‘making the rules’. Gugu pointed out that women’s political participation varied from region to region, arguing that although there are some women in parliament, ‘still in other parts of this country, it’s still men who are supposed to make rules, not women’ (Interview, 19 March 2008). She also viewed women’s participation in politics as being something that had ‘just started’ (ibid).

Most of the women interviewed differentiated between women participating in law making in parliament and women ‘making the rules’ of Swazi culture. The customary or ‘traditional’ decision-making processes were seen to be solely the domain of men. Primrose stated that, when it comes to ‘culture’, ‘men are the right people to make rules’ (Interview, 21 March 2008). The use of the word ‘right’ here implies an acceptance of a cultural relativism. It might not be ‘right’ for women to be excluded from parliament, but it is ‘right’ for men to have absolute control over Swazi Law and Custom. Primrose also said that ‘we are outcasts…women are outcasts in Swaziland’ (ibid). To describe oneself as an outcast suggests a strong feeling of powerlessness; outcasts are not permitted a say in the way the group is governed. Interestingly, while these women see their culture as an important constituent of their identity, they also feel excluded from the construction of that culture.

Another instance of the conflict between empowerment and adherence to traditional norms concerned the fulfilment of socially prescribed roles. The interview responses suggested that ‘being a woman’ involves conforming to a very narrow, stereotyped role; simply put, women should only concern themselves with taking responsibility for cooking, keeping the house clean and child rearing. All the women interviewed for this thesis stated that the role of the woman in Swazi culture was to cook, to clean the house and to look after the children. Moreover, this is solely the responsibility of the woman, as Gugu specifically

stated that ‘men don’t do those things’ (Interview, 19 March 2008). A Swazi woman is primarily a carer; Zama stated that a woman’s job was to ‘take care of those…I mean…of everyone actually’ (Interview, 21 March 2008). This socially prescribed role was associated with a subordinate status; Inkhosikati LaMbikiza stated that a woman is expected ‘just to assist the man, to be subservient to the man’ (Interview, 30 April 2008).

Of course, it is true that Swazi women now participate in activities previously dominated by men and take up wage employment. When this social change began, it ‘became a source of concern to the ruling traditional class whose authority was based on the subjugation of the lower classes within a framework of a traditional division of labour’ (Simelane 1995: 54). The traditional authorities framed this new trend in negative terms, arguing that women were trying to avoid home responsibilities by undertaking paid work (ibid). This analysis highlights the overtly political motives behind maintaining the ‘traditional’ patriarchal system. If the ruling class derives its authority from ‘tradition’, sanctioning major changes in the ‘traditional’ division of labour endangers the legitimacy of their authority.

Simelane argues that women saw taking up wage employment as ‘an option to the restrictions of the traditional society’ and ‘a chance for individual improvement’ (1995: 54). In the interviews, all of the women expressed similar sentiments and all showed awareness of the independence and empowerment that being able to take up paid employment offers them. Nevertheless, deviating from their place in the private realm, and their dependence on their husbands, deviates from their perception of what ‘being a woman’ entails. The general analysis on customary law therefore begins to uncover some of the problems entailed by communitarianism. The positive sense of identity women derive from their cultural context is tempered by their lack of influence in that context and by the way that empowerment and femininity have been dichotomised.

Despite the inequalities inherent within Swazi customary law, a project has been undertaken to codify it. The codification committee was chaired by one of the King’s brothers Prince Mangaliso, the same man who chaired the Constitutional Review Commission (CRC). Apparently the document has been ready for at least two years, but is now ‘collecting dust at the prince’s home’ because the committee has been disbanded and the prince has argued that he therefore has no authority or official capacity with which to present it to the King (Magagula, *Times of Swaziland*, 7 May 2006).

In 2005, WLSA criticised the project to codify customary law, on the grounds that women’s rights had only just been enacted into law via the constitution. In the interview

for this thesis, Lomcebo Dlamini acknowledged that while the fluidity of Swazi Law and Custom is problematic, codification would essentially retain women's subordinate position exactly as it is, thus making it a hindrance to the gender equality movement (Interview, 26 March 2008).

Critics have noted that codification shifts custom into the 'descriptive framework of legal realism' (Sheleff 2000: 13), thus inhibiting its naturally adaptive capacity and, to a large extent, divorcing its development from the community by transferring authority to the state.[7] 'Customary law' then essentially becomes a static system of rules based on a 'traditional' or pre-modern way of life.

Given that the people who testify to the relevant authority are likely to be members of the ruling elite, elders and men, it is their interests that are likely to be presented as the interests of the entire society. This raises a broader concern, which holds that 'custom' and 'tradition', far from being products of the will of the people, are in fact, masks that powerful traditional authorities hide behind whilst seeking to entrench their interests (Sheleff 2000: 465, Silk 1990: 314). Codified custom then becomes a product of manipulation by groups with vested interests in maintaining, asserting or increasing control.

Prince Mangaliso responded to the WLSA statement in an interview with the *Times of Swaziland*, in which he said that the codification was being undertaken to benefit the entire nation (Twala, *Times of Swaziland*, 6 August 2005). He said that the spirit of the codification exercise lay in harmonizing Swazi Law and Custom with contemporary conditions, and stated that there would be an additional phase after the recording, which would involve the committee visiting all areas of the country so that the people could have their say on how to modernize it (ibid). The report ran with the headline 'Prince Mangaliso tells women to just shut up' (Ibid).

Whether or not this additional phase will be undertaken is unclear. Inkhosikati LaMbikiza said that the document is ready to be debated in parliament, the only obstacle being the absence of someone to introduce the bill and table the debate (Interview, 30 April 2008). If the document is ready to be passed into law, it is not clear when the proposed community dialogue will take place.

Despite the initial implication of the above arguments, proponents of customary law often argue that many seemingly oppressive 'traditions' and 'customs' are better appreciated from a communitarian viewpoint. What is often perceived to be an inhibition

[7] See, for example, Lehnert 2005, Phillips 2004, Chanock 1991

to the autonomy of an individual may simply be a means of providing what is best for the group, or even a means of providing what is best for the individual as part of the group. It is often stressed that customary marriage, in particular, ought to be regarded as part of a communally orientated cultural milieu. Marwick, for example, describes marriage in Swaziland as 'a communal business' (Marwick 1940: 93). Corroborating this evaluation, Dominic Mngomezulu said that legally speaking, a customary marriage is considered to be a contract between two families, and not two individuals (Interview, 10 March 2008). It is within this framework that polygamy is, according to its proponents, best understood.

Polygamy in Swazi Law and Custom: The Communitarian Defence

Marwick contends that, in Swaziland, 'the institution of polygamy is so deeply rooted in the social, economic and religious life of the people that it cannot be lightly dismissed' (1940: 41). In Swaziland, although polygamy is prohibited in civil law marriages under Section 7 of the Marriage Act 1964, it is fully recognised and endorsed in Swazi Law and Custom.

In 1940, Marwick dismissed the idea that the reason for acquiring more than one wife was lust and argued that 'the Swazi' is a polygamist by preference because 'it is the cherished aspiration of everyone to rear as large a family as possible to keep his name alive' (38).[8] However, although wives are 'practically self-supporting' on the old subsistence economy, the polygamous household is increasingly difficult to sustain on the capitalist system (ibid). Even if a man can pay *lobola* for an additional wife, the cost of providing for an additional family is vastly more expensive in the contemporary context. Contemporary difficulties include the shortage of land, and the need for money to pay for school fees, clothing, labour and food (Kilbride 1994: 109). The resources of one man are, for many families, simply inadequate and this means increased competition between wives (Whyte in Kilbride 1994: 109). 'To rear as large a family as possible' is, then, probably no longer a realistic ambition for many Swazi men.

As evidence of this, the *Times of Swaziland* published a story in 2005 about the 65-year-old *Indvuna*[9] of Ngwenyaboya, who renounced the polygamous lifestyle after realising that he had been 'grossly irresponsible' (Magagula, *Times of Swaziland*, 9 December 2005). He had had eight wives, who had given him 49 children, most of whom never went to

[8] Note that by 'everyone', Marwick evidently means 'every man'.
[9] Chief's assistant

school. Two of his wives had left him, four had died of 'a mysterious illness' and one was in custody awaiting trial for the murder of the senior wife. He also admitted to having sired numerous children outside of marriage, with his girlfriends. Now poverty stricken, the *Indvuna* claims that 'men should be content with one woman and they should not cheat on their partners' (ibid).

However, Maillu (1988) has argued that, even though there may be fewer of them, there are still some men who can afford to provide more than one woman with her own accommodation and private property (which is the condition on which a polygamous marriage becomes meaningful and respectful on his account). Given that there are some men who are able to provide for two or more wives, polygamy cannot be rejected on economic grounds (Ibid). In other words, economic change is merely a practical concern and in no way necessitates a change in cultural values.

Polygamy as Necessity: The Importance of Marriage in Swazi Society

Another justification for polygamy in Swaziland relates to the importance of marriage in Swazi society. According to Marwick, 'no Swazi has full social status until he is married' (1940: 97) and a woman who did not marry was, apparently, seen as being 'not fully sexed' (ibid). LaDube said that a woman should 'get married officially' if she is to fulfil her social role (Interview, 10 July 2008) and all the married women interviewed for this project associated 'being a woman' with 'being a wife', thus suggesting that marriage still has important connotations for social status in Swaziland. The media evidence corroborates this, with one reader arguing that 'the most important thing for a grown woman is to get married. That is how life is' ("Women are…", *Times of Swaziland*, 3 February 2008). In addition, Marwick posits that every 'normal' Swazi woman wants to have the opportunity of 'legitimate' motherhood (1940: 97). Seeing as there are more women than men in Swaziland, the surplus females are absorbed into polygamous marriages in an act of kindness that ensures that every woman, 'however ill-natured or ugly she may be', has a home and a husband (Ibid).

Because of the social importance of marriage, for some women, the risk of going through life unmarried outweighs the pains of being a second or third wife (Maillu 1988: 56). And a first wife does not, or should not, have the right to deny another woman the chance to have a family. Furthermore, in societies where reproduction is of the utmost importance, infertility is not merely unfortunate, but 'a calamity' (Maillu 1988: 56).

Instead of divorcing an infertile wife, ‘the kindest solution’ is to marry another woman who can provide a child for the family (Ibid).

Here polygamy is defended on the grounds that it is for the good of the community; a way of ensuring every woman is able to fulfil her socially prescribed role. Interestingly however, of the six unmarried women interviewed (whose ages ranged between 22 and 29 yrs), all but one are mothers and none of them were in any particular rush to get married. The eldest, Primrose, was adamant that she did not want to ever get married ‘because you can’t lead you own life. You have to obey rules. You can’t just do your own thing without asking your husband and his family first. But I want to decide for myself’ (Interview, 21 March 2008).

Furthermore, four of the six unmarried women declared that they would not want to get married if they were financially stable or ‘rich’. These women stated that the reason for getting married lay in ‘having a better life’ (Phindile, Interview, 18 March 2008) or ‘having your own home’ (i.e. to move out of your parental homestead) (Ntombi, Interview, 19 March 2008). They also valued the concept of ‘living together with your children’ (Winile, Interview, 19 March 2008), but if they were able to provide themselves with their own home and support themselves financially, it would be far more preferable, on these women’s account, to have a boyfriend, rather than a husband. This conclusion was borne out of an awareness that their partners would exert far more power over them if they were married, and implies a change in certain norms and values that makes cohabitation more socially acceptable.

The two women that maintained they would still want to get married if they were rich stated that they would only want to marry if their husbands agreed to marry them according to civil rites. Interestingly, although they liked the idea of participating in a customary marriage, for these women polygamy was too strong a deterrent: ‘the reason for a white wedding is to prevent this thing of your husband taking many wives’, said Winile (Interview, 19 March 2008). They also viewed civil marriage as a better guarantee of equality. They acknowledged that inequalities continue to manifest themselves in civil marriage, but maintained that it would offer them more protection and security than customary marriage. Winile and Ntombi said they would ‘pack my bags and go back home’ if their husbands married another woman (Interviews, 19 March 2008). Only Phindile considered marrying into a polygamous family, but only if the husband was ‘really rich. I mean, I’d have to get some benefit out of the marriage’ (Interview, 18 March 2008). Apparently Maillu’s argument that women’s desire, or need to get married outweighs the

pains of sharing a husband is no longer true, at least for the urban youth in Swaziland, who appear to prize independence, decision-making power and economic stability over and above the idea of 'legitimate motherhood'.

Polygamy and the Family: Sisterhood and the Division of the Domestic Work Burden

The communitarian endorsement of African polygamy continues with the argument that, as a wife, a woman has responsibility for her husband, her children and her fields, and so becomes 'a usefully functioning part of the economic and social machine' (Marwick 1940: 42). If she is the wife of a polygamist, her position is improved because domestic tasks can be shared among wives, who do sometimes quarrel and experience jealousy, but who ultimately work together to achieve common interests. It is for these reasons that Maillu has argued that 'not all married women resent having a co-wife, particularly when there is a plausible reason behind it' (1988: 58). Kilbride (1994) even suggests that the idea of sharing domestic responsibilities among women is an idea that might appeal to modern feminists! He also argues that whether sharing a husband is seen as a detriment or not depends 'on the extent to which husbands as such are considered to be assets or liabilities' (Ibid).

Similarly, the Mormon polygamy saga revealed Mormon women fighting for their rights to live as co-wives (Iversen 1990). Polygamy, they argued, gave women the opportunity to be financially and emotionally independent, self-reliant, autonomous, self-sufficient, strong and resourceful. Kaganas and Murray (1991) have noted similar conclusions in South Africa. Polygamy, they contend, can offer real benefits to women through relieving part of the domestic work burden, and freeing women to engage in economic activities (often even pushing them to do so because of the loss of a part of their husbands economic and moral support). The addition of subsequent wives can, arguably, increase the wealth of the collective group, rather than depleting it (ibid: 128). Seen from this perspective, polygamy, rather than being intrinsically disadvantageous to women, might actually be able to alleviate some of the hardships and challenges women face in a patriarchal society (ibid).

In the interviews, LaMbikiza acknowledged that being in a polygamous marriage had afforded her the chance to further her academic career and pursue other projects. She had gained a certain amount of independence from her situation, and seemed to appreciate the fact that 'you don't have to be the doting wife all the time' (Interview, 30 April 2008). She also said that being in a polygamous relationship had taught her about patience,

compassion, tolerance, long suffering and endurance (ibid). However, LaMbikiza stated clearly that, while she never expected to be the only wife (given the importance of polygamy for the royal family), she did not agree with the principle of polygamy:

> It's just not good. Not good for anybody. I don't think this is the way it was supposed to be in the first place. I think it is supposed to be like the Garden of Eden. Polygamy brings out a lot of negative emotions. Some women end up belligerent, hostile, jealous, evil-hearted, envious – all the negative things you can think of, simply because she is not receiving as much attention as the other women. So you see, it just goes with the package … and it's not a very good package (ibid).

In effect, LaMbikiza's response suggests that while polygamy may give rise to some positive outcomes, they do not outweigh the negative effects. Although she believes in keeping a positive outlook on life, and although she has tried to use her situation to her advantage, her personal preference is still clearly on the side of monogamy.

LaSimelane, the fifth of five wives, lives in a peri-urban homestead in which all the wives have separate rooms or apartments (Interview, 13 July 2008). However, she is the only wife who lives there on a full-time basis, meaning that she is responsible for the upkeep of the entire home. The first wife lives at and takes care of the rural homestead, and the other three wives are at college or often away on business. Being in a polygamous relationship had allowed three of the five wives to start businesses and further their education, as they can leave their children with one of the other wives. LaSimelane said she likes children, and so does not mind looking after the children of the other wives, but she did point out that, for her, being part of a polygamous family has meant she has had to assume the domestic burden of looking after a large home, and the majority of her husband's 22 children (ibid). In fact, LaSimelane has asked her husband to look for another wife because she would like someone to share the domestic work with (ibid). This does suggest that polygamy can afford women more independence, freedom and the opportunity of self-sufficiency, but only at the expense of another woman. LaSimelane said that as long as she is expected to manage the homestead and tend to the children, the prospect of undertaking paid employment or furthering her studies is an unrealistic one (ibid).

Furthermore, the impact of migration and the higher prevalence of wage labour (as opposed to subsistence agriculture) have meant that the primary site of economic relationships is no longer the family (Kaganas and Murray 1991: 132). These conditions affected LaMsibi, the first of two wives, who had to move away from her husband's rural homestead in order to take up employment in the capital city, Mbabane (Interview, 29 July

2008). Her husband visited her once a month, and she only discovered the existence of the second wife upon the death of her husband, when she returned to his parental home to mourn him. She described feeling hurt and betrayed upon her discovery, particularly because her marriage was a civil rites marriage (her husband had married the second wife through customary law) (ibid). In the ensuing inheritance dispute, LaMsibi's in-laws sided with the second wife because she was married through customary law and because the husband had lived with the second wife on a more permanent basis (ibid).

Migration and urbanisation have thus meant that adultery, desertion and divorce are increasingly widespread (Kaganas and Murray 1991). These trends have influenced a change in social values, with many people in Southern Africa no longer viewing marriage primarily as an alliance, or contract, between two family groups (Ibid). A change in the way that people perceive marriage (which indicates a shift from communal thinking to more individualistic thinking) would seem to be problematic for the principle justifications behind polygamy, which rest on a communal view of the family as a self-sufficient, internally economically productive unit.

In her 'Women on Sunday' supplement, Barbara Mabuza agreed that

> [i]n the past the polygamous family was one big family, wives with different houses, but children sharing beds and plates of food, regardless of which wife they belonged to. They could eat in any house/kitchen, and had access to their father, in case they needed him, for he too lived in the same homestead, just in a different house … all wives got the same houses, were visited by the husband basically the same number of days and supposedly respected one another (*Times of Swaziland*, 7 December 1997).

Now however, women's ability to take up wage labour has meant that men feel able to move onto a new wife when he feels that too much is expected of him. Men cannot support many wives, and the big family does not live in the same homestead, as men now tend to build houses for their wives in different areas. Visiting practices are therefore very different now, as men visit different wives depending on their mood. Fathers are not as available to their children and competition creates malice between wives and children (Ibid).

LaDube, the second of two wives, lives in the same region as her co-wife, but not in the same homestead (Interview, 10 July 2008). She described enormous difficulty in regulating visitations, and depicted the practice of polygamy as one that encouraged deception and deceit. She said that her husband often lies to her, or makes excuses when he is going to see his other wife (ibid). She said that her husband visits 'whoever is his favourite at the time' and said that women living in polygamous marriages are constantly in competition to see who can secure the husband for the longest (ibid).

On the other hand, some critics have argued that a polygamous setting can be a beneficial environment for women, as co-wives can cooperate and find strength in their numbers creating a sense of sisterhood and community (Iversen 1984). Kilbride argues that although jealousy, like romantic love, is universal it is also 'subject to localized cultural and special circumstances' (1994: 36). In societies where polygamy is the norm, and where men treat their wives equally, there is no reason to think that jealousy would be a necessary consequence of polygamy (ibid). In her work on Mormon polygamy, Embry (1984) contends that jealousy is an emotion that wives continually have to face, but also points out that some women overcome the emotion to work together with other wives. She also contends that most wives get used to the first wife being given preference. Whether a wife experiences jealousy or not is completely dependent on her personality, just as the level of economic and moral support contributed by her husband is dependent on his economic situation and personality. In this way, polygamy is no different from monogamy, or any other form of marriage (Embry 1984).

LaMbikiza's responses did suggest that the way women cope with polygamy depends almost entirely on their personality. She said that how you cope with living in a polygamous marriage, like all things in life, 'depends on how you condition your mind' (Interview, 30 April 2008). She viewed polygamy as being 'like a cake. Either you have it all to yourself, or you slice it up and share it. The more wives there are, the smaller your share' (ibid).

Nevertheless, tales of the harmony and feelings of sisterhood between wives do appear to be of a 'saccharine sweetness' and are perhaps 'a little too good to be true' (Iversen 1984: 512). Kaganas and Murray note that 'Western' values, such as the emphasis on romantic love, emotional attachment and companionship in marriage have also begun to permeate African societies and consequently, the impact of a man marrying another woman increasingly leads to feelings of abandonment, loneliness and rejection (1991: 132).

None of the married women interviewed for this thesis reported any sisterly feelings towards their co-wives. In fact, the tension and competition between wives was the primary point of contention for all the women interviewed. LaDube explained that

> [s]ometimes we pretend as if we love each other but it's not from the inner heart because she's not my sister, and I'm not her sister. As much as we're with the same man, I claim that he's my husband, but so does she. And when he's talking to her, I'll be looking to see if he looks at her the same way he looks at me, or if he looks at me the same way he looks at her. Is he just talking to her the way he would talk to anybody, or is he talking to her in a way that shows he's in love with her? How far does he flaunt the relationship in front of me? And when he talks to her the same way

> he talks to me - showing the relationship - ah, you can feel it, you can really feel it. It is painful (Interview, 10 July 2008).

LaSimelane described being ignored and isolated by the first and second wives in her marriage, but said that the other two are civil (Interview, 13 July 2008). Nevertheless she maintained that she would never go into another woman's room, or allow another woman to enter her room, stating 'they are not my sisters' (ibid). LaMavuso said that there was always jealousy and competition between wives, and that she preferred to live on her own, away from the other wives (Interview, 18 March 2008). These responses explicitly deny the existence of 'sisterhood' in the modern polygamous family and also suggest that Swazi women do value emotional attachment and companionship in marriage.

Contemporary Forms of Polygamy in Swazi Society

Thus far, the analysis of contemporary polygamy in Swaziland suggests that women derive little advantage from their situation and often face difficult emotional challenges. It has therefore been suggested that polygamy continues today because polygamous men gain a certain 'social prestige', and that the number of wives a man is able to afford is still to some extent a sign of wealth (Marwick 1940: 43). LaDube confirmed that men continued to associate multiple partners with an elevated social standing and sexual prowess: 'it gives them a status', she explained (Interview, 10 July 2008).[10] This attitude has been criticised in the media, with one correspondent arguing that 'any custom that has been divorced of social purpose becomes an empty shell, a sterile performance, a farce…polygamy has become a mere show, a show of status' ("Time has…", *Times of Swaziland*, 2 April 1997).

On the other hand, Altman and Ginat (1996) have argued against the idea that taking additional wives is primarily for the sexual satisfaction of the man because while it is possible that a man takes another wife for this purpose, the excitement of having a new woman would fade after a while as the day to day pressures and responsibilities of family life take over. Sexual satisfaction or lust is unlikely to be the reason behind polygyny considering the fact that it is much easier to have mistresses and affairs and much more acceptable, these days, to live together unmarried.

Then again, Nhlapo suggests that nowadays, 'the very act of marrying another wife signifies abandonment of the first' and that polygamy is used as a substitute to, or means of

[10] Bhana et al. (2007) have noted the continued racist construction of African male sexuality as hypersexual, and so I want to be careful to distinguish between a portrayal of Swazi males as hypersexual, and an observation that hypersexuality is often viewed as an important component of masculinity in Swaziland.

avoiding divorce (1990: 111). This may be because divorce in Swazi customary marriage is very difficult to obtain. Traditionally, the only circumstances when separation is sanctioned are in cases of adultery (on the part of the woman), witchcraft, and sterility (again only on the part of the woman) (Marwick 1940). The woman will however, remain under the guardianship of her husband, separated or not, until his death, and under guardianship of his family thereafter. This is because a woman may only be married once in her life, even after her husband's death (Nhlapo 1992). There is some suggestion that rituals can be performed to cleanse oneself of a marriage, but interpretations differ from place to place and it is still widely believed that 'there is no divorce in Swazi Law and Custom' (ibid).

Because divorce under Swazi Law and Custom is so difficult, if not impossible to obtain for women, this means the first wife will almost certainly suffer the major consequences of losing both emotional and financial support to 'the new favourite' (Ibid). All six of the unmarried women interviewed believed that the act of marrying another wife would result in the virtual abandonment of the first. Primrose explained that

> [i]n Swaziland, they say that the man must look after the new wife more because she doesn't know the ways, so they have to groom her to be a wife, to show her how things work. But what happens is that the first woman ends up with all the kids, because the man is with the new wife (Interview, 21 July 2008).

'There's always the best woman in the man's life. You find that it's always the youngest wife who now gets everything from the man, even time. The man spends most of his time with the youngest one', said Gugu (Interview, 19 March 2008). LaMavuso said that for all intents and purposes, her husband, who has four wives but lives with none of them, preferring to live with one of his girlfriends instead, has abandoned her (Interview, 18 March 2008). She said that her husband no longer provided for her or her children and that she had suffered, and continued to suffer severe economic hardship (ibid). In this way, LaMavuso's situation gives weight to the argument that polygamous unions allow men to transfer the costs of child rearing to women more easily (Nii-Amoo Dodoo 1998: 233).

The abandonment of the first wife is by no means limited to customary marriages. It is also common for men to marry one woman by civil rites and then go on to marry another under customary law (Nhlapo 1987a). This is clearly illegal under the Marriage Act, which prohibits bigamy; that is the coexistence of a civil marriage with any other marriage (civil or customary), but is theoretically permissible under Swazi Law and Custom. Similar consequences result when men marry the same woman through both civil

rites and customary law (dual marriage). Civil law may be superior in theory, but as is becoming increasingly clear, supremacy on paper does not necessarily equate to supremacy in practice. Men assert their right to be polygamous (as stipulated in customary law) over the obligation to be monogamous (as required by civil law). It seems to be relatively easy, therefore, for men to use the dual legal system to their advantage, by using it to escape the duties and obligations required of them by either legal system (Nhlapo 1987a: 129).

Bigamy is very seldom prosecuted. Former Attorney General Phesheya Dlamini has said this is because it is difficult to get the aggrieved party to present their case in court (Mordaunt, *Times of Swaziland*, 15 January 2004). This is likely due to a lack of awareness about what the law can do, a lack of resources to access the justice system and a fear of the social implications of what essentially amounts to taking one's husband to court.

Additionally, it is expected that men married by 'Christian' civil rites will continue to have extra-marital affairs. One *Times* reader contended that, 'a Swazi who is not legally polygamous is secretly adulterous' ("Polygamous culture", *Times of Swaziland*, 14 January 2006). Men who are married through customary rites, but who cannot afford a second wife have mistresses or girlfriends instead, thereby allowing them to have relationships with other women but without assuming any of the responsibilities or obligations that come with marriage. The move from overt or 'official' polygamy to covert or 'unofficial' polygamy can perhaps be attributed to the fact that it is economic factors that make polygamy undesirable in the contemporary context, rather than a change in moral values (Kilbride 1994).

Orubuloye has therefore suggested that the practice of polygamy in Sub-Saharan Africa has 'taught men that relations with only one woman are not part of a man's nature' (2007: 2). Women too, seem to believe that men are never monogamous. Importantly however, they do not appear to like it. In a letter to the editor of the *Times of Swaziland*, one female reader argued that

> [h]ere in Swaziland there is nothing like "my husband". He is your husband when you are with him in bed. As soon as he walks out of the bedroom door you have to refer to him as "our husband". I understand that according to Swazi culture (custom) a man can or is allowed to have as many women as he wishes. My sisters don't waste your time breaking doors because the law will always be against you. ("There is…", *Times of Swaziland*, 2 September 2003).

Tellingly, this reader's interpretation of 'Swazi culture' is that it allows men to 'have', rather than to *marry* as many women as he wishes. This suggests that contemporary interpretations of Swazi culture reflect an understanding of the polygamous principle as one

that allows men to have sexual or casual relationships with as many women as he wishes, without necessarily assuming the responsibilities that marriage entails. Men's multiple sexual partnering is socially sanctioned regardless of whether or not it results in marriage. This is also an indication that the primary motivation behind polygamy in Swaziland today is male satisfaction, rather than a genuine concern that every woman finds a home and a husband, as Marwick suggested. A feeling of hopelessness is conveyed as the reader advises women not to 'waste your time breaking doors', i.e. trying to do something about it. It also implies that women value fidelity, but feel powerless to enforce that preference. The statement that 'the law will always be against you' also includes the implication that Swazi customary law is the only 'law' that, in practical terms, matters.

Some critics have suggested that it is the irresponsible practice of polygamy that is problematic, rather than the principle of polygamy itself. Derek Von Wissell, director of the National Emergency Response Council on HIV and AIDS (NERCHA) in Swaziland, has echoed this sentiment, arguing that the problem is not with the cultural practices themselves, but with people abusing those practices and 'perverting' the culture ("Von Wissell", *Times of Swaziland*, 31 May 2006). Similarly, Kilbride suggests that 'much of the current female opposition to polygyny may well be related to the irresponsible practice of this custom by many men in modern circumstances throughout the African continent' (1994: 111). But the claim that covert polygamy is a 'perversion' of custom is problematic because, firstly, the claim is contrary to the spirit of custom in general as it denies the flexibility and dynamism that is supposed to be inherent to the system. More specifically, the claim exempts polygamy from evaluation and critique because it refuses to engage with modern forms of polygamy on the grounds that those forms are, somehow, distortions of a pure practice.

Furthermore, the traditional authorities do not seem to have a problem with covert polygamy, and seem to imply that the principle of polygamy is merely one that allows men access to as many women as he chooses. For example, when asked to comment on the behaviour of a certain government minister, married by civil rites, and centre of a 'pants down' scandal at the time, the Ludzidzini Governor (also known as the 'traditional prime minister') Jim Gama, replied that the minister was 'a fine Swazi man' (Twala, *Times of Swaziland,* 30 April 2006). As far as the traditional authorities were concerned, 'a man is free to propose to and marry anyone…he has all the rights to go out with anyone' (Ibid). The fact that he was married through civil rites seemed irrelevant; 'we are not at liberty to

judge him because in Swazi culture a man can have as many wives as he can afford', Gama said (Ibid).

Irrespective of whether a man chooses to marry through customary or civil rites, the psychology of polygamy therefore seems to be all-pervasive. 'The worst effect of polygamy on our nation is not so much the actual practice, but the example it sets among young Swazi males', wrote one media columnist, 'the psychology of polygamy has been instilled in these men, so they consider it their right to have multiple lovers, with as many children as they feel like' ("Time has…", *Times of Swaziland*, 2 April 1997). Compounding this analysis, in the interviews, all of the unmarried women stated that, even if they married through civil rites, they did not expect their husband's to be faithful:

> Swazi men don't mind if they're married or not. In fact, most cheating men are married men. He'll still have other wives, but they won't be official. They'll be secret. He can even have many kids outside, while he's still a married man. (Phindile, Interview, 18 March 2008).

It is for this reason that polygamy could be seen as more of a mindset than a practice. Dlamini suggested that the high rate of bigamy and the social acceptance of the inevitability of infidelity in 'so-called monogamous civil rites marriages' made polygamy, in this sense, 'part and parcel of being Swazi' (Interview, 26 March 2008). The media research and the interview material suggest that while covert polygamy can be constructed as a 'perversion' of the custom as it was practiced traditionally, it is the principle behind polygamy that has provided for the continuation of men's multiple sexual partnering in socio-economic circumstances that make supporting more than one wife difficult. This principle is one that asserts polygamy as an exclusively masculine right, and a right that men are entitled to irrespective of the wishes of their partners.

The argument that polygamy persists in Swaziland solely because of the advantages men derive from the practice is bolstered by the arguments of the traditional prime minister. Gama has said that polygamy is good because it relieves men's stress by allowing them to go to one wife for emotional relief if the other is giving him trouble ("Polygamy is…", *Times of Swaziland*, 14 December 2005). He also argues that polygamy gives a man a sense of security because it ensures he dies a 'dignified' death: should one wife die before you, the younger wives will be there to ensure you don't 'die a lonely death' ("Burning issue", *Times of Swaziland*, 26 April 1997). Here, women are objectified in the sense that they are considered largely interchangeable. If one woman dies, there is another to replace her. If one woman causes you stress, you can easily relieve your frustrations by spending

your time with one of the others. Obviously women are not to be valued for themselves, but for the services they can provide to men.

Gama denies that any conflict exists in polygamous marriages, so long as ‘the marriage is structured as it should be’, that is, so long as the man lays down and enforces the rules of the homestead (ibid). In other words, the successful functioning of the polygamous family depends on the continued dominance of patriarchal principles. Gama has stated that he is yet to meet a man who is ‘satisfied’ with one woman, but denies that polygamy contributes to the spread of HIV/AIDS because if he has four wives at home, he won’t have time to go looking for more women (Ibid). He also denies that inheritance disputes are exacerbated in polygamous situations, ‘unless of course, the dead man is rich. These women who fight over the dead man do so because they have something to gain’ (Ibid). Evidently then, Gama’s defence of polygamy rests on the assumptions that men’s sexual needs are greater and more important than women’s, and that women’s struggle for access to resources is based on greed.

Gama has advised that the best time to get another wife is when women reach menopause because ‘they lose interest in men’ and men are therefore sexually frustrated by their older wives (Mohammed, *Times of Swaziland*, 10 June 2006). Again, Gama’s justifications for polygamy rest on misplaced stereotypes about women. The positive aspects of sex – the emotional and sensual aspects specifically – are represented as positive for men only; women’s needs and wants are not considered or even acknowledged.

In response, an unnamed writer pointed out that Gama’s defence of polygamy did nothing to justify the custom and merely revealed his insecurity (“Polygamy exposed”, *Times of Swaziland*, 7 May 1997).

> The suggestion that women also have needs is blasphemous to Gama. Like the sun blazing in the centre of his own solar system, Gama sees wives as lesser planets orbiting himself and children as inconsequential satellites…the whole matter for Gama boils down to I, I, I! What I want. What pleases me…He seems utterly indifferent to the humanity of women at all (Ibid).

In conclusion, the writer argues, ‘Gama shows polygamy for what it truly is today: a way for the nation’s vain male hierarchy to continue to lord over women and children, impoverishing themselves and the nation’ (Ibid).

Another reader also wrote in to respond to Gama’s remarks, arguing that the Ludzidzini Governor had made clear that polygamy was about increasing male domination in society and satisfying men’s ‘sexual lust’ (“Polygamy a…”, *Times of Swaziland*, 14 December 2005). ‘Polygamy is not intended for a mutually satisfactory relationship

between a man and a woman. It is only for the good and the pleasure of the man' (Ibid). Gama's remarks reinforce the idea that polygamy allows a man to acquire wives as 'same-sex substitutes, which facilitates stereotyping and the objectification of women to a greater degree than monogamy does' (Kaganas and Murray 1991: 128). Nowhere does Gama address the implications of polygamy for women, and his comments highlight the way in which the voice of the traditional authorities takes on a singularly masculine tone.

The communitarian arguments given in defence of polygamy seem to be premised on the assumption that what is good for women is merely the opportunity to fulfil their socially prescribed role. A significant proportion of the arguments seem to be based on the assumption that the solution to the problem of the sexual division of labour lies in adding more women to a family, rather than moving towards the equal participation of the sexes in both public and private life. Maillu quite openly states that

> [i]t is well known that no husband expects to be ruled by his wife…since it is the woman who conceives and bears children, that puts her in a definite role…she must be a woman; a woman biologically and a woman behaviourally. He expects her also to adequately perform the prescribed function of a woman (1988: 24).

This attitude seems to underlie most of the arguments given above and it is therefore fair to say that the communitarian defence of polygamy is not based on a genuine concern for gender equality, but is premised on a standpoint, distinctly communitarian in nature, that asserts the paramount importance of women fulfilling a socially prescribed, stereotyped and restricted role.

There is also evidence to suggest that polygamy may exacerbate familial inheritance disputes. When the (male) head of a household dies, he is succeeded by a male heir (usually his eldest son), in typical patrilineal fashion. A man can name his preferred heir before he dies, but this decision can be overruled by the family council because 'the matter is not private but one which affects the whole clan' (Marwick 1940: 48). Women cannot inherit directly because 'traditionally', and legally speaking, Swazi women have always been minors, and have always been under guardianship.[11] This means that before marriage, a woman is under the guardianship of her father, and after marriage, that guardianship is transferred to the husband and his family. Women's minority status has meant that, according to most interpretations of Swazi Law and Custom, a woman cannot own

[11] The human rights lawyer confirmed that the guardianship principle is still largely lived in practice (Interview, 10 March 2008).

property. Although, when married, she may be given a house as her private property, she cannot dispose of it without her husband's permission (Marwick 1940: 67). If a woman's husband dies, guardianship of the widow is supposed to be transferred to one of her husband's male relatives, usually his brother.

Both Lomcebo Dlamini and Dominic Mngomezulu gave numerous examples of women's minority status being used to disadvantage women, particularly by way of dispossessing them of land after the death of their husbands (Interviews, 26 March 2008 & 10 March 2008 respectively).[12] Difficult contemporary conditions have made women vulnerable to what has become known as 'property grabbing'. This is where the woman's in-laws attempt to take control or gain ownership of the land belonging to the woman's deceased husband on the basis of her minority status. Dlamini also drew attention to the fact that although this is done in the name of 'culture', the real motive behind it is to secure access to resources (Interview, 26 March 2008).

Although inheritance disputes can and do occur in monogamous marriages, they are often exacerbated in a polygamous situation. In a polygamous family, the status of the wives is the primary consideration when selecting an heir, and a woman's status is almost completely derived from the status of her father (Marwick 1940: 132). But because competition for land, assets and resources is so stiff, it is often the case that some wives are recognised by the deceased husband's family, and some are not.

> When the family council gets around to choose an heir, that is the time when the mortal squabbles come to the fire. Then begins the time for accusations and counter-accusations of cheating…Always there is bound to be a favourite wife in the seraglio. And that favourite wife will look after her own flesh and blood when the husband has passed on to the back of beyond (Magagula, *Times of Swaziland*, 9 March 1997).

Because resources are limited, choosing an heir to administer those resources becomes of vital importance. This 'communal' decision now affects the clan, not in a way that will benefit all equally, but in a way that will see some individuals profit and others lose out. Again the competitive capitalist system jars with the communal orientation of 'traditional' life. As O'Neill argues, 'a woman who has no entitlements of her own lives at the discretion of other family members who have them, so is likely to have to go along even with proposals she greatly dislikes or judges imprudent' (1990: 458). In the contemporary

[12] One incredible case, which Dlamini estimated to have taken place between two and three years ago, involved a woman who wanted to take her in-laws to court to stop their attempts at 'property grabbing' after the death of her husband (Interview, 26 March 2008). She was told that, as a minor, she must have the assistance of her in-laws if she wanted to bring a case before the court!

context, women in polygamous relationships (and their children) are often left vulnerable to the attitudes, decisions and actions of her in-laws and co-wives.

There is some suggestion that the civil law system is starting to offer some protection in these matters. Hlanze and Mkabela (1998) do note that, following the dissemination of information by WLSA, women married under Swazi Law and Custom are now starting to take inheritance disputes to the Master of the High Court, who applies civil law principles and statutes to such matters. Consequently, all wives receive an equal share of their deceased husbands' estate. However, not all women know they can do this because of a lack of information, and very few women have access to the High Court because of a lack of resources. It is also true that, in some cases, even when a court order is issued, the practical supremacy of customary law trumps the civil law ruling when the woman returns to claim her inheritance. In communities where Swazi Law and Custom remains, in practical terms, paramount, a court order is 'just a useless bit of paper' (Dlamini, Interview, 26 March 2008).

It is for these reasons then, that polygamy has become a symbol of the oppression of women and has largely been regarded as 'incompatible with a social order in which the liberation of women is a recognized goal' (Kaganas and Murray 1991: 129). Kaganas and Murray have argued that the change from a subsistence agricultural economy to a capitalist economy has also given weight to the claim that polygamy is 'a system that does not reflect contemporary life', and posit that a majority of women in Southern Africa appear to favour its abolition because of its incompatibility with contemporary social and economic conditions (ibid: 131). All in all, the communitarian endorsement of polygamy seems to be based on a romantic idealization of how the custom operated in pre-modern times and this has not helped women struggling with the challenges of modernity. Consequently, Nhlapo (1991) has suggested that polygamy is an uncontroversial contender for constitutional review. It is with this in mind that the following chapter turns to an analysis of the recently instituted Constitution of the Kingdom of Swaziland and asks whether a liberal emphasis can provide any answers to the problems raised by the supposed impasse between polygamy and gender equality.

Chapter Two – Constitutional Law, Liberalism and Polygamy in Swaziland

While the human rights expressed in constitutions and international conventions are posited as being 'universal', they are nonetheless, derived from liberal values. The central tenet of liberalism is often presumed to be the isolated, autonomous individual, 'capable of creating life's own opportunities, each entitled to the protective mechanisms of the state, each carving out a personal pattern that is unique by virtue of the idiosyncrasies of every individual' (Sheleff 2000: 136). Furthermore, a person is entitled to his or her rights simply in virtue of his being a person – a human being – and irrespective of your place in the community from which you originate (Donnelly 1990: 35).

Despite the entrenchment of the traditional mode of governance, in terms of human rights, the Constitution of the Kingdom of Swaziland, Act No.1 of 2006 is written from a liberal viewpoint in many respects.

For example, it is certainly true that the constitution recognises and places emphasis on the fundamental importance of all individuals as equal 'before and under the law in all spheres of political, economic, social and cultural life' (S20(1)). And in the section concerning the rights of women, the constitution states that

> [w]omen have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities (S28(1)).

The obvious question at this stage then becomes: Does polygamy violate the equality clause? In the interviews, all of the women stated that they believed it to be impossible to achieve equality in a polygamous marriage. This was primarily because women were perceived to be constantly in competition with each other for the attention of the husband and because the husband could leave one wife and go to the other should she get too demanding. LaMbikiza specifically stated that she believes the strict enforcement of the gender equality principle would necessitate the prohibition of polygamy (Interview, 30 April 2008).

The media evidence also suggests that polygamy and equality are irreconcilable. 'I do not believe that polygamy should be part of the new democratic Swaziland', stated one female reader in a letter to the editor ("Polygamy is…", *Times of Swaziland*, 3 June 1998). The reader argued that although there had been good reasons for it in the past, polygamy now breeds poverty, emotional instability and disadvantage for women. 'This practice is outdated and undemocratic', she concluded (ibid). In using the term 'democratic', it is fair

to assume that the reader is referring to a system in which all citizens are presumed to be equal. The implication, therefore, is that polygamy and equality cannot coexist. The reader shares her opinion with Princess Sikhanyiso, the first-born child of the King. In a newspaper interview the princess stated that polygamy 'brings all advantages in a relationship to men and this to me is unfair and evil' (Magagula, *Times of Swaziland*, 16 July 2006). The princess' experience of life in a polygamous family led her to conclude that wives were not treated equally, that it is impossible to satisfy all the women in such a relationship and that the practice significantly disadvantaged the first wife in the relationship, as she has no control over the number of subsequent wives her husband might add (Ibid).

Nevertheless, Kaganas and Murray have warned against 'a glib application of the notion of equality' (1991: 124). While women in polygamous relationships face numerous disadvantages, most of these stem from the cultural context in general and the only violation of the principle of equality that relates specifically to polygamy is the fact that men may have more than one wife, while women may only have one, shared husband (ibid: 127). If the equality principle were strictly applied to the practice of polygamy, the result would either entail the legalisation of polyandry or the revocation of the legal recognition of polygyny. The latter suggestion would, if implemented, do irreparable harm to women already living in polygynous marriages because they would lose any legal entitlements as recognised spouses. The legalisation of polyandry is also undesirable, not only because it would be deemed illegitimate in the eyes of the majority population, but also because 'the notion of a woman acting as a wife to more than one man suggests greater oppression, not liberation' (ibid).

In addition, Kilbride (1994) contends that polygamy can provide support for women in unstable social and financial positions. The polygamous home can offer a community, a family, and a structured and secure environment (ibid). Lomcebo Dlamini said that some women have stood up to defend polygamy on the grounds that 'it is not men who create polygamy, it is women who choose it. If I find you in a marriage already and I agree to be your second wife, then in a way, women are perpetuating it' (Interview, 26 March 2008). Even Inkhosikati LaMbikiza, who stated that she was in principle opposed to the idea of polygamy, argued that 'most of the time, women go into it with their eyes wide open. So for those women who enter into that situation, it is viable to them, for them. Because that is the choice of life they have made' (Interview, 30 April 2008). These arguments rest on the assumption that because women continue to enter into polygamous marriages, this is

evidence of the exercise of women's free choice and women's willingness to maintain the custom. Yet it is not clear how 'willing' these women actually are. As Lomcebo Dlamini argued, 'once you gain an understanding of how patriarchy has organised society, the idea of free choice becomes debateable…do I really have a choice if I have been socialised to be economically dependent on a man?' (Interview, 26 March 2008) The implication of this argument is that women do not choose polygamy freely; rather they 'choose' it because they feel like they do not have any other choice.

Sa'ar has also noted that

> [s]ome women stand to benefit from unequal gender arrangements, depending on their stage in the life cycle or on their particular familial status. Such women are more likely to strike a bargain with patriarchy than to resist it (2005: 681).

LaShongwe, the fourth of five wives said that she got married because her husband had promised to pay her school fees and help her to achieve things she was previously unable to do because of financial restraints (Interview, 13 July 2008). Although she maintained that she loved her husband, she said she did not particularly like or agree with the principle or the lived reality of polygamy (ibid). In this way, Swazi women's continued participation in polygamy may be evidence of their attempts to negotiate the best for themselves in an overtly patriarchal society battling with an inordinately high poverty rate and characterised by a severe struggle for resources. LaShongwe's situation strengthens the idea that women do not enter into polygamous marriages completely freely (preferring monogamy, but choosing polygamy because of a lack of available options), but also gives weight to Kaganas and Murray's contention that the abolition of polygamy may not be the answer that women are looking for.

In any case, the origin of the constitutional equality clauses appears to be primarily external. Mbongeni Mbingo said that most people viewed the principles contained within the Bill of Rights as the product of commonwealth stipulations and pressure from the UN, the SADC and other influential international organisations (Interview, 7 May 2008). Lomcebo Dlamini also commented on the weakness of the women's movement in Swaziland, which lacks cohesion and is constrained by an ideology that makes involvement in political groupings taboo (Interview 26 March 2008). She admitted that the inclusion of the Bill of Rights was in large part due to 'diplomatic nudging' and external pressure, rather than an internal politicised women's movement (ibid). It is also important to note that while the general equality clause in Section 20 includes a guarantee to equality in cultural life, the clause relating specifically to women does not. This is deliberate - the term

‘cultural’ was removed from the women’s equality clause during the parliamentary debate of the Constitution Bill. These factors make dubious the Government’s expressed commitment to ‘enhance the welfare of women to enable them to realise their full potential and advancement’ (S28(2)) and call into question the potential efficacy of the equality clause should it be employed by women hoping to address grievances relating to custom.

Constitutional provision is made to ensure that marriage is entered into ‘only with the free and full consent of both the intending spouses’ (S27(2)). And the final section on the rights of women, S28(3), provides that

> [a] woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.

There is some suggestion that this clause could be used by first wives, married by customary rites, but unwilling to be part of a polygamous marriage. Polygamy is widely considered to be non-consensual for the first wife because, particularly in a capitalist economy, it is difficult to believe that any woman would willingly accept the financial set backs that the addition of another woman and her prospective children would result in. The division of her husband’s resources (both emotional and economic) could significantly affect her quality of life, her feelings of self-worth, her personal autonomy and her children’s access to education. At present, should a woman not want to be part of a polygamous marriage, her preference is overruled by her husband’s preference. Or in other words, her choice is subordinated to her husband’s choice. But if a woman is ‘in conscience opposed’ to being part of a polygamous marriage, does this give women the means to stop their husbands taking subsequent wives?

It does not seem likely. Dominic Mngomezulu argued that women who are opposed to the principle of polygamy should not enter into a customary marriage in the first place (Interview, 10 March 2008). If a woman consents to be married by customary rites, knowing fully well that polygamy is potentially part and parcel of what those rites entail, then she cannot reasonably expect to be able to veto that particular part of those rites. Inkhosikati LaMbikiza also believes that the clause would be ineffective if employed in this way, and argued that the only option left open to first wives is to leave the marriage altogether (Interview, 30 April 2008).

These responses deny the reality of many women’s disadvantaged socio-economic situation, which leaves them without a realistic possibility of exercising these choices. LaMbikiza did acknowledge that whether or not a woman leaves her husband ‘depends on

her character, how strong she is, how independent she is, and whether or not she's able to take that step and move out of the relationship or not' (ibid). Mngomezulu, however, flatly denied the point, arguing that 'there's always a choice' (Interview, 10 March 2008). His response betrays a simplistic view of the law, which assumes that because women have these choices in theory, they also have them in practice. This also, therefore, reflects the problem with a legally centralistic outlook.

The constitution recognises both civil and customary marriages and surviving spouses are granted the right to reasonable provision out of the estate of the deceased spouse, no matter whether the spouses were married by civil or customary rites (S34(1)). While seemingly giving married women inheritance rights more in line with civil law, Dominic Mngomezulu highlighted the vagueness of the term 'reasonable'. He pointed out that 'reasonableness' is subjective – what is reasonable to you, might not be reasonable to me, what is reasonable to a second wife, might not be reasonable to the first, and what is reasonable under customary law, might not be reasonable under civil law (Interview, 10 March 2008).

Consequently, there does seem to be a need for clarity on the issue of whether customary or civil law principles will take precedence. The Constitution stipulates that

> [s]ubject to the provisions of this constitution, the principles of Swazi customary law (Swazi Law and Custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland (S252(2)).

There is now, therefore, a constitutional obligation to apply customary law as part of the law of Swaziland and this clause places Swazi Law and Custom firmly in the realm of public law. However, there is nothing in the constitution that specifies how this obligation is to be determined and no criteria to stipulate how this obligation should be interpreted in light of the other obligations contained within the Bill of Rights. It does go on to specify that the provisions of this subsection

> [d]o not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of the Constitution or a statute, or repugnant to natural justice or morality or the general principles of humanity (S252(3)).

However, as Lomcebo Dlamini pointed out, an almost identically worded repugnancy clause has existed in Swazi statute law since colonial times and has been largely redundant owing to the overriding influence of customary law (Interview, 26 March 2008). Whelpton (1997) has also noted that the repugnancy clause is used sparingly, if at all, in Swaziland

and has concluded firstly that it serves little purpose in legal reform and secondly that it should not be retained in Swazi statute law due to the offence arbitrary decisions taken in its name could cause. As such, it is slightly surprising that the repugnancy clause was included in the Swazi constitution at all and there is no evidence to suggest that its inclusion will serve any purpose in the new constitutional era.

It appears that the Constitution does take ultimate superiority over Swazi Law and Custom in S268(1), which states that

> [t]he existing law, after the commencement of this Constitution, shall as far as possible be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.

For the purposes of clarification the expression 'existing law'

> [m]eans the written and unwritten law including customary law of Swaziland as existing immediately before the commencement of this Constitution, including any Act of Parliament or subordinate legislation enacted or made before that date which is to come into force on or after that date (S268(2)).

However, in S115(7), the Constitution allows that certain matters will continue to be regulated by Swazi customary law. These matters include issues relating to traditional authorities, Swazi customary courts, Swazi nation land, cultural activities and organisations and 'Swazi Law and Custom'. To state that Swazi Law and Custom will continue to be regulated by Swazi Law and Custom is peculiarly circular and informative. Realising this discrepancy, Lomcebo Dlamini commented on 'the grey area' within the constitution, which unlike the South African constitution, leaves unclear the ultimate superiority of either customary or constitutional law (Interview, 26 March 2008). Both Inkhosikati LaMbikiza and Dominic Mngomezulu denied the existence of a grey area, arguing that S268 made it clear that the constitution was supreme (Interviews, 30 April 2008 & 10 March 2008 respectively). Inkhosikati LaMbikiza described the clause as 'the cornerstone of this constitution', and said she didn't think it could be much clearer (ibid). However, in the interview with Dlamini, she said that the problem lies firstly in knowing how customary law has previously trumped civil law, secondly in the circular and uninformative phrasing of S115(7) and lastly in the absence of a stipulation as to how the clause fits in vis-à-vis all the other sections (Interview, 26 March 2008). It must also be true, given that it was the traditional authorities that were largely responsible for drafting the constitution, and for seeing to it that the traditional system of governance remained firmly entrenched, that the constitution obviously privileges and reinforces traditional authority.

Entrenching an obligation to apply customary law in the Constitution, and failing to clearly articulate its rank in relation to the Bill of Rights may have complex consequences for the debate surrounding polygamy. Recent defences of polygamy in Swaziland have often been phrased in terms of 'rights'. In a letter to the editor concerning polygamy, one reader argued that

> [t]his is the undeniable right of people who choose to practice it. It is not fair to discriminate against people for their religious and cultural beliefs. Let us allow those who practice it to enjoy their rights. The only people, who can judge whether or not polygamy should be done away with, are its practitioners and not its opponents. There should be equal enjoyment of our human rights by all ("Polygamy should…", *Times of Swaziland*, 7 April 2008).

Here, polygamy is framed as a cultural or religious 'right', and one that is made available through the freedom of choice. The reader depicts polygamy as an individual lifestyle choice, and therefore frames his argument in decidedly liberal terms. When the reader argues that only the practitioners of polygamy can decide whether or not to 'do away with' the custom, the implication is surely that the individual should be free to choose how he should conduct his private life and his claim can clearly be reinforced by the constitutional stipulation that Swazi Law and Custom should continue to be regulated by Swazi Law and Custom.

Dominic Mngomezulu also articulated a liberal defence of polygamy, distinguishing liberal values from Western values:

> That one man is only entitled to one woman because one man has one heart is a Western idea. But in contemporary liberal Swaziland, polygamy is ok. Particularly because customary law is now essentially part of constitutional law and even more so because there are still women who willingly enter polygamous marriages as second or third wives, and so on. Then polygamy becomes one's free choice. Why then, should one be denied? (Interview, 10 March 2008)

Interestingly, these two responses neglect to mention, or engage with, the equality clause or the repercussions of polygamy for women. In effect the implication of the above arguments is that the obligation to uphold customary law can trump any concerns about equality. Both the reader cited above and Mngomezulu use the principles of 'freedom' and 'choice', and engage the liberal distinction between public and private matters, to assert the continued viability of polygamy in contemporary Swaziland.

Lastly, the Constitution does contain a clause committing the Kingdom of Swaziland to abide by any international agreements that the nation is party to (S236 & S238). Relevant to this thesis might be Article 16 of the Universal Declaration of Human Rights,

which states that men and women 'are entitled to equal rights as to marriage, during marriage, and at its dissolution' (United Nations, 1948). Swaziland is also a signatory to CEDAW, which requires a commitment to

> [m]odify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women (Article 5(a), United Nations, 1979).

On the face of it then, this clause also appears to be irreconcilable with the obligation to apply customary law. Given the arguments outlined in Chapter One, there is certainly a strong case to suggest that polygamy is a practice premised on a very stereotyped role for women, and which facilitates the objectification of women in a way that posits wives as being largely interchangeable.

Public and Government reactions to the Bill of Rights

Whelpton argues that Swazis 'do not understand 'human rights' in the same way as Westerners do' because while Swazi customary law does endow rights or entitlements on all members of society, participants do not share equally in those rights and the rights are subject to the needs and interests of the group, which will always take precedence (1997: 150). Whelpton's assertion that Swazi's 'do not understand' human rights 'in the same way' as people from the West is a localised version of the argument that asserts 'Africans have their own way of doing things'; a way where the fulfilment of one's socially prescribed role is paramount and a way in which the interests of the individual are subordinated to the interests of the group.

Recent reactions have shown that 'Swazi culture' is often used as an excuse to label the exercise of certain human rights as 'unSwazi'. Women's rights in particular are under threat, most notably from the traditional authorities. For example, Chiefs attending a gender equality sensitisation conference declared the principle of gender equality to be 'unSwazi' ("Gender equality", *Times of Swaziland,* 3 December 1997). Most recently, Chiefs at the 'Vote for a Woman' campaign conference also declared voting for women to be 'unSwazi'. This compounds the analysis in the first chapter, which highlighted how community leaders with vested interests in asserting and maintaining control over the group can manipulate collective identities to their advantage. It also serves as a warning that

without the understanding and acceptance of the people they govern, human rights face a redundant future.

A sampling of published letters and articles from the Times of Swaziland shows that over the past twelve years the state of confusion and lack of understanding surrounding what human rights, and in particular women's rights, are and what they entail has remained constant. In 1996, one reader suggested that women should publish their demands in the press so that men could decide whether to say "yes" or "no" to them ("Not every…", *Times of Swaziland*, 21 November 1996). Evidently the implication here is that if women are going to have rights, those rights will be subject to the authority of men.

The introduction of the concept of gender equality seems, for many readers, to have come out of the blue; 'We are now told that woman is equal to a man. BUT HOW, WHERE AND WHEN?' cried one reader ("What about…", *Times of Swaziland*, 3 August 2003). This excerpt, which is characteristic of many of the letters written to the paper on the subject of gender equality, implies confusion over the meaning of equality and a lack of understanding about the concepts behind human rights. It could also be evidence of the problem with asserting liberal principles in a culture characterised by communitarian thought. Liberalism's blindness to difference amongst its subjects will obviously appear confusing, if not plain inaccurate, in a cultural setting that emphasises the importance of difference, particularly between men and women.

Times of Swaziland columnist Nimrod Mabuza points out that most people who misunderstand or are misinformed about women's rights think that the concept 'is one way by women to usurp men's power as head of the family' (*Times of Swaziland*, 5 October 2004).

> Can someone please explain to me what is the meaning of these so-called women's rights? Do they intend to fight men and usurp their power to govern their homes? I pity those men who have given into this filthy and stupid demand

said one reader ("This women's…", *Times of Swaziland*, 29 April 1998). Senator Phanginjobo Metiso contended that gender equality would cause the breakdown of the family, because men would be afraid to chastise or discipline their wives (Dlamini, *Times of Swaziland*, 29 May 1998). The implication here is that the successful functioning of the Swazi family depends on the ability of the patriarch to exercise his power over all members of his family. In the letters to the editor, one reader wondered whether gender equality means that women would soon be shaving their heads bald, wearing trousers and having many boyfriends ("What does…", *Times of Swaziland*, 25 March 2006). Would men now

wash napkins, bath the children, cook, serve and wash dishes while women watch their favourite TV programme (ibid)? The humorous tone of the letter obviously implies that the idea of bald-headed, trouser-wearing women who let their men do house chores is a ridiculous one. Thus, the reader concluded that 'people do not have to be equal to respect each other' (ibid). This letter reflects a communitarian perspective, as the implication seems to be that human rights are socially disruptive and that respect and human dignity are achieved through the fulfilment of socially prescribed roles.

There also seems to be a tendency to confuse rights with duties. This is again evidence of the tension between a communitarian outlook and the liberal phrasing of human rights. In the following examples, the fulfilment of one's socially prescribed role is constructed as one's right. It is also, however, the only right that one is expected to exercise, or indeed, that one is entitled to. There also seems to be a lack of recognition or understanding that women's 'difference', and their confinement to the domestic realm, subordinates and disadvantages them.

In 1997, a female MP, Lomasontfo Dludlu argued that the call for gender equality was inappropriate because women had the greatest right of all – that of cooking for their husbands (Zwane, *Times of Swaziland*, 23 August 1997). This sentiment was echoed by Senator Metiso in 1998, when he asked what women were complaining about given that they had always enjoyed many rights in Swaziland, including the right to have a husband, to raise children and to look after the home (Dlamini, *Times of Swaziland*, 29 May 1998). He did, however, concede that the call for equal opportunities in the workplace was 'genuine' because 'both men and women are equally capable of doing well at work' (Ibid). Of course, this implies that men and women are not equally capable of raising children and looking after the home. Interestingly, this statement conveys a typically liberal distinction between the public and private spheres. It is a distinction that is often made. Though he supported equal opportunities in the workplace, MP Michael Siza Dlamini worried about the possibility that adopting an equality clause would have implications in domestic life – 'What will happen if, for instance, you want to have sex with your wife and she says no ways?' (Mabuza, *Times of Swaziland*, 29 November 2004).

Evidently, human rights are not yet understood as universal, inalienable or fundamental. In one particularly poignant quote, a resident from the Hhohho region, when asked to give her opinion on the removal of the constitutional clause giving women the right to equality in cultural life, said 'I agree that women must be awarded rights but I do not believe that equality is one right they deserve' ("Women divided", *Times of Swaziland*,

21 July 2005). Here, ‘rights’ are something that must be ‘awarded’ (so they are not fundamental), women must ‘deserve’ the rights they do have (so they are not inalienable) and equality, on this woman’s account, is not deserved, and should not, therefore, be awarded (so they are not universal).

Critics have contended that the reason for the negative reaction to human rights in Africa may have a lot to do with the language in which human rights concepts are phrased. Chanock, for example, notes that the civil law half of the dual system, constituted by Roman-Dutch statute and common law, is largely based on English models, drafting styles, court procedures and rules (1991: 52). Because human rights are phrased or termed in the same language as colonial law, they are often associated with the ‘imposed law’ of colonialism (Sheleff 2000: 125). They have, therefore, often been seen as ‘white’, ‘foreign’ or ‘Western’ law. Because of their supposed bourgeois Western origin, human rights have been treated with ‘suspicion and resistance’ because, particularly given their colonial past, ‘no independent African state would willingly acknowledge western cultural or moral hegemony’ (Bennett 1991: 30). Thus, for many African people, and therefore for many African governments, ‘human rights remain an alien concept and an example of cultural imperialism’ (Leary 1990: 16).

It has also been suggested that early international standards of human rights were overwhelmingly influenced and dominated by Western cultural norms and values (Leary 1990). Non-Western cultures, including African cultures, had very little influence in the early drafting processes and this has been highlighted as ‘a serious deficiency in the development of a universally acceptable concept of human rights’ (Leary 1990: 16). In other words, the contention that human rights are, or should be, universally applicable, has come under threat due to the fact that the development and drafting of those rights was not a universal process. This presents an interesting paradox. In many African nations, constitutions, which express ‘formal foundations of state power’ and which ‘circumscribe the different possibilities of policy’ (Phillips 2004: 85) are expressed in language that the majority of its citizens perceive to be ‘foreign’.

The implication that women’s rights are ‘foreign’, and mere instances of cultural imperialism appears to be prevalent in Swaziland:

> This won’t happen in our Kingdom … Let’s not copy from other countries because we have our own way of doing things … Those women who want to be equal to men must please go elsewhere because no man can allow his wife to be equal to him

argued one reader (“Women can’t…”, *Times of Swaziland*, 6 April 2000).

> A constitution is a written document about how a country or nation lives, i.e. its culture, norms and values, NOT bringing in new things done in other countries suitable for them and then force them down people's throats

argued another ("Woman's place", *Times of Swaziland*, 16 November 2007). These letters show the way in which stereotyped social roles and positions can be reinforced by a strong sense of national cultural identity. The readers see equality as something that is being forced 'down people's throats', in other words, imposed upon them. Equality is constructed as a principle directly in opposition with the 'culture, norms and values' of 'our Kingdom'. The indication that women fighting for equality 'must please go elsewhere' also suggests that the call for equality is not only of external origin, but also implies that Swazi women pressing for liberation are rejecting their culture.

Another reason for the continued lack of understanding on, and hostility towards, human rights may be in large part due to the fact that public information and civic education on the constitutional review and drafting processes was minimal, if not non-existent. Mbongeni Mbingo explained that

> [p]eople were not told what a constitution was for, or what a constitution does. And because only individual submissions were allowed, people went to the review meetings with individual and community concerns. People weren't talking about rights (Interview, 7 May 2008).

Dominic Mngomezulu and Lomcebo Dlamini were both highly critical of the lack of civic education. Mngomezulu said that as a result, the majority of the population are sceptical about constitutional law, which they perceive to be 'foreign law' (Interview, 10 March 2008). As such the document is perceived to be one that by no means represents the views of the majority, and therefore lacks legitimacy (ibid). Dlamini said the lack of civic education and participation has meant that the people do not have as much of a sense of ownership over the constitution as they should have (Interview, 26 March 2008). This has added to the perception of the constitution as a 'foreign', unrepresentative document.

Additionally, of the 31 members appointed by the king to serve in the review commission, only four were women (Hlanze and Mkabela 1998). Lomcebo Dlamini did reveal that women's groups were able to find a loophole in the mandate, which prevented them from making group submissions, but allowed them to contribute as 'experts' in their field. However, as she recounted her first experience with the Constitutional Drafting Commission, she admitted that most of the committee members appeared sceptical about the need to include the rights of women in the constitution.

It is not surprising, therefore, that a great deal of the confusion over and hostility towards gender equality seems to originate from Parliament. Firstly, there seems to be a general ignorance about even the basics. Senator Metiso asked the Ministry of Home Affairs to clarify 'what gender is all about. Is it about men and women or just about women only?' (Dlamini, *Times of Swaziland*, 29 May 1998). During the debate of the Constitution Bill, appointed MP Vuka Masilela wondered whether gender equality meant that women would now want to *teka* men (Mabuza, *Times of Swaziland*, 17 November 2004).[13] He also stated that 'women should not get married if the constitution is going to empower them to do what they please in a another man's home…if they want to do what they please, they should rather stay in their father's homes and not bother with married life' (Mabuza, *Times of Swaziland*, 29 November 2004).

Obviously Masilela's submission insinuates that, when a woman is married, she is living in 'another man's home', and not her own, therefore making her subordinate status within the marital home clear. He was supported by MP Sibusiso Nkambule who argued that *lobola* should be done away with if men were going to lose authority over their wives (Ibid). Even the Chairman of the Constitutional Drafting Commission Prince David posed the question of whether equal opportunities in cultural life would mean that women would now want to cut *Lusekwane* (a tree used to repair the king's cattle byre, and an activity carried out only by men) (Mabuza, *Times of Swaziland*, 17 November 2004).

The above submissions were made in support of the amendment to remove women's right to equality in cultural life. The supposed incompatibility of cultural life and the equality principle is neatly summarised in a letter from one reader who declared: 'I think these so-called women's rights should have been declared after we abolished our customs, culture and changed our nationality' ("Women will…", *Times of Swaziland*, 4 August 2006). The suggestion here is that women's rights are fundamentally incompatible with, and completely alien to, the Swazi way of life. Noting a similar problem in the Zimbabwean constitution, which explicitly exempts matters falling under the jurisdiction of customary law from the equality clause, Phillips argues that 'a constitution that has neither symbolic strength nor the practical advantage of an unambiguous dedication to human rights can serve to exacerbate inequities of sex and gender' (2004: 103). The constitution's lack of legitimacy, the lack of a clear ranking system, the implication that the Bill of Rights

[13] The custom of *kuteka* is usually the first step in a customary marriage. The woman is brought to sleep at the man's homestead and is awoken early in the morning by the man's female relatives who proceed to perform rituals and practices that will start the process of 'making her a wife', and part of the family.

was only included because of external pressure, and the fact that that the word 'cultural' was removed from the equality clause dealing with the rights of women may mean that Swazi women will find their ability to access the rights and freedoms listed in the Constitution strictly limited by custom.

Additionally, because even members of parliament seem to be confused about what gender equality entails, it is not surprising that the Swazi government has not yet given a clear indication of how it understands gender equality. It is therefore unclear how the courts will interpret the gender equality clause, or what guidelines they will use in interpreting the rights of women contained in the constitution. It is also unclear how they will adjudicate on matters where the gender equality principle will conflict with other constitutional obligations, such as the obligation to apply customary law. The grey area surrounding the universal applicability of the constitution, and the implication of removing women's rights to equality in cultural life, seem to suggest that the principle of gender equality will, in practice, be subordinate to the authority of Swazi Law and Custom.

Phillips notes that in South Africa, the judicial authority on the equality clause was derived from a 'painstakingly extensive and unusually inclusive process of participation in the drafting of the Constitution' (2004: 92). Because of the lack of inclusivity and participation in the process in Swaziland, judicial authority on the gender equality clause is likely to be slight. Lomcebo Dlamini also estimated that less than 10% of Swazi women have access to legal representation because of their lack of access to resources, the absence of a legal aid system and because of the high fees involved in paying for legal representation. Women's difficulty in accessing the justice system, and the pressure and various modes of socialisation at work in their communities make it difficult for women to realise their rights.

Last, but certainly not least, is the issue of law reform. At the time of writing not a single piece of legislation had been amended in conformity with the constitution. There are, apparently, several act amendments 'in the pipeline', but they have been there for between five and seven years. For example, despite the new constitutional guarantee to equality, women remain subject to the marital power principle[14] according to the still

[14] In legal terms, the marital power principle is the principle that legally subordinates a wife to a husband, so that a woman is effectively under the legal guardianship of her husband. In Swaziland this principle has been translated into other aspects of law, meaning that women married in community of property, or out of community of property but without an ante-nuptial contract, must attain the written permission of their husbands in order to access finance institutions, register vehicles, and address grievances in court among other things.

existing, and yet to be amended, statute law.[15] The act also stipulates that without a valid ante-nuptial contract, the consequences of any marriage, civil or customary, will be governed by customary law property and inheritance regulations. According to both Mngomezulu and Dlamini, very few women are aware of this clause and even fewer women actually obtain an ante-nuptial contract (Interviews, 10 March 2008 & 26 March 2008 respectively). Reform of marriage laws in Swaziland is, therefore, urgently required. However, Lomcebo Dlamini described law reform in Swaziland thus: 'thing's go into the pipe, then they just stay there, they don't come out the other end!' (Interview, 26 March 2008) The sluggish pace of law reform in the country suggests that none of the supposed commitment to gender equality is being translated into tangible results.

In summary then, the liberal emphasis in the Constitution of the Kingdom of Swaziland is revealed to be startlingly superficial and masks a multitude of controversies surrounding some of the most important sections for women. Furthermore, it may well be the case that many of the norms embodied by popular and state perceptions of customary law are directly opposed to human rights norms (Bennett 1991: 23) but the tension also appears within the constitution itself; the obligation to apply customary law does seem to conflict with the commitment to gender equality. The two claims are incoherent, competing with and contradicting each other. It is not clear, therefore, what a liberal approach to resolving tensions between constitutional and customary law can offer us. In particular, the liberal emphasis in the Bill of Rights provides few answers for the debate on polygamy. Liberal arguments are employed both to attack and defend the custom, leaving the way forward uncertain. Most importantly, the potential efficacy of the equality clause is, for the numerous reasons outlined above, dubious. If the principle of gender equality is subordinated to the principles of customary law, then it is unlikely that women's views and opinions on polygamy will be heard or prioritised. Okin (1989a) contends that the debate between communitarianism and liberalism highlights the problems that result from the continuing neglect of feminist theory, and it is for that reason that the final chapter focuses on the feminist critique of the dispute and evaluates the implications for polygamy.

[15] Under the Marriage Act 1964, the only way to avoid this principle is in a civil, out of community of property marriage, and only then after both parties have signed an ante-nuptial contract. If married by customary law, or by civil law (in community of property, or out of community of property without an ante-nuptial contract) a woman remains subject to this principle.

Chapter Three – The Feminist Critique of the Communitarian/Liberal Debate and its Relevance for the Discourse on Polygamy in Swaziland

The feminist critique of liberalism has largely centred on the distinction between the public and private realms, and the identification of the former as male and the latter as female (Coltheart 1986: 112).[16] This distinction, feminists argued, led to matters that are considered 'private' being largely ignored in 'public' or 'political' debate. 'Personal' matters are ascribed a lower status because they do not gel with the rational, unattached, autonomous subjects of classical liberal theory (Coltheart 1986, Okin 1989b). Therefore, although liberalism has evolved to incorporate the principle of gender equality, feminists have pointed out that the liberal's reliance on the law and on formal rights, has failed to address the inequalities that persist in the domestic realm (Kaganas and Murray 1994a: 16). This criticism gave rise to the claim that 'the personal is political', and created an awareness of the inequalities inherent within family life (Okin 1989a).

These criticisms certainly have relevance for the debate in Swaziland, where politicians often make a distinction between the applicability of equality in the workplace, and the applicability of equality in the home. The media analysis also highlighted the use of liberal principles to construe polygamy as a private lifestyle choice that, by implication, should be immune from review on the grounds of equality.

The liberal model of marriage has attracted significant feminist criticism. Pateman (1988) describes liberal marriage as a sexual contract that establishes orderly access to women and a division of labour in which women are subordinate to men. The institution has been legitimated by the assumption that the unequal relations of domestic life are 'natural' and therefore do not detract from the universal equality of the public world (Pateman 1988). Okin (1989a) has pointed out that classical liberal theory is fundamentally patriarchal because of this sexual division of labour, which allows men the opportunity to participate on the rational, autonomous, 'equal' terms of public life, but which creates dependence and subordination for women who are excluded from public life because of the restrictions they face in the private realm. Okin also contends that the liberal distinction between the public and private realms is a pretence, and argues that 'the liberal state *has*

[16] I do recognise that feminism is a broad term, and that feminist theories are diverse and varied in content. However, for the purposes of this thesis, I use Okin's definition of the term 'feminism', that is 'the belief that women should not be disadvantaged by their sex, that they should be recognized as having human dignity equally with men, and that they should have the opportunity to live as fulfilling and as freely chosen lives as men can' (Okin 1998: 661).

regulated and controlled the family, in innumerable ways, and in such ways as to reinforce patriarchy' (ibid: 42, emphasis in the original). Citing Horney, Coltheart (1986) also suggests that the enforced demand for monogamy was linked to the social sanctions against infidelity and the economic sanctions against female independence.

Interestingly, the feminist critique of liberal marriage has been utilised by defenders of polygamy, who argue firstly that monogamy is certainly no guarantee of equality and secondly that polygamy may actually provide respite from some aspects of a patriarchal society. Critics have pointed out that contemporary feminism has considered ideas revolving around monogamy, the nuclear family, and romantic love, as impediments to women's liberation (Iversen 1984). Murray for example, notes that although it is true that women are often oppressed within polygamous relationships,

> [v]iolence is endemic in western nuclear families. Nuclear families isolate women and disadvantage them economically and when monogamous unions disintegrate, women are usually left to join the poorest class in society, that of single mothers (1994: 39).

Sheleff (2000) also points out that the West was, and to a certain extent still is, a predominantly patriarchal society, and that monogamous marriage has proved historically to be in no way a guarantee for women's status, rights or responsible roles.

Even Maillu has noted that the idea that monogamy improves the status of women and brings gender equality is 'at best a sweet but futile propaganda' (1988: 144). What, for example, is the moral difference between polygamy and serial monogamy? Remarriage after a divorce could quite easily be seen as another form of polygamy, the only difference being that it is consecutive instead of concurrent. As Glendon states, the term 'polygamy' only seems to be used to denote 'that form of polygamy which is not very popular in the West' (in Sheleff 2000: 338). Vesey-FitzGerald argued that there is little moral difference between the two, apart from the fact that consecutive polygamy 'adds to the sin of sexual unfaithfulness and the economic scandal of desertion' (in Bartholomew 1961: 814).

In fact, Maillu (1988) refers to consecutive polygamy as 'the Whiteman's polygamy', and argues that it manufactures, among other things, marital arrogance and male chauvinism. This leads men to mistreat their wives because they think they can easily replace them and Maillu argues that women cannot be equal in a society where they must compete against each other for men (Ibid).

Feminists have also rejected the idea of the desirability of the competition for men among women, and Iversen (1984) argues that it was through a detachment from Western

ideals about monogamy and romantic love that some Mormon women were able to achieve greater personal autonomy, and emotional and economic independence in their polygamous lifestyles. Official, sanctioned polygamy is not a world of the 'survival of the fittest woman' and all women, on Maillu's account, are taken care of (1988: 31). Additionally, if the monogamous, nuclear family isolates women, makes them more susceptible to their husbands' power, and more economically dependent on men, then theoretically polygamy may well provide more protection for women as wives can cooperate and gain more opportunity and freedom to provide for themselves and their children (Sheleff 2000). As a result, Murray cautions against rejecting some institutions without examining the justness of the practices within them; 'just as we must recognise that western monogamous marriage does not guarantee equality, we cannot assume that polygamy inevitably leads to oppression' (1994: 39).

In short, the general conclusion seems to be that the connection between the form of marriage and the status of women is 'purely spurious' (Sheleff 2000: 330). It is not polygamy *per se* that disadvantages women, but 'the framework of ideas in the larger social and economic setting' (Ibid). In other words, singling out polygamy is like singling out one symptom of a much more complex disease and the contention that removing polygamy will remove all the other restrictions and disadvantages facing women in Southern Africa is 'an illusion' (Sheleff 2000: 340). This evaluation corresponds with feminist critiques of marriage in the Western world, which argue that it is institutionalised disadvantages in employment, housing and tax law (for example), and societal norms and values regarding the role and status of women that provide for discrimination within marriages.[17] The feminist critique of liberal, monogamous marriage and the nuclear family led Sheleff to conclude that

> [i]n essence, what emerges is that modern monogamous marriages are bound up with economic considerations that differ more in degree and form than in kind and substance from the accruements of a customary marriage (2000: 348).

Feminists have also criticised liberalism for disregarding the role of social relationships and human community in constituting the identity and nature of individual human beings, and critics have noted that communitarians and feminists share in the rejection of the abstract, unattached, disembodied subject of classical liberal thought (Friedman 1993, Hekman 1992). Both communitarians and feminists stress the need to take differences between human beings and the nuances of each context into account

[17] See, for example Pateman 1988, Okin 1989

(O'Neill 1990). The importance of this criticism is evident when looking at the media research in Swaziland, which revealed a great deal of confusion relating to women's rights. Readers highlighted the discrepancy between the liberal phrasing of the equality clauses, which posit all individuals as equal, and the reality of life in Swaziland, where men and women are clearly not equal.

Nevertheless, feminist theory has also been very critical of communitarian theory, which as Hekman indicates, is often overtly patriarchal (1992: 1107). Both Okin (1998) and Benhabib (1992) have criticised communitarianism on the grounds that it is a primarily negative philosophy, based on the rejection of liberalism, rather than a positive socio-political theory. Okin has dismissed communitarianism outright for being 'vague or inconsistent both about what a "community" is and about what should happen when the claims of one level of community conflict with those of another' (1998: 663) and Bano (1999) has argued that the communitarian approach fails to acknowledge issues concerning difference and diversity within groups. In Swaziland, what is or is not 'Swazi' seems to be decided by older men in the traditional authorities, and so when women criticise or speak out against polygamy, the communitarian emphasis seems to exclude them from the group. Communitarian arguments construct polygamy as part of 'our culture', but communitarianism cannot make room for instances where members of 'our culture' speak out against polygamy.

Benhabib (1992) sympathises with the communitarian claim that modernity, capitalism and the liberal principle of autonomy have led to individuals losing a sense of agency and efficacy that a coherent sense of community entails. However, her primary argument against communitarians is that they often confuse the significance of community for identity formation with a 'conventionalist' or 'role-conformist' attitude (Benhabib 1992: 74). In other words, communitarians move from the descriptive claim that social roles and community structures are crucial in forming one's identity, to the normative claim that those roles and structures (and the identities that are constructed by them) are morally good or beneficial. Communitarianism therefore, acknowledges difference amongst its subjects, but cannot rectify inequality because it grounds the principles of justice in pre-existing traditions and customs, nearly all of which relegate women to the private realm and ascribe women a subordinate status (O'Neill 1990: 440).

Thus, Okin criticises communitarian thought for failing to appreciate 'the facts of gender' and for continuing to 'neglect the family as a politically relevant institution' (1989a: 48). By falling back on a romantic idealization of the traditional family,

communitarians have ignored the fact that ‘embodied’ selves are subject to gender-structured disadvantages (ibid). Hekman explains further that this romanticisation of tradition fails to allow women the opportunity to create and engage in new discourses (or discourses already closed off to them) or to challenge the roles scripted for them (1992: 1110). In this way, the communitarian discourse shows ‘little improvement over the discourse of liberalism’ (ibid). These criticisms are particularly relevant for the debate in Swaziland, where a great deal of the defence of polygamy is based on a romantic idealization of how the custom operated in pre-modern times, and the assumption that women should take full responsibility for the maintenance of the domestic realm. Similarly, in the discussion surrounding human rights, readers who noticed that men and women were clearly not equal (in opposition to the liberal phrasing of the constitutional equality clause), translated this descriptive fact into the normative claim that ascribed social roles and positions are good or natural (‘people do not have to be equal to respect each other’).

Additionally, Benhabib (1992) also contends that although communitarian theory is based in the rejection of modernism and the liberal conception of historical progress, the fact still remains that individuals in modern societies no longer share a common conception of the human good or even a shared understanding of the value of belonging to a community. Modern conditions and changes in social understandings mean that a romantic idealization of the ‘traditional’ communities of the past will do little to help people today, and may possibly hurt them. For instance, it is certainly true that women in Swaziland do not share the same views on the importance of marriage. The older married women saw marriage as the means of attaining womanhood, whereas the younger unmarried women associated marriage with economic stability and, in several cases, with oppression.

Because Okin (1998) dismisses communitarianism outright, her critique of multiculturalism is confined to liberal arguments for group rights. These arguments, on her view, are stronger and more coherent because they are based on a concern for the well-being of individuals. Theorists like Kymlicka (1989) and Kukathas (1992), for example, have argued that individuals need to be able to participate fully in their cultures in order to develop a sense of self-esteem and self-respect.

Kymlicka (1989) asserts that a structured cultural environment is a necessary prerequisite for a person to be able to make informed choices about his or her life. However, his defence of group rights is confined to groups that are internally liberal, arguing that group rights should not be accorded to groups that operate a discriminatory

culture because they could result in the oppression of sub-groups within the community. Kukathas' (1992) conclusion is stronger, as he argues that groups have the right to determine for themselves, what the good life entails. Essentially, this means that groups should generally be left alone to develop their culture as they see fit, and that a group should be able to require of its members, conformity to cultural practices over and above the reclamation of their individual rights. A localized example of these arguments might be the liberal arguments given for polygamy in the second chapter. One letter suggested that polygamy was a cultural right belonging to 'its practitioners and not its opponents', therefore suggesting that adherents of polygamy should be left alone to conduct their private lives as they see fit ("Polygamy should…", *Times of Swaziland*, 7 April 2008).

Okin's (1998) critique of these theories largely revolves around the fact that the authors continue in the liberal tradition of ignoring the relevance of the private sphere. Kymlicka in particular, speaks as if what constitutes a 'liberal' society is merely an absence of formal or public discrimination. But as Okin points out, 'a great deal of culture-based gender construction and inequality occurs informally and in the most private sphere of life, that of the household' (1998: 665). There are many culturally endorsed practices that are oppressive to women, but they are usually framed in terms that construct them as being private family matters, thus exempting them from public debate (ibid: 680). Returning to the letter mentioned above, the reader shows no awareness or consideration of the implications that polygamy might have for women. By constructing polygamy as a private family matter, it is exempted from public debate and any gender inequality relating to the practice is not taken into consideration.

Followed to conclusion, Okin's point is that inequality and discrimination in the private realm contributes and reinforces inequality and discrimination in the public realm. Once this fact is acknowledged, it becomes clear that it is insufficient to be concerned only with formal or public restrictions and this is particularly problematic for Kymlicka, who concedes that group rights should not be granted to discriminatory cultures (ibid). Given the highly patriarchal and gender discriminatory nature of most cultures, very few, if any groups would qualify for group rights if Kymlicka's theory is combined with Okin's analysis.

Needless to say, Kukathas' (1992) argument fares even worse when subjected to feminist critique. Okin (1998) blasts Kukathas for being insensitive to power differences in general, and feminist concerns in particular. What happens, she asks, if the interests of the male elite differ from the interests of the masses, or women? Or if conforming to a certain

cultural practice results in a lack of self-esteem or a lack of a sense of entitlement for women? The problem with multiculturalist arguments is that they often neglect to consider the *content* of the cultures they defend:

> At least as important to the development of self-respect and self-esteem as one's culture is *one's place within that culture*. And at least as important to one's capacity to question one's social role is *whether one's culture instils in and enforces on one, particular social roles* (Okin 1998: 679-680, emphasis in the original).

Similarly, as noted above, liberal defences of polygamy in Swaziland often neglect to take into account the reality of most women's subordinate status within Swazi society. For example, to say that women always have the option of leaving their husbands should they not want to be part of a polygamous marriage denies the socio-economic disadvantage many women would face if they dissolved the relationship. And to say that polygamy benefits women through the provision of an extra pair of hands to help with domestic work ignores the importance of being able to question the sexual division of labour in general.

Okin's analysis would seem to suggest that a radical restructuring of customary law is in order and as Bennett points out, to enforce the gender equality principle strictly would entail 'a complete overhaul of the present system of customary law' (1991: 26). This makes change in the context of customary law very difficult to achieve because of the fear that 'reforms to benefit women will undermine the very foundations of African society and bring the whole edifice crashing down' (Kaganas and Murray in Sheleff 2000: 470).

The potential for reconciliation is also hindered by the fact that traditional authorities are predominantly male. This makes the ethos of the traditional system of governance 'deeply masculinist', because the people in power are 'strongly committed to upholding patriarchal norms and practices' (Mare in Walker 1994: 350). Because of their subordinate status, this makes it difficult for women living in 'traditional' communities to challenge 'tradition' head-on (Walker 1994: 349). And because patriarchy appears to be so deeply and fundamentally entrenched in customary law, it also means that legal reform to dislodge patriarchal rules disadvantaging women are 'either ignored or actively combated' (Bennett 1991: 32). As such, it has often been noted that fear about the effects of change has led to the endorsement of uniform, inflexible, codified law that makes development and reform even more difficult.

The hostility towards gender equality in Swaziland is almost certainly due to a fear of change and disempowerment. Men's anxiety over women's attempts to 'usurp their power as head of the household' and their apprehension at the thought of being denied sex or the

right to chastise unruly wives reveals a deep insecurity. In particular, the traditional prime minister's sexism and blatant disregard for the needs of women in his defence of polygamy suggests that men will continue to cling to any custom that confirms their superior status in Swazi society.

In turn, Phillips describes the project to realise individual human rights while promoting 'traditional' family structures and reinforcing the role and importance of customary law at the same time, as 'a crippling ambivalence' (2004: 90). This is because 'it is not enough to pay lip-service to the notion of women's agency while colluding in maintaining the structures that block the development of that agency' (ibid: 103). There is little use in depending on a state to implement human rights, when the very same state reinforces structures and institutions that violate, or permit violations of those rights (MacKinnon 2006). And in the case of polygamy, women's voices are not likely to be heard and taken into account, when men continue to depend on the continuation of oppressive customs to reinforce their power in society.

As a final point, it should be noted that while feminist thought has produced powerful critiques of both communitarian and liberal theories, feminism itself, as a broad political theory, has not avoided criticism. Sa'ar (2005) believes that feminism has become 'an exclusionary practice and ideology', because of its tendency to proscribe women outside the white, middle-classes. As such feminism has sometimes been associated with colonialism, cultural imperialism and even racism. In Swaziland, the view that women's rights are an imperialist imposition continues to persist. The accusation that women's rights originate from 'other countries' and are being forced 'down people's throats', suggests that feminism has little relevance or place in Swazi society.

MacKinnon has defended feminist theory against this charge, crediting feminism for expressly rejecting the idea of the presocial, biologically determined 'woman' (2006: 50). In retaliation, MacKinnon accuses multiculturalism of being 'a politically normative version of the anthropological notion of cultural relativism' (2006: 53). Feminism is not a modern mode of cultural imperialism, but a movement that 'questions the cultural validity of subordinating women to men anywhere' (MacKinnon 2006: 53). MacKinnon also draws attention to the way in which 'defences of differences' are often merely 'defences of male power in its local guise…the fact that they are local does not improve them' (ibid).

Similarly, Kaganas and Murray have argued that 'while feminists should be sensitive to cultural differences, the feminist enterprise is to eliminate 'patterns of disadvantage and

dominance' wherever they are found' (1991: 118-9). Acquiring a respect for cultural diversity

> [n]eed not inevitably lead to an ethical quicksand of cultural relativism and does not absolve us from a responsibility to respond to oppression and suffering in different cultures. Instead…it reminds us of the dangers of uninformed value judgements and requires us to reach an understanding of different cultures before we condemn practices as denying human dignity, for instance (Kaganas and Murray 1991: 125-6).

Writing specifically about South African women, Kaganas and Murray argue that the wealth of attention given to customary law is evidence of feminism's enhanced recognition of diversity amongst groups of women (1994a: 16).

Kaganas and Murray (1994b) have also defended feminist challenges to customary law against charges of cultural imperialism on the grounds that critics often ignore the fact that women have historically had little influence on the shape that cultures have taken. The interview material employed in this thesis confirms that women feel excluded from the process of cultural construction, with participants describing themselves as 'outcasts' and stating explicitly that men have been solely responsible for 'making the rules' of Swazi culture. Customary law proponents also assume, or implicitly suggest, that traditional values are untainted by very specific relations of power, and therefore fail to acknowledge that they are open to 'opportunistic manipulation' (Kaganas and Murray 1994b: 422). Kaganas and Murray fully support the idea that the women whom customary law affects should be the people to decide whether or not any particular cultural practice is indeed oppressive, but they are also careful to point out that 'coercion silences the oppressed' (1994b: 428). They caution against 'insensitive intervention' in cultural practices, yet they maintain that every culture should be open to examination, evaluation and challenge (ibid).

Similarly, Walker argues that while the people's commitment to 'culture' and 'tradition' should be respected and acknowledged, it is equally important that 'culture' and 'tradition' are critically deconstructed so that strategies employed to deal with tensions surrounding custom do not proceed on the basis of 'the ahistorical, partisan and essentially self-serving use that many male traditionalists make of these emotive terms' (1994: 349).

Finally, Kaganas and Murray also deny the implication that feminist challenges to customary law are always derived from external sources, noting that 'while most people within a culture subscribe in general terms to its meanings and practices, they may not adopt them wholesale; cultures are contested from within as well as from the ranks of oppositional and alternative cultures' (1994b: 424). The interview participant's responses clearly show that the debate surrounding polygamy is an intra-cultural debate. It is true that

women derived a sense of identity from Swazi culture and spoke positively about communalism, but at the same time, they also articulated dissatisfaction with many aspects of their culture, including women's lack of effective politico-cultural power in general and the tolerance of polygamy in particular.

Even so, the arguments given in defence of polygamy are enough to conclude that monogamy is not inherently preferable or superior to polygamy. There is evidence to suggest that life in a polygamous marriage has afforded some women opportunities that they might not otherwise have had. Additionally, it is true that many of the negative effects of polygamy stem from the framework of ideas in the wider culture; there are certainly larger patriarchal forces at work, not to mention the difficulties associated with poverty and lack of access to justice.

Nevertheless, the viability of polygamy in present-day Swaziland seems to be waning. In the capitalist economic system, polygamy is no longer viable for a vast proportion of the population because resources are spread too thinly. The absence of any checks or restrictions on the practice of the custom means that polygamy poses a definite risk of disadvantage for many women and their children, particularly for the first wives.

The social justification for polygamy also seems outdated. The interview material suggests that many women no longer prize the idea of 'legitimate' motherhood and the chance to be a wife over all else. Young women want independence and economic stability, and while marriage was recognised to be one way of attaining those things, it is not the only, nor the most desirable way.

Polygamy also appears to facilitate the objectification and stereotyping of women. It is largely defended on the grounds that it is a choice that men are entitled to, and a choice that will benefit men. Little consideration is given to women's needs, expectations and preferences. Perhaps the problem lies predominantly with the way that polygamy is practiced nowadays, rather than with the idealized version of polygamy found in anthropological accounts. However, if it is true that customary law is inherently dynamic the fact that polygamy is practiced differently today does not make it a 'perversion' of culture. Furthermore, although there are instances of women deriving benefits from being one of two or more wives, the practice of polygamy now seems to function primarily because of the benefits men derive from it, rather than because of the mutual benefits women may have derived from it in the past. The polygamous mindset also appears to facilitate the crime of bigamy, which is seldom prosecuted and has meant that, whether or

not women choose to enter civil marriage, they do not really have the option of avoiding polygamy.

Consequently, there may be a great deal of difference and confusion between the merits of polygamy in theory and the actual consequences of polygamy as it is practiced in Swaziland today. It seems that the strongest arguments given in defence of polygamy are nowadays used as a front to justify the continuance of a practice that no longer offers many of the advantages it purported to. As O'Neill warns, 'a rhetoric of familial concern and protective paternalism can easily camouflage callous lack of concern and legitimate deceptive acts and practices' (1990: 457).

Kaganas and Murray (1991) have suggested that, while it is true that the various forms of oppression perpetuated against women in polygamous marriages are not limited to polygamous unions, it might well be true that polygamy exacerbates those forms of oppression and that it may well be difficult to disassociate those oppressive practices and values from polygamy. The analysis of polygamy in Swaziland suggests that the practice does exacerbate inheritance disputes and deprives many women of access to land, resources and assets by leaving them subject to the whims of their co-wives and in-laws. The fact that there seems to be little potential for change may well be why women in Swaziland appear to favour its abolition.

Finally, many women in Swaziland now appear to value monogamy. It may be true that Swazi women's apparent preference for monogamy is largely a result of Western influence, whether Christian, feminist or other. Whether these forces of influence constitute cultural imperialism or not is hardly the point, however. The point is that many Swazi women have, for whatever reason, adopted a preference for monogamy and that preference should be given more consideration and respect than it currently is. As such, the problem should not be portrayed as a conflict between external and internal influences; the discord over polygamy is now an intra-cultural debate.

The problem is that women in Swaziland feel excluded from the process of cultural construction. The interview material revealed both the unmarried and married participants as strong, opinionated women. These women are not victims; they are not submissive or passive. But they are affected by their lack of power and they have been disheartened by the way they are silenced and ignored. The most striking point that emerges is not their disapproval of polygamy, but their inability (or feeling of inability) to effect change.

In the interviews, I asked all the participants what they would do about polygamy if the decision lay with them. Every participant said they would like to put an end to the

custom, but qualified their responses by insisting that this would never happen so long as men maintained their monopoly on politico-cultural power. Interestingly, Phindile viewed polygamy as a contributing factor to women's powerlessness. She said that polygamy (whether official or covert) promoted jealousy and competition between women, which in turn diminishes women's ability to garner collective power.

All in all, the feminist critique of the communitarian/liberal debate seems to imply that while both theories have their merits, neither ideology promises to resolve much for women. In the attempt to deal with conflicts between customary and constitutional law, focusing on the impasse between communitarianism and liberalism clearly highlights the problem with overlooking feminist concerns, and suggests that if these tensions are to be resolved, the answer lies in developing strategies and policies that directly address those concerns.

Conclusion – Resolving the Tensions

The deconstruction of the communitarian/liberal debate has featured heavily in writing about tensions between human rights and customary law in Africa. Howard (1990) suggests that the key to resolving the conflict lies in rejecting the arbitrary dichotomisation of 'African' and 'Western' thought. Contemporary social change in Africa suggests that although communitarian values persist in African societies, there is an undeniable movement towards individualism in African social practice. It is no longer possible, and certainly no longer advisable to dichotomise 'traditional' and 'modern' (or 'African' and 'Western') societies. Many Western citizens advocate for a more communal notion of justice, just as many African citizens fight for their human rights (ibid). It is inappropriate, therefore, to talk about communitarianism and liberalism in terms that suggest that there is a homogeneity of thought in either Africa or the West. To do so results in a perpetuation of the view that African cultures are unchangeable and non-political, which is, in itself, a form of 'condescending cultural imperialism', given that there is much internal debate between members of every cultural group (ibid: 161). In Swaziland, the media research revealed the use of both communitarian and liberal arguments to both defend and attack polygamy. This highlights the lack of any supposed homogeneity of thought between members of this particular cultural context and also suggests that the issue should be viewed as an intra-cultural debate rather than a conflict between internal and external cultural philosophies.

Leary (1990) also suggests that the increasing influence of non-Western perspectives on human rights (seen most notably through the formulation of social and cultural rights) means that 'the present concept of international human rights has become a universal one that is not inimical to non-Western cultures' (Leary 1990: 29-30). Furthermore, as O'Neill points out, it is important to understand that 'universalizability is not uniformity' (1990: 451). In other words, there is no reason why adherence to notionally universal principles should necessitate a movement towards a homogenous culture, or standardized cultural practices. It is for these reasons that the traditional authorities in Swaziland must stop portraying the attempt to uplift the social status of women as an attack on 'culture'. The aim is not to do away with custom, but to attempt to reform customary practices that disadvantage women in modern circumstances while trying to maintain the benevolent and protective intentions behind them.

In conclusion, Howard does not assert the moral superiority of either liberalism or communitarianism, but does caution against 'populist socialism', which he argues can

quickly turn to fascism, which he defines as ‘the enforcement of group membership and loyalty to the state through coercive corporatism’ (ibid: 179). Howard laments the fact that communitarians often fail to acknowledge the possibility of the ‘political perversion’ of communitarian thought and advocates for the universal applicability of human rights, which in his view, provide the necessary checks against ‘the perversion of communal beliefs about dignity and social justice into state-centric fascism’ (ibid). Howard argues that ‘the real question is not whether people ought to have human rights, but whether they will be able to obtain them when they need them, in African as in any other society’ (ibid: 181). The analysis of Swaziland’s political context does suggest that the traditional authorities often manipulate communal beliefs and national identities as a means of enforcing group loyalty to the traditional system of governance. And as long as the Kingdom’s leadership continues to discourage the formation and activity of political groupings, the efficacy of the women’s movement (which should constitute the primary motivator for meaningful change in the struggle for equality) will remain heavily limited.

Considering the fact that there is evidence of both communitarian and liberal ideologies operating in Africa, it is not surprising that some critics have focused on producing hybrid theories. Habermas (1995), for example, outlines a liberal theory that is sensitive to the intersubjectivist claims of the communitarian project. His answer to this conflict lies firstly in appreciating that an individualistic approach to a theory of rights does not necessarily imply the idea of the legal subject as an atomistic, disembodied, and desocialized person (ibid: 852). The legal subject should be constructed as a socialized, embodied individual (ibid). Nevertheless, group rights must be validated by individuals. If customs and traditions are to be preserved and reproduced, group members must all have the capability, as well as the right, to ‘say yes or no’ (ibid: 850). Furthermore, the traditional liberal distinction between public and private spheres must be reassessed, and the move must be made towards a system in which ‘there are no legitimate “gag rules” for keeping issues off the agenda that could be taken as “ontologically private”’ (ibid: 851). This is because citizens can only put their public autonomy to use if they are assured of their private autonomy, and can only agree about the regulation of their private autonomy if they are able to make use of their public autonomy (ibid). In Swaziland, meaningful discussions of polygamy have been hampered by the claim that it is a private matter or lifestyle choice and is therefore, exempt from critique. This public/private dichotomy must therefore be disrupted and forums for the discussion of the development of ‘culture’ must be created. Additionally, the interview material and media research suggest that women’s

voices are not heard or taken into account when the continued preservation and reproduction of the custom of polygamy is (rarely) discussed. Women's capability to speak out on issues affecting them must therefore be improved.

Like Habermas, Okin believes that liberalism can be rescued, providing it accepts the claim that 'the personal is political' (1989a: 41). In other words, liberalism must fully include women and extend the principles of justice to the private realm (ibid: 53). Furthermore, because there is such enormous scope for coercion within the private sphere of family life, women and other vulnerable groups should be protected by the state, which should aim to eliminate discriminatory practices through education and advocacy, and, if that proves insufficient, through punishment (Okin 1998). Okin does talk about the importance of ensuring that women are fully represented in negotiations about group rights, but given that negotiations in patriarchal settings may not be possible without inequality, coercion and domination, she sees the state-enforced protection of liberal rights as a necessary measure (ibid). However, the analysis in this thesis has marked out the Swazi government's lack of commitment to the principle of gender equality as a serious hindrance to the constitution's potential. There is little hope that the state will enforce the gender equality principle, or eliminate any discriminatory customs, given the importance of the ideology of traditionalism for the continuance of the current political set-up.

Friedman (1993) believes that communitarianism can avoid the pitfalls of feminist criticism by conceding the influence of certain communities, but without endorsing them. Friedman argues that the communitarian conception of the social self must be reconciled with the 'longed-for communities of feminist aspiration' (ibid: 247). In other words, communitarian thought can be developed towards an appreciation for 'chosen communities' that allow women to live liberated and rich lives (ibid: 242).

Similarly, Benhabib (1992) wants to retain communitarianism's descriptive claim about the role of community in identity formation without losing the ability to challenge and question those identities, and the duties and obligations that are imposed by specific social roles. If the role of the community is not continually challenged, questioned and criticised in this way, communitarian thought runs the risk of endorsing social conformism, authoritarianism, and from women's standpoint, patriarchy (ibid). In the case of Swaziland, this means that women must be able to question their ascribed social role and status, without being accused of going against their culture. Swazi women should be able to maintain their sense of identity as Swazis, but at the same time, they should also be able to

critique any aspect of Swazi culture that contributes to that sense of identity assuming an inferior status.

O'Neill's (1990) approach seems to suggest a synthesis of communitarian and liberal thought. She argues that justice does need abstract, universal principles, but also argues that they must be applied in a manner that takes account of difference between human beings and local contexts. In other words, the *principles* of justice must not be rooted in culturally specific traditions and customs that might endorse sexism, but the *application* of justice must, nevertheless, be sensitive to context (ibid). O'Neill goes on to specify that the application of justice must be sensitive to context by identifying the features that secure or, conversely, make vulnerable an individual's ability to change the 'variable aspects of the arrangements which structure their lives' (ibid: 459). This is a particularly important argument for the polygamy debate in Swaziland, given that while polygamy often appears to disadvantage women, there are some instances of the practice providing women with opportunities to escape poverty, and to become more independent. Therefore, the equality principle must not be blindly employed in a way that would disadvantage women more than it would help them.

Some feminist critics have followed the recent trend in rejecting the communal/liberal distinction altogether. Hekman (1992), for example, finds attempts to synthesise communitarian and liberal values problematic because, on her view, the dichotomy between individual autonomy and communality should be challenged outright. Most critics seem to want to retain the advantages in both liberalism and communitarianism, so Hekman argues that a discourse must be forged, in which the polarities of this dichotomy are avoided.

Furthermore, any attempt to ameliorate communitarian and liberal values is virtually sure to be problematic for women because both theories are 'rooted in patriarchal assumptions, thus insuring that the discourse they produce is patriarchal as well' (ibid: 1107). Hekman rejects the liberalism/communitarianism debate as a whole, because she rejects the implication that women must choose between the 'masculinist, disembodied subject of liberalism' or 'the subordinated, determined subject implicit in the communitarian's vision of the ideal community' (ibid: 1113).

Hekman (1992) believes that the answer lies in the development of a discourse that embodies women, but without privileging one form of embodiment (and the social relations that flow from it) over others. In this way women can be embodied, without being denied

equality (ibid: 1117). Furthermore, and in line with her rejection of the entire communitarian/liberal dichotomy, Hekman has developed the idea of a 'discourse of resistance'; that is, a discourse in which women refuse to be defined by the discourses that repress them. In Swaziland, the discourse revealed that culture and human rights are often dichotomised, and so Hekman's recommendation that this dichotomy be rejected altogether is important because ideally, Swazi women should be able to retain the advantages of communalism, without having to sacrifice their human rights (or vice versa). At the same time, however, Swazi women should be able to avoid the patriarchal pit-falls of both constitutional and customary law and develop a discourse that will facilitate empowerment within their unique cultural context. In discussions concerning practices that disadvantage women, our focus should be on the women it disadvantages and not on the supremacy of either collectivism or individualism.

The question then becomes how this is to be achieved. Benhabib (1992) believes that the answer lies in participation and democracy. Democratic participation may not aim at social cohesion and harmony, but it does encourage political agency and efficacy and allow individuals to have a fuller say in the way all aspects of their lives are governed (ibid).

Continuing in this line of thought, Deveaux (2007) has criticised Okin for adopting a juridical and state-centred approach to conflicts of culture. Deveaux believes that the line of thought that posits individual and group rights as fundamentally opposed to each other is unhelpful, if not harmful to the project to reform discriminatory customs and practices, and that the juridical framework exacerbates this kind of thinking. Although she admits that legislative reform is sometimes necessary, Deveaux points out that there is still a big question mark over practices that are not strictly prohibited by criminal law, or in flagrant violation of a state's bill of rights. For the purposes of this thesis, this point is particularly important, given that polygamy in Swaziland is legally prohibited only in civil marriages, and also given that it would be hard to argue that polygamy constituted a *flagrant* violation of the constitutional guarantee to gender equality.

When it comes to proposals for the reform of cultural practices, Deveaux (2007) argues that liberal principles (including the gender equality principle) should not be uncritically applied, no matter how laudable they may be. This is because doing so runs the risk both of ignoring the lived reality of those practices (and therefore of worsening the many forms of oppression facing those affected) and of implementing proposals that group members consider illegitimate and unjust, which may in turn affect their practicability

(ibid). In fact, Deveaux contends that when a state intervenes without consulting the group members themselves, the intervention often backfires, strengthening the custom in question and leaving vulnerable sub-groups within the community disempowered (ibid: 53-55).

An examination of legislative responses to the issue of polygamy around the world gives weight to Deveaux's argument and highlights the limitations of the law.

In South Africa, the Law Reform Commission (Project 90, 1998) found that although polygamy does disadvantage women, legally abolishing or banning the practice would do little to help women avoid polygamy, given the social pressures they face, and would probably harm women already in polygamous marriages, given that their marriages would not be legally recognised. As Glendon points out, if polygamy is not afforded some sort of recognition, many women will be left without legal protection and many children will be deemed illegitimate (in Sheleff 2000). Furthermore, I believe that prohibiting polygamy would do nothing to help abandoned wives and may possibly exacerbate abandonment. In Swaziland, the fact that covert polygamy is becoming the increasingly popular form of polygamy, coupled with the fact that bigamy continues to occur regularly, means that abolishing polygamy would have little effect in real terms. It would also be practically impossible to effect, particularly because of the customs relevance to the monarchy, and because it would be an illegitimate move in the eyes of the majority population who may see it as a denial of culture and tradition. As such, the proposal to legislatively ban polygamy is a 'formally appealing but substantially empty' extension of the law (Murray 1994: 41). The South African commission concluded that the best solution to the problem involves conferring greater rights on women within polygamous marriages (ibid).

Similarly in Australia, the Law Reform Commission found that laws and policies based on the privileging of one family form over all others had the potential to impact negatively on individuals or groups who defined family arrangements differently (Canada 2006). In Turkey, for example, although polygamy is legally prohibited, it is still practiced in the rural areas and amongst the urban rich. Second and all subsequent wives, however, have no legal rights under Turkish law (ibid).

Some states have attempted to regulate polygamy, not through prohibition, but through stipulating that men wishing to marry more than one woman simultaneously fulfil certain conditions. Polygamy is permitted in Jordan and the majority of francophone Africa, for example, but provision has been made for women to specify in a marriage contract that their husbands are not able to take another wife, if they so wish (Canada

2006). This entitles women to sue for divorce if the condition is not met (ibid). In Sri Lanka, the man is required to give notice of his intention to marry another woman in the area where he lives, where his intended wife lives and where his already existing wife (or wives) live (ibid). This is meant to eliminate any deceptive part of the practice and ensure that all parties know and accept the situation (or are given the opportunity to contest it if it is not consensual). In Egypt and Yemen, it is mandatory that a Public Notary informs the already existing wife/wives of the proposed marriage by registered mail, and that the new wife is made aware that the man is already married. In Iraq, Syria and South Africa, potentially polygamous men are required to obtain judicial authorization, which can be endowed only after the man has convinced a judge that he is financially capable of supporting another wife, that there is legitimate reason for the new marriage, and that he will treat his wives equitably (ibid).

There are some general problems with these policies. For example, the question arises as to what a 'legitimate' reason would entail. It would, no doubt, centre on a 'defect' in the already existing wife (Maillu has suggested insanity, inability to perform marital 'duties', infertility and incurable disease as legitimate reasons) and this might facilitate the stereotyping of women into sexual/reproductive roles. Additionally, these systems do not usually allow women to seek divorce on reciprocal grounds (Canada 2006). These policies also ignore women's sexual and emotional needs, as they place conditions only on men's ability to provide financially.

Furthermore, most of these strategies or policies would be difficult, if not impossible to apply in the Kingdom of Swaziland. Dominic Mngomezulu said that drafting an ante-nuptial contract for a customary marriage would be impossible given that customary marriage is viewed as an alliance between two families, rather than two individuals. Getting all members of both families to agree to a clause renouncing the husband's right to take subsequent wives would be unfeasible (Interview, 10 March 2006). Furthermore, the lawyer argued that it would be difficult for a woman to contest her husband's decision to take another wife by using the constitutional clause entitling women to refuse to participate in any custom to which she is in conscience opposed, because 'she shouldn't have chosen to enter a customary marriage, knowing fully well that it was potentially polygamous' (ibid). Essentially, the argument seems to be that agreeing to be married by customary rites, rather than civil rites, can be taken as evidence of a wife's consent to the possibility of her marriage being a polygamous one.

Requiring men to obtain judicial permission before they marry subsequent wives would be a policy that would almost certainly be ignored, given that civil law requirements, even as they stand now, are often ignored (if the high number of bigamy cases are anything to go by). Additionally, if the Ludzidzini Governor Jim Gama is to be believed, 'I don't want to die a lonely death' is reason enough to add more wives to a family. Mngomezulu also explained that, according to legal precedent in Swaziland (which does not require customary marriages to be registered or certified), a woman is recognised as a wife if she has been smeared with red ochre (Interview, 10 March 2006). Therefore, even if a man were required to fulfil certain conditions, it would go against legal precedent if his inability to do so were used as an argument in favour of nullifying the marriage.

The only policies Mngomezulu did support was the requirement to notify the already existing wife/wives of the intended marriage, and the requirement that the new wife should be made aware that the man is already married (ibid). Again however, the practicality of this recommendation is dubious, given that Swazi law does not require the registration or certification of customary marriages. It may be advisable, therefore, to enact legislation along the lines of the South African Recognition of Customary Marriages Act 1998, which requires the registration of all customary marriages (polygamous or not) and gives all parties full legal status and the same rights and protections given to parties in civil marriages.

The democratic, participationist approach advocated by Deveaux suggests that the answer to resolving tensions between constitutional and customary law lies outside the judicial framework and is representative of the relatively recent tendency to distance feminist reform proposals from legal centralism. Kaganas and Murray (1994a), for example, have frequently spoken about the limitations of the law, arguing that formal equality is by no means a guarantor of equality in practice. As Samuel puts it, 'legal triumphs risk becoming echoes of a world wished for, but not realisable' (1999: 30). Rather 'it is the way in which legal rights are translated into reality and the way they are supplemented by social change that determine whether they change women's lives' (Kaganas & Murray 1994a: 1).

Furthermore, all members of a given cultural community must play a central role in re-evaluating their own customs and practices (ibid). Deveaux believes that the answer lies in the development of a deliberative, inclusive, participationist democratic approach to reforming practices that conflict with liberal or constitutional principles. Not only would this accord the members of a given cultural community the respect due to them, such an

approach also has the potential to empower minorities within the group (Deveaux 2007: 23). This participationist approach can be achieved by deepening democratic principles, fostering broader inclusion of citizens in political deliberation and decision-making processes and by working towards a conception of democratic life that is no longer confined to formal political institutions (ibid).

Deveaux's approach corresponds with Chanock's (1991) recommendation that custom should develop outside of state regulation. While this may indeed be the best way forward, it will certainly be an extremely difficult approach for Swaziland to adopt, given that the entire national system of governance is based on the union of state and male elders. In fact, the problem with nearly all of the above arguments is that they are concerned with minority cultures in liberal societies and are based on the idea that state interference should be minimized because group members should ultimately have authority over their own cultural construction (Deveaux 2007: 53). But in Swaziland, the problem is not that the culture is under threat from the state, rather the problem is that the culture is rigidly enforced by the state.

This does not make Deveaux's (2007) theory useless in the case of Swaziland. Her approach would still advocate for the increased participation and inclusion of Swazi women in cultural decision-making. But perhaps, in the Swazi case, Deveaux's theory should be adapted towards an approach that would advocate for minimized state interference in 'cultural' institutions and relations, not for the purposes of allowing group leaders more authority, but for the purposes of allowing a wider, more inclusive range of group members the opportunity to participate in their cultural development.

Keen to avoid charges of neo-colonialism, Ferguson (1998), like Deveaux, also believes that the answer lies in democracy. Although there are some universal principles that must be developed (Ferguson gives the principle that 'women's rights are human rights' as an example), participatory decision-making powers for women at a local level are crucial because all women must be involved in the knowledge production and development process of their own contexts. For the purposes of this thesis, this means that Swazi women must be empowered to understand women's rights in a way that applies to their specific context, and they must be empowered to decide how best to implement these rights.

Ferguson (1998) suggests that participatory decision-making can be achieved through consciousness-raising workshops facilitated by trained educators and paid staff, and field-based inquiry and development programmes. She suggests focusing on how the unequal division of power and property and the sexual division of labour play themselves

out in each specific context. If polygamy were to be discussed in such a forum, Swazi women would need to decide how, or to what extent being in a polygamous marriage affects power relations, property entitlement and women's relegation to the domestic realm. If the interview material in this thesis is anything to go by, Swazi women appear to believe that, while some benefits can be derived from being part of a polygamous marriage, genuine equality and polygamy cannot co-exist. Furthermore, the interview material also suggests that women in Swaziland often wish to effect change, but also often feel powerless to do so. Women in Swaziland must, therefore, be empowered to decide what should be done about the practice of polygamy, and to effect the changes they desire.

While I strongly agree with a focus on democratic participation, I also believe that ongoing engagements with the law should not be abandoned. Kaganas and Murray maintain that law is not 'a unified, monolithic force directed solely at benefiting men', and that law can change to embrace feminist concerns (1994a: 4). They also maintain that while feminists cannot rely on law and legal method alone, analyses of, and engagements with law and legal reform are still important for the gender equality project because the law *can* be a powerful tool that can stimulate change (ibid).

Currie (1994) also maintains that constitutional law is a potentially powerful force as it gives lawyers and activists the opportunity to utilise the power of the state in the project to reform discriminatory practices. He notes, however, that 'applications for review are likely to be resisted by arguments that wholesale law reform in the name of egalitarian principles threatens the integrity of the customary law system' (ibid: 152). What then, can the law do for women living in polygamous marriages in Swaziland?

Chanock (1991) believes that the discussion of polygamy, or any one form of marriage in isolation is essentially a waste of time and advocates a legal approach that would avoid concerning itself with the nuances of different marriage types and that would concentrate on making provision for equitable support obligations, property access and access to justice institutions. Writing specifically about the law in South Africa, Chanock recommends basing family law statutes on de facto relationships rather than marriage, as it is better suited to the real personal lives of most South African citizens (ibid). This is also true for Swazi citizens and particularly so in the context of the increasing trend to engage in covert or unofficial polygamy. Family law in Swaziland must, therefore, provide for both civil and customary, and both monogamous and polygamous conceptions of marriage. By

doing so, the law can ensure that provision exists for all Swazi women to live their lives more in line with the conditions of equality.

Similarly, Kaganas and Murray (1991) argue that major changes in institutionalised African customary law are necessary if the system is to adapt and respond to modern conditions and changes in family structures. However, the changes they envisage have more to do with structural inequalities concerning access to land and resources, and overtly discriminatory principles, such as the marital power principle, than legal/formal restrictions or prohibitions on customary practices or marriage types. The Bill of Rights should be an accessible means of challenging customary practices that undermine women in Swazi society. However, the media research revealed a lack of understanding about human rights in general and gender equality in particular, both in civil society and in government. If the legal barriers to gender equality (such as the marital power principle and the discriminatory inheritance and property regulations) are to be revised, the Swazi government needs to make a much more concerted effort, not only to improve its own understanding of gender and equality, but also to translate that understanding, through education and the facilitation of dialogue, into the communities.

Lastly, given the complexity of the debate, and our concern to avoid arbitrarily privileging one family form over another, it is possible to conclude that if conflicts relating to polygamy are taken to the courts in Swaziland, they will probably need to be decided on a case by case basis. However, whether or not women access the justice system to challenge their husband's ability to take subsequent wives will depend on their determination (or perhaps, desperation) to fight for change, and their right to be heard. This is likely to be a tall order for Swazi women who will no doubt face a great deal of pressure and disapproval from their families and from society in general. Therefore women must be empowered through access to justice institutions, legal representation, and education and support networks.

In line with recent feminist recommendations concerning how to evaluate different cultures, this thesis has aimed to situate the evaluation of a specific cultural practice in an understanding of the context in which it is practiced. Moreover, I have attempted to construct that context and the lived reality of the practice in question through the eyes of the women it affects. Essentially, this analysis suggests that resolving the tensions between constitutional and customary law lies in a comprehensive strategy that should encompass law reform, community dialogue and civic education. While each of these approaches will

play an important role, the emphasis should remain on enhanced democratic participation and decision-making powers for women. If the government can successfully implement programmes that ensure that women's voices are both heard and endowed with authority, then it will be the major merit of the Swazi system.

Summary of Recommendations

● The practice of polygamy should not be outlawed. Neither should judicial permission requirements be introduced. These measures are particularly unrealistic in the Swazi context, risk casting the law in an illegitimate light, will disadvantage women already in polygamous marriages and will most likely result in civil disobedience and increases in bigamy cases.

● Law reform is long overdue. The programme of law reform needs to be more efficient so that inconsistencies between statutory law and the constitution can be rectified quickly. Appropriate provisions for the construction of a Law Reform Commission should be made by parliament.

● In particular, marriage laws must be reformed urgently:

- The concept of marital power should be abolished so that wives can benefit from their entitlement to their husband's assets without sacrificing their legal independence.
- Men and women should have equal parental rights and support entitlements regardless of marital status.
- Couples married by civil rites should be governed by civil law principles without the need for an ante-nuptial agreement.
- Legislation should be enacted along the lines of the South African Recognition of Customary Marriages Act, and should provide for the compulsory registration of customary marriages. Guidelines specifying the legal implications of customary marriage should be published and brought under the jurisdiction of the Magistrates and High Courts after any necessary modifications.

● Women should be granted equal land and property rights to men. The regulations specifying what a spouse (or spouses) is (are) entitled to upon death or separation should be less vague and more specific.

● The codification of Swazi Law and Custom will most likely prove to be more problematic than helpful to the gender equality project. Nevertheless, it looks likely that the document will be released eventually. Therefore, it must be ensured that the pending document of codified customary law will be subject to modifications that will bring it into line with the constitution. These modifications are imperative, not only because of the state commitment to gender equality, but also because if challenged in a court of law, a great deal of Swazi customary law risks being declared null and void. Therefore, these

modifications must be a product of community dialogue, and that dialogue should be inclusive of women in the communities.

● Civic education programmes must be improved:

- Workshops educating both men and women on concepts concerning the constitution, human rights and gender equality should be an ongoing and regular exercise. Workshops and forums should both inform and stimulate discussion about how best to apply human rights in the Swazi context.
- While it is important for the whole community to be involved in this dialogue, forums for women to come together and express their needs should be established in an attempt to undermine the cultural taboo that prevents women speaking out about issues that affect them.
- Human rights education, in the context of the constitutional Bill of Rights, needs to be incorporated into the school curriculum alongside cultural/social studies.

● Provision should be made for better and ongoing training for judicial officers in both court systems. The training should involve techniques for applying and developing both customary and constitutional law. In particular, chiefs, traditional leaders and SNC presidents should be sensitised on their obligation to uphold constitutional principles.

● While women in Swaziland now have more individual choices and freedoms, their collective power remains slight. If Swazi women are to be empowered the women's movement in Swaziland must be strengthened and become more coherent. Lobbying must continue at a local, regional and national level.

- The Government should consider the creation of a gender commission. Its mandate should be to develop a better understanding of gender equality, and to incorporate this understanding into government policy. The commission should monitor and enforce legislation and social policy relating specifically to matters concerning gender in the broad sense of promoting effective equality.

● Access to the law, and to justice delivery institutions needs to be vastly improved. Barriers to the introduction of a legal aid system should be removed and the state should facilitate the construction of such a system.

Appendix A

CONSENT TO PARTICIPATE IN INTERVIEW

A Study in Constitutional and Customary Law in Swaziland

You have been asked to participate in a research study conducted by Katherine Manson from the Department of Political and International Studies at Rhodes University. The purpose of the study is to investigate different approaches to resolving the tensions between constitutional and customary law in Swaziland. The results of this study will be included in my Masters thesis. You should read the information below, and ask questions about anything you do not understand, before deciding whether or not to participate.

• This interview is voluntary. You have the right not to answer any question, and to stop the interview at any time or for any reason. We expect that the interview will take between half an hour to an hour.

• Unless you give us permission to use your name and / or quote you in any publications that may result from this research, the information you tell us will be confidential.

• We would like to record this interview on a digital voice recorder so that we can use it for reference while proceeding with this study. We will not record this interview without your permission. If you do grant permission for this conversation to be recorded, you have the right to revoke recording permission and/or end the interview at any time.

This project will be completed by June 2008. All interview recordings will be stored in a secure work space until 6 months after that date. The files will then be destroyed.

I understand the procedures described above. My questions have been answered to my satisfaction, and I agree to participate in this study. I have been given a copy of this form.

(*Please check all that apply*)

[] I give permission for this interview to be recorded.

I give permission for the following information to be included in publications resulting from this study:

[] my name [] direct quotes from this interview

Name of Subject ____

Signature of Subject ______________________________________ Date ____________

Signature of Investigator _________________________Date _________

Please contact Katherine Manson (Cell: 641 7997) with any questions or concerns.

Bibliography

Altman, I. & Ginat, J. 1996. *Polygamous Families in Contemporary Society.* Cambridge: Cambridge University Press

Alund, A. 1999. 'Feminism, Multiculturalism, Essentialism' in N. Yuval-Davis & P. Werbner (eds.), *Women, Citizenship & Difference*. London: Zed Books

Bano, S. 1999. 'Muslim and South Asian Women: Customary Law and Citizenship in Britain' in N. Yuval-Davis & P. Werbner (eds.), *Women, Citizenship & Difference.* London: Zed Books

Bartholomew, G. 1961. 'Recognition of Polygamous Marriages in Canada' *The International and Comparative Law Quarterly* 10,2: 305-327

Benhabib, S. 1992. *Situating the Self.* Cambridge: Polity Press

Bennett, T. 1991. 'The Compatibility of African Customary Law and Human Rights' *Acta Juridica*:18-36

Bhana, D., Morrell, R., Hearn, J. & Moletsane, R. 2007. 'Power and Identity: An Introduction to Sexualities in Southern Africa' *Sexualities* 10: 131-139

Bukurura, S. 2001. 'Traditional Institutions and Conflict Resolutions in Swaziland: Some Observations on Recent Events' *Southern African Journal on Human Rights* 17, 3: 421-434

Canada. 2006. *Polygyny and Canada's Obligations under International Human Rights Law*, Research Report, September 2006. [online]. Available from: http://www.justice.gc.ca/eng/dept-min/pub/poly/chap2.html

Cannon, C. 1974. 'The Awesome Power of Sex: The Polemical Campaign Against Mormon Polygamy' *The Pacific Historical Review* 43,1: 61-82

Chanock, M. 1991. 'Law, State and Culture: Thinking About 'Customary Law' After Apartheid' *Acta Juridica* 91*:* 52-70

Coltheart, L. 1986. 'Desire, Consent and Liberal theory' in C. Pateman & E. Gross (eds.), *Feminist Challenges: Social and Political Theory.* Boston: NorthEastern University Press

Currie, I. 1994. 'The Future of Customary Law: Lessons from the Lobolo Debate' in C. Murray (ed.), *Gender and the New South African Legal Order.* Cape Town: Juta & Co. Ltd.

Deveaux, M. 2007. *Gender and Justice in Multicultural Liberal States*. Oxford: Oxford University Press [online]. Available from: http://www.oxfordscholarship.com/oso/private/content/philosophy/9780199289790

Donnelly, J. 1990. 'Human Rights and Western Liberalism' in A.A. An-Na'Im & F.M. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives.* Washington: The Brookings Institution

Dunfey, J. 1984. 'Living the Principle of Plural Marriage: Mormon Women, Utopia, and Female Sexuality in the Nineteenth Century' *Feminist Studies* 10,3: 523-536

Embry, J. 1984. 'Effects of Polygamy on Mormon Women' *Frontiers: A Journal of Women Studies* 7,3: 56-61

Fairclough, N. 1992. *Discourse and Social Change*. Cambridge: Polity Press

Ferguson, A. 1998. 'Resisting the Veil of Privilege: Building Bridge Identities as an Ethico-Politics of Global Feminisms' *Hypatia* 13,3: 95-113

Fisk, M. 1993. 'Community and Morality' *The Review of Politics* 55,4: 593-616

Friedman, M. 1993. *What Are Friends For?: Feminist Perspectives on Personal Relationships and Moral Theory.* New York: Cornell University Press

Gordon, R. 2003. 'Dimensions of the Depth Interview' in N. Fielding (ed.), *Interviewing*, Vol.1, London: Sage Publications

Gordon, S. 1996. 'The Liberty of Self-Degradation: Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America' *The Journal of American History* 83,3: 815-847

Habermas, J. 1995. 'Multiculturalism and the Liberal State' *Stanford Law Review* 47,5: 849-853

Hekman, S. 1992. 'The Embodiment of the Subject: Feminism and the Communitarian Critique of Liberalism' *The Journal of Politics* 54,4: 1098-1119

Hlanze, Z. & Mkabela, L. 1998. *Beyond Inequalities: Women in Swaziland*. Harare: SARDC

Howard, R.E. 1990. 'Group versus Individual Identity in the African Debate on Human Rights' in A.A. An-Na'Im & F.M. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives*. Washington: The Brookings Institution.

Iversen, J. 1984. 'Feminist Implications of Mormon Polygyny' *Feminist Studies* 10,3: 505-522

Iversen, J. 1990. 'The Mormon-Suffrage Relationship: Personal and Political Quandries' *Frontiers: A Journal of Women Studies* 11,2/3: 8-16

Kaganas, F. & Murray, C. 1991. 'Law, Women and the Family: the Question of Polygyny in a new South Africa' *Acta Juridica* 116-134

Kaganas, F. & Murray, C. 1994a. 'Law and Women's Rights in South Africa: An Overview' in C. Murray (ed.), *Gender and the New South African Legal Order*. Cape Town: Juta & Co. Ltd.

Kaganas, F. & Murray, C. 1994b. 'The Contest Between Culture and Gender Equality Under South Africa's Interim Constitution' *Journal of Law and Society* 21,4: 409-433

Kalley, J. 2003. 'Historical Background' in *Swaziland Election Dossier 2003.* South Africa: Electoral Institute of Southern Africa

Kasper, A. 2003. 'A Feminist, Qualitative Methodology: A Study of Women with Breast Cancer' in N. Fielding (ed.), *Interviewing,* Vol.2, Sage Publications, London

Kilbride, P. 1994. *Plural Marriage for Our Times: A Reinvented Option?* London: Bergin & Garney Publishing

Kukathas, C. 1992. 'Are there any Cultural Rights?' *Political Theory* 20: 105-39

Kymlicka, W. 1989. *Liberalism, Community and Culture*. Oxford: Clarendon Press

Leary, V. 1990. 'The Effect of Western Perspectives on International Human Rights' in A.A. An-Na'Im & F.M. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives*. Washington: The Brookings Institution

Lehnert, W. 2005. 'The Role of the Courts in the Conflict between African Customary Law and Human Rights' *SAJHR* 21: 241-277

MacKinnon, C. 2006. *Are Women Human?…* . Cambridge: Harvard University Press

Maillu, D. 1988. *Our Kind of Polygamy*. Nairobi: Heinemann

Marwick, B. 1940. *The Swazi.* Cambridge: Cambridge University Press

Matlosa, K. 2003. 'Constitutional Development' in *Swaziland Election Dossier 2003,* South Africa: Electoral Institute of Southern Africa

Mulhall, S. and Swift, A. 1992. *Liberals and Communitarians*. Oxford: Blackwell

Murray, C. 1994. 'Is Polygamy Wrong?' *Agenda* 22: 37-41

Nhlapo, T.R. 1987a. 'No Cause for Optimism: Bigamy and Dual Marriage in Swaziland' in A. Armstrong (ed.), *Women in Law in Southern Africa.* Harare: Zimbabwe Publishing House

Nhlapo, T.R. 1987b. 'Law versus Culture: Ownership of Freehold Land in Swaziland' in A. Armstrong (ed.), *Women and Law in Southern Africa*. Harare: Zimbabwe Publishing House

Nhlapo, T.R. 1990. 'The Legal Situation of Women in Swaziland and Some Thoughts on Research' in J. Stewart & A. Armstrong (eds.), *The Legal Situation of Women in Southern Africa.* Harare: University of Zimbabwe Publications

Nhlapo, T.R. 1991. 'The African Family and Women's Rights: Friends or Foes?' *Acta Juridica* 135: 138-9

Nhlapo, T.R. 1992. *Marriage and Divorce in Swazi Law and Custom*. Mbabane: Websters Ltd

Nii-Amoo Dodoo, F. 1998. 'Marriage Type and Reproductive Decisions: A Comparative Study in Sub-Saharan Africa' *Journal of Marriage and the Family* 60,1: 232-242

Nsibande, B. 1995. 'Historical Perspectives on the Proletarianisation Process in Swaziland' in N. Simelane (ed.), *Social Transformation: The Swaziland Case,* Dakar: CODESIRA

O'Neill, O. 1990. 'Justice, Gender and International Boundaries' *British Journal of Political Science* 20,4: 439-459

Orubuloye, O. 2007. 'Demography, Sexuality and Sexual Behaviour Research in Nigeria' *ARSRC* [online] Available from: http://www.arsrc.org/phprint.php [cited 08 July 2008]

Okin, S.M. 1989a. 'Humanist Liberalism' in N.L. Rosenblum (ed.), *Liberalism and the Moral Life*. Massachusetts: Harvard University Press

Okin, S.M. 1989b. *Justice, Gender and the Family*. USA: Basic Books Inc.

Okin, S.M. 1998. 'Feminism and Multiculturalism: Some Tensions' *Ethics* 108,4: 661-684

Pateman, C. 1988. *The Sexual Contract.* Cambridge: Polity Press

Phillips, O. 2004. '(Dis)Continuities of Custom in Zimbabwe and South Africa: The Implications for Gendered and Sexual Rights' *Health and Human Rights*, 7,2: 82-113

Sa'ar, A. 2005. 'Postcolonial Feminism, the Politics of Identification, and the Liberal Bargain' *Gender and Society* 19,5: 680-700

Samuel, S. 1999. 'Women Married in Customary Law: No Longer Permanent Minors' *Agenda* 40: 23-31

Sheleff, L. 2000. *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*. London: Frank Cass Publishers.

Silk, J. 1990. 'Traditional Culture and the Prospect for Human Rights in Africa' in A.A. An-Na'Im & F.M. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives*. Washington: The Brookings Institution

Simelane, H. 1995. 'Capitalism and the Development of the Swazi Working Class, 1947-62 in N. Simelane (ed.), *Social Transformations: The Swaziland Case,* Dakar: CODESIRA

Walker, C. 1994. 'Women, 'Tradition' and Reconstruction' *Review of African Political Economy,* 21,61: 347-358

Whelpton, R. 1997. 'Swazi Law and Custom in the Kingdom of Swaziland' *South African Journal of Ethnology* 20,3: 145-154

Newspaper Articles

Dlamini, S. 1998. ‘Women have always enjoyed many rights’. *Times of Swaziland.* Mbabane: African Echo Ltd. May 29

Mabuza, B. 1997. ‘The other side of polygamy’. *Times of Swaziland.* Mbabane: African Echo Ltd. December 7

Mabuza, N. 2004. ‘Are human rights taken too far?’ *Times of Swaziland.* Mbabane: African Echo Ltd. October 5

Mabuza, N. 2004. ‘Clause giving women equal rights approved’. *Times of Swaziland.* Mbabane: African Echo Ltd. November 17

Mabuza, N. 2004. ‘Women should not get married if…’. *Times of Swaziland.* Mbabane: African Echo Ltd. November 29

Magagula, N. 1997. ‘The painful story of the Swazi woman’. *Times of Swaziland.* Mbabane: African Echo Ltd. March 9

Magagula, M. 2005. ‘Men should be content with one wife – polygamist’. *Times of Swaziland.* Mbabane: African Echo Ltd. December 9

Magagula, M. 2006. ‘Swazi Law and Custom document ready’. *Times of Swaziland.* Mbabane: African Echo Ltd. May 7

Magagula, M. 2006. ‘I’m no fan of polygamy – Sikhanyiso’. *Times of Swaziland.* Mbabane: African Echo Ltd. July 16

Mohammed, B. 2006. ‘Swazi women just love polygamy – Jim’. *Times of Swaziland.* Mbabane: African Echo Ltd. June 10

Mordaunt, A. 2004. ‘Bigamy cases on the rise’. *Times of Swaziland.* Mbabane: African Echo Ltd. January 15

Twala, T. 2005. ‘Prince Mangaliso tells women to just shut up’. *Times of Swaziland.* Mbabane: African Echo Ltd. August 6

Twala, T. 2006. ‘Msibi is a fine Swazi man – Gama’. *Times of Swaziland.* Mbabane: African Echo Ltd. April 30

Zwane, B. 1997. ‘Tackling the gender issue’. *Times of Swaziland.* Mbabane: African Echo Ltd. August 23

‘Not every woman wants to be liberated’. 1996. *Times of Swaziland.* Mbabane: African Echo Ltd. November 21

‘Time has run out for common polygamists’. 1997. *Times of Swaziland.* Mbabane: African Echo Ltd. April 2

‘The burning issue of polygamy’. 1997. *Times of Swaziland.* Mbabane: African Echo Ltd. April 26

‘Polygamy exposed as naked male vanity’. 1997. *Times of Swaziland.* Mbabane: African Echo Ltd. May 7

‘Gender equality a long way to go’. 1997. *Times of Swaziland.* Mbabane: African Echo Ltd. December 3

‘This women’s rights business is taking us too far’. 1998. *Times of Swaziland.* Mbabane: African Echo Ltd. April 29

‘Polygamy is now outdated’. 1998. *Times of Swaziland.* Mbabane: African Echo Ltd. June 3

‘Women can’t be equal to men here’. 2000. *Times of Swaziland.* Mbabane: African Echo Ltd. April 6

‘What about man’s rights?’ 2003. *Times of Swaziland.* Mbabane: African Echo Ltd. August 3

‘There is nothing like “my husband” in Swaziland’. 2003. *Times of Swaziland.* Mbabane: African Echo Ltd. September 2

‘Women divided over equality to men’. 2005. *Times of Swaziland.* Mbabane: African Echo Ltd. July 21

‘Polygamy a symbol of a selfish heart’. 2005. *Times of Swaziland.* Mbabane: African Echo Ltd. December 14

‘Polygamous culture and attitude will wipe out us Swazis from HIV/AIDS’. 2006. *Times of Swaziland.* Mbabane: African Echo Ltd. January 14

‘What does the constitution mean by “men and women are equal”?’ 2006. *Times of Swaziland.* Mbabane: African Echo Ltd. March 25

‘Von Wissell supports polygamy’. 2006. *Times of Swaziland.* Mbabane: African Echo Ltd. May 31

‘Women will never be equal to men’. 2006. *Times of Swaziland.* Mbabane: African Echo Ltd. August 4

‘A woman’s place will always be in the kitchen’. 2007. *Times of Swaziland.* Mbabane: African Echo Ltd. November 16

‘Women are not slaves Kath’. 2008. *Times of Swaziland.* Mbabane: African Echo Ltd. February 3

‘Polygamy should not be abolished’. 2008. *Times of Swaziland.* Mbabane: African Echo Ltd. April 7

Formal Interviews

Mngomezulu, Dominic [pseudonym]. 2008. Interview with Attorney Specialising in Human Rights Law on 10 March 2008. Mbabane. [Recording in possession of author]

Dlamini, Lomcebo. 2008. Interview with Regional Director of Women and Law in Southern Africa (Swaziland) on 26 March 2008. Mbabane. [Recording in possession of author]

Mbikiza, Sibonelo HRH. 2008. Interview with *Inkhosikati* to His Majesty King Mswati III on 30 April 2008. Nkoyoyo. [Recording in possession of author]

Mbingo, Mbongeni. 2008. Interview with Editor of the *Times of Swaziland* Sunday edition on 7 May 2008. Mbabane. [Personal communication]

Informal Interviews

Gugu. 2008. Informal Interview on 19 March 2008. Mbabane [Recording in possession of author]

Ntombi. 2008. Informal Interview on 19 March 2008. Mbabane [Recording in possession of author]

Phindile. 2008. Informal Interview on 18 March 2008. Mbabane [Recording in possession of author]

Primrose. 2008. Informal Interview on 21 March 2008. Mbabane [Recording in possession of author]

Winile. 2008. Informal Interview on 19 March 2008. Mbabane [Recording in possession of author]

Zama. 2008. Informal Interview on 21 March 2008. Mbabane [Recording in possession of author]

LaDube. 2008. Informal Interview on 10 July 2008. Mbabane [Recording in possession of author]

LaMbikiza. 2008. Informal Interview on 30 April 2008. Nkoyoyo [Recording in possession of author]

LaMavuso. 2008. Informal Interview on 18 March 2008. Mbabane [Personal communication]

LaMsibi. 2008. Informal Interview on 29 July 2008. Mbabane [Recording in possession of author]

LaSimelane. 2008. Informal Interview on 13 July 2008. Mbabane [Recording in possession of author]

LaShongwe. 2008. Informal Interview on 13 July 2008. Mbabane [Personal communication]

International and National Laws

South Africa. 1998. *Recognition of Customary Marriages Act No. 120 of 1998.* Pretoria: Government Printer [Laws]

United Nations. 1948. *Universal Declaration of Human Rights*. General Assembly Resolution 217A (III), UN Doc. A/810

United Nations. 1979. *Convention on the Elimination of All Forms of Discrimination Against Women.* General Assembly Resolution 34/180, UN Doc. A/34/46

Swaziland. 2006. *The Constitution of the Kingdom of Swaziland Act No.1 of 2006.* Mbabane: Government Printer [Laws]