

# Maine Law Review

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Volume 60  
Number 2 *Symposium -- Nation-Building: A  
Legal Architecture?*

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Article 8

June 2008

## Gender and Nation-Building: Family Law as Legal Architecture

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### Recommended Citation

Tracy E. Higgins & Rachel P. Fink, *Gender and Nation-Building: Family Law as Legal Architecture*, 60 Me. L. Rev. 375 (2008).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol60/iss2/8>

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# GENDER AND NATION-BUILDING: FAMILY LAW AS LEGAL ARCHITECTURE

*Tracy E. Higgins and Rachel P. Fink*

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## GENDER AND NATION-BUILDING: FAMILY LAW AS LEGAL ARCHITECTURE

*Tracy E. Higgins\* and Rachel P. Fink\*\**

### I. INTRODUCTION

In considering the legal architecture of nation-building, we might most readily think of public law as our subject insofar as it governs the relationship between the individual and the state, and establishes the institutions of governance and the sources and limits of their power.<sup>1</sup> The essays in this volume, in large part, track this instinct in that they concern themselves with fields such as constitutional law, criminal law, and public international law. Closer to the margin of public and private law are essays dealing with various dimensions of the modern regulatory state, including banking and commercial transactions. In each of these fields of law, the connection between the legal framework and the state structure is reasonably clear. This is perhaps less true for family law.

Although the discipline of family law in the western legal tradition transcends the public/private law boundary in many ways,<sup>2</sup> it is the argument of this Essay that family

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1. See generally Morton Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); see also Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843 (2006). Randy Barnett has written of the public/private spheres:

For several decades now American legal thought has suffered from a pervasive schizophrenia. In one sphere lies "public law"—the rules which determine the relationship between citizen and state; rules which are based on principles of "public" governance; rules which are usually prosecuted or defended by state officials and adjudicated in state courts. In another sphere lies "private law"—the rules which define the legal relationships between individuals; rules which are based on principles of private rights and responsibilities; rules which are usually prosecuted by private "plaintiffs" and defended by private "defendants."

Randy Barnett, *Reviewed Work—Takings: Private Property and the Power of Eminent Domain by Richard A. Epstein*, 97 ETHICS 669, 669 (1987).

2. See generally Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001) (exploring the connection between family law and private business law); see also Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992). Singer writes:

Traditionally, the legal principles governing marriage and consensual alternatives to marriage reflected a strong preference in favor of public ordering of behavior. First, and perhaps most important, the law distinguished sharply between marriage and other intimate relationships and used marriage or marital status as a criteria for allocating a wide variety of public benefits and burdens. Second, the state, and not individual marriage partners, determined many of the consequences of marital status, particularly the legal and economic relationship between spouses. Third, the law prescribed certain premarital procedures for entering into a valid formal union. Fourth, the law controlled entry into marriage by restricting who could marry whom.

law, in the private law sense of defining the rights and obligations of members of a family, forms an important part of the legal architecture of nation-building in at least three ways. First, access to the resources of the nation-state devolves through biologically and culturally gendered national boundaries, both reflecting and reinforcing the differential status of men and women in the sphere of the family. Second, the social institution of the family and the legal framework that defines it embody power relations that, in turn, help to shape the larger polity. Hence, laws governing marriage, divorce, marital property, maintenance, child custody, child support, cohabitation, inheritance, and illegitimacy define not only power and status within families, but also within civil society, the market, and the political sphere. Third, the symbolic family, and sometimes the law defining it, may figure in important ways in the struggle for national identity that often takes place contemporaneously with nation-building.

In Part II of this Essay, we explore the first claim, that national boundaries are gendered through the use of family relationships to control access to citizenship and thus to the resources and the protection of the state. We suggest that the use of kinship ties in an explicitly gendered way in the United States reinforces a concept of ethnic nationalism, casting women, and especially mothers, as the symbolic protectors of national identity. In Part III, we analyze ways in which family structure is defined by and reinforces hierarchy within the larger society. Following an exploration of theoretical arguments concerning the interplay of family and social hierarchy, we offer as an example of this dynamic the historical manipulation of African customary law by colonial powers. Finally, in Part IV, we argue that the ideology of the family often figures in important ways in the development of national identity in post-colonial or post-crisis states. We then discuss the example of South Africa and show how family law can serve as a site for the intersection of nationalist politics and the legal architecture of the nation-building process, here again in ways that are highly gendered.

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In each of these four areas, the state has ceded some of its traditional authority, in favor of increased private ordering of behavior. Most strikingly, the sharp legal line between marriage and nonmarriage has become increasingly blurred, as the state has extended to nonmarried persons many of the benefits that it traditionally reserved for married couples. At the same time, the law has accorded individual spouses a substantial degree of authority to define the terms of their relationship and has ceased to view marriage as a critical determinant of an individual's legal status. The law governing the marriage process also reflects an increased role for private ordering. Although the state still regulates entry into marriage, parties contemplating matrimony today have considerably more choice about who they will marry and what premarital procedures they will follow than did their counterparts a generation ago.

*Id.* at 1446-47; see also Tracy Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHL-KENT L. REV. 847, 850-51 (2000); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 164-65 (1994) (“[A]t least a good deal of the time, in the name of guaranteeing constitutional protection of individual freedom, [the Constitution] also aggressively *protects* the very hierarchies of wealth, status, race, sexual preference, and gender that facilitate those practices of subordination.” (emphasis added)); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991) (“[T]he law’s privacy is a sphere of sanctified isolation, impunity, and unaccountability”). For a discussion of the decline of the public/private distinction, see Michaels & Jansen, *supra* note 1.

## II. THE NUCLEAR FAMILY AND THE NATIONAL FAMILY

The most obvious connection between family law and the nation is the traditional relationship between membership in a particular family and membership in the national family.<sup>3</sup> In most states, individuals may claim citizenship based on a family relationship to another citizen.<sup>4</sup> The ubiquity of the rule makes it appear unremarkable, but it is worth asking why this should be the case. If the family is viewed functionally as a collection of individuals with presumptively long-term commitments to each other and a shared desire to function as an emotional and economic unit, the interest of the state in permitting the acquisition of citizenship by family members seems reasonably clear.<sup>5</sup> The difficulty arises in defining the precise nature of the family relationship in a way that is related to the purpose of regulating the acquisition of citizenship. Marriage offers the most obvious proxy for the above-described relationship. If a citizen and a noncitizen express their intent to establish a family unit through marriage, the interests of the state are presumably served by easing the path to citizenship (or at least regularized status) of the noncitizen.<sup>6</sup>

The connection between consanguinity and the state's interest in regulating the acquisition of citizenship is substantially less clear. The state has an interest in conferring citizenship on the offspring of citizen parents in an automatic and unproblematic fashion, particularly if those parents are residing within the state at the time the children are born. Such children will almost certainly have a political, social, and economic attachment to the state that grounds citizenship in the most fundamental way. Yet, consanguinity alone does not ensure such an attachment, particularly when the children are born abroad. Moreover, consanguinity is neither necessary nor sufficient to establish that a family relationship exists in the sense described above.

The relationship between law and kinship that defines citizenship is further complicated by gender. Traditionally, for example, married women automatically

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3. See Kathleen Canning & Sonya O. Rose, *Gender, Citizenship and Subjectivity: Some Historical and Theoretical Considerations*, 13 *GENDER & HIST.* 427 (2001).

One of the most porous concepts in contemporary academic parlance, citizenship can be understood as a political status assigned to individuals by states, as a relation of belonging to specific communities, or as a set of social practices that define the relationships between peoples and states and among peoples within communities.

*Id.* at 427.

4. This is largely true, although with notable differentiations or exceptions by country. Women's ability to pass their citizenship to children is not universal—some are unable to ever convey it or to convey it after marrying non-nationals while others are required to be physically present in the country for the birth, and many face further obstacles when their children are born out of wedlock. Some women may not pass their citizenship to non-national spouses, and in some cases, the women lose their own citizenship.

5. The state's initial project and continual goal is the creation of a unitary bond which transcends race, religion, ethnicity or cultural difference, as the "essence of a civic state lies in a common denominator, that is, a common identity shared by all diverse ethnic or cultural groups. This common denominator is citizenship." FELIKS GROSS, *CITIZENSHIP AND ETHNICITY: THE GROWTH AND DEVELOPMENT OF A DEMOCRATIC MULTIETHNIC INSTITUTION* 13 (1999). When this meaning "has a more universal quality than ethnicity, race, or religion" citizenship becomes "an articulation of an inclusive political association and common culture that unites all inhabitants." *Id.*

6. Yet, marriage as a proxy is both under- and over-inclusive. It excludes individuals who have a comparably committed relationship and yet either chose not to marry or are prevented from doing so; and it includes individuals who, although married, do not have the intent to create a family unit.

acquired the citizenship of their husbands, and unmarried women were incapable of conferring citizenship on their children.<sup>7</sup> Both legal rules reflected the notion that women did not enjoy citizenship equally with men.<sup>8</sup> Although most modern states now formally recognize equal citizenship for women and men, allowing married women to retain their citizenship and unmarried women to confer theirs on their children, gender differences persist with respect to the ease with which this can be done.<sup>9</sup>

7. Beroë Bicknell, *The Nationality of Married Women*, in 20 TRANSACTIONS OF THE GROTIUS SOCIETY 106 (British Inst. of Int'l & Comparative Law, 1962). Bicknell noted that:

Before the [First World War], in the majority of States, a married woman's nationality depended on that of her husband. On marriage with a foreigner she lost her own nationality and acquired his, and during the subsistence of the marriage she could not of her own volition change her nationality, but if he changed his hers changed also. While this principle was not universally accepted, it was not generally questioned.

*Id.* at 106. Bicknell further discussed the changing attitudes that prevailed following the First World War: Since the War a very considerable number of countries have changed their law on this matter, either by an almost entire reversal of principle, as in the case of the United States, so that marriage of itself does not directly change a woman's nationality, or, alternatively, and more generally, by the introduction of exceptions to the general rule.

*Id.* at 107. After discussing the complexity and wide variety of laws on the subject, enacted by over seventy-two countries, Bicknell concludes,

The number of countries which have now made provision enabling their own women to retain their nationality is considerable. This has been done either by providing that marriage shall not alter the woman's nationality unless she makes a declaration to that effect; or, alternatively, while leaving intact the principle that marriage alters nationality, by providing that a woman may by declaration made within a limited period retain her nationality of origin.

*Id.* at 118.

8. Nira Yuval-Davis, *The Citizenship Debate: Women, Ethnic Processes and the State*, 39 FEMINIST REV. 59 (1991) [hereinafter Yuval-Davis, *The Citizenship Debate*]. Yuval-Davis writes:

As Floya Anthias and I argued: "We can specify the state in terms of a body of institutions which are centrally organized around the intentionality of control with a given apparatus of enforcement at its command and basis." The state, however, cannot be understood as a neutral universalistic institution. It has its own history and its own material and ideological origins and effects. Feminist critiques have highlighted the sexist bias inherent in this construction. Carol Pateman, for instance, has shown how the whole social philosophy which was at the base of the rise of the notion of state citizenship, far from being universalistic, was constructed in terms of the "Rights of Man." Ursula Vogel has shown that women were not simply latecomers to citizenship rights, as in [T.H.] Marshall's evolutionary model. Their exclusion was part and parcel of the construction of the entitlement of men to democratic participation which conferred citizen status not upon individuals as such, but upon men in their capacity as members and representatives of a family (i.e., a group of non-citizens). Unlike in Marshall's scheme where political rights followed civil rights, married women have still not been given full civil and legal rights. . . .

The construction by the state of relationships in the private domain, i.e., marriage and the family, is what has determined women's status as citizens within the public domain.

*Id.* at 63-64 (citations omitted); see also Nira Yuval-Davis, *Women, Citizenship, and Difference*, 57 FEMINIST REV. 4, 12 (1997) [hereinafter Yuval-Davis, *Women, Citizenship, and Difference*] ("Indeed, in Britain women lost their citizenship during Victorian times, when they got married; they continued to lose it if they got married to 'foreigners' until 1948, and it was not until 1981 that they got the independent right to transfer their citizenship to their children." (citations omitted)).

9. Claiming Equal Citizenship: The Campaign for Arab Women's Right to Nationality, available at <http://www.learningpartnership.org/citizenship/about/>.

For example, in the United States, different standards apply to the acquisition of citizenship by children born abroad to American citizens, depending on whether the U.S. citizen is the mother or the father of the child. If the parents of the child are married, the child will be considered a citizen if the citizen parent had lived in the United States for a total of five years, at least two of which were after the parent turned fourteen years of age.<sup>10</sup> The applicable statute imposes no additional proof other than, implicitly, that the parents are legally married and that the child is legally theirs.<sup>11</sup> The residency requirement presumably functions to ensure that the citizen parent has sufficient attachment to the United States to convey the values of U.S. citizenship on his or her offspring.<sup>12</sup> According to the statute, whatever the actual relationship

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Women's right to equal citizenship is guaranteed by the majority of Arab constitutions, as well as by international law. Yet across the Middle East and North Africa (MENA) region and the Gulf, women are denied their right to nationality—a crucial component of citizenship. In almost every country in the MENA and Gulf regions, women who marry men of other nationalities cannot confer their original nationality to their husbands or children. Only fathers, not mothers, can confer their nationality to their children. Discriminatory laws denying women equal nationality rights undermine women's status as equal citizens in their home countries. Such laws send the message that women do not enjoy a direct relationship with the state, but must access their citizenship rights through mediation of a male family member, such as a father or a husband . . . . The denial of women's nationality rights also created real suffering for dual nationality families living in the woman's home country. Children and spouses are treated as foreigners and must obtain costly residence permits. Children are often excluded from social services such as social security, healthcare and subsidized or free access to education. In many countries, spouses and children have limited employment opportunities and are unable to own property.

*Id.*; see also Interview by Anna Workman with Lina Abou-Habib, Director of Collective for Research and Training on Development-Action (CRTD-A) (Mar. 4, 2006), available at <http://www.learningpartnership.org/en/advocacy/campaign/labhinterview>. Ms. Abou-Habib asserts that

[t]he regional aspect of the campaign undermines the arguments against granting nationality to women at the national level. It demonstrates that the real issue is patriarchy and a male vision of citizenship, rather than all the silly political arguments that are made when we demand women's right to nationality . . . . [H]owever, we have seen that in countries where the law has been reformed to some extent, like in Egypt, the problem hasn't been resolved yet because changing the law is just the first step. We have seen that reform of the law could either be partial, poorly interpreted, or selectively implemented . . . . In Egypt the law has changed, allowing women to pass on their nationality to their children only, not their spouses . . . . In Algeria, the law has been changed in a much more progressive way, allowing women to pass on their nationality to their children and spouses and we're using our learning from the monitoring in Egypt to do the same kind of monitoring in Algeria.

*Id.*

10. 8 U.S.C. § 1401(g) (2000).

11. *See id.*

12. *See* Miller v. Albright, 523 U.S. 420, 468-69 (1998) (Ginsberg, J., dissenting). In her dissent, Justice Ginsberg noted Congress's view on residency requirements vis-a-vis children:

It bears emphasis, too, that in 1934, when Congress allowed United States citizen mothers to transmit their citizenship to their foreign-born children, Congress simultaneously and for the first time required that such children (unless both parents were citizens) fulfill a residence requirement: "[T]he right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday." Commentary underscores what the text conveys. Congress largely relied on a residence requirement, not the sex of the child's citizen parent, to assure an abiding affiliation with the United States.

*Id.* (quoting Act of May 24, 1934, ch. 344, §1, 48 Stat. 797, 797).

between the parents, the legal relationship of marriage suffices to satisfy the state's interest in a real or potential relationship of the child to the United States, once the residency requirement of the citizen parent is met. Neither a blood relationship nor an actual relationship between the citizen parent and child need be proven. Rather, it is assumed by virtue of the marital tie between the parents.

The requirements for establishing the citizenship of a child born to unmarried parents, one of whom is a U.S. citizen, are different and gender-specific.<sup>13</sup> If the citizen parent is the father, the statute requires that a blood relationship between the person and the father be established by clear and convincing evidence;<sup>14</sup> that the father was a U.S. citizen at the time the child was born;<sup>15</sup> and that the father agree to provide financial support for the child until he or she reaches the age of eighteen.<sup>16</sup> In addition, before the child reaches the age of eighteen, the statute requires that he or she be "legitimated" under the law of his or her residence, that the father acknowledge paternity under oath, or that paternity is established by adjudication of a competent court.<sup>17</sup> In contrast, if the citizen is the mother of the child, the child will be deemed to have acquired U.S. citizenship at birth if the mother was a citizen at that time and had lived continuously in the United States for a period of one year.<sup>18</sup>

In *Nguyen v. I.N.S.*,<sup>19</sup> a controversial 2001 decision, the United States Supreme Court rejected a challenge to the differential treatment of unmarried citizen parents under the Equal Protection Clause of the Fourteenth Amendment.<sup>20</sup> For the purposes of this Essay, the equal protection implications of the statute are less important than the meaning it conveys with respect to gender and citizenship. On one view, the statute can be understood as discriminating against citizen fathers, erecting significant hurdles to conveying citizenship to their offspring if they are not married to the mother of the child.<sup>21</sup> In the case of the citizen father, he must establish that a blood tie exists with the child (something presumed if he is married to the mother), that he agrees to support the child financially (again presumed or at least not required in the case of married parents), and that legal paternity was established before the child reached the age of eighteen.<sup>22</sup> In contrast, in the case of the citizen-mother, the blood and social relationship between the citizen and the child is established by the fact of childbirth. Citizenship for the child is automatic. Nothing more is required of the citizen mother. The passing of citizenship from mother to child tracks the natural course of childbirth rather than the legal path marked out by the statute for the citizen father.

Why the difference? In upholding the statute against an equal protection challenge, the Supreme Court accepted the rationale that the woman's role in childbirth means greater certainty regarding the biological relationship between the mother and the child, thereby justifying the requirement of the establishment of paternity but not

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13. See 8 U.S.C. § 1409(a), (c) (2000).

14. *Id.* § 1409(a)(1).

15. *Id.* § 1409(a)(2).

16. *Id.* § 1409(a)(3).

17. *Id.* § 1409(a)(4)(A)-(C).

18. *Id.* § 1409(c).

19. 533 U.S. 53 (2001).

20. *Id.* at 58-59.

21. This was the litigation posture of the parties in *Nguyen*. *Id.* at 57-59.

22. 8 U.S.C. § 1409(a).



maternity as a prerequisite of citizenship.<sup>23</sup> Yet, even accepting that greater uncertainty attends the paternity of the child, the biological difference does not, in an obvious way, justify the additional requirements placed on the child of a citizen father, including a commitment of financial support by the father and the establishment of paternity before the age of eighteen.<sup>24</sup> The Court's rationale was that requiring the establishment of paternity or the legitimation of the child prior to the age of eighteen served the important state interest of ensuring that the citizen father had at least the opportunity to establish a parenting relationship with the child, an opportunity that the mother would automatically have by virtue of being present at the birth of the child.<sup>25</sup> Of course, so long as the other requirements are met, the statute does not require proof of an *actual* parenting relationship.<sup>26</sup> As the dissenters pointed out in *Nguyen*, the connection between the opportunity to establish such a relationship (as opposed to the fact of such relationship) does not seem to bear much relationship to the state's interest in defining who falls within the family of citizens.<sup>27</sup>

How, then, can the statutory scheme be explained? One possibility is that it embraces the traditional view that motherhood is biological and that fatherhood is created, an act of will.<sup>28</sup> The mother is assumed to have and to maintain a connection

23. *Nguyen*, 533 U.S. at 62. Even granting the biological differences between mothers and fathers, as one commentator has observed, the mother's relationship is only certain at the moment of birth and to those witnessing it. Laura Oren, *Honor Thy Mother?: The Supreme Court's Jurisprudence of Motherhood*, 17 HASTINGS WOMEN'S L.J. 187, 197 (2006).

24. 8 U.S.C. § 1409(a).

25. *Nguyen*, 533 U.S. at 65 (finding that Congress recognized that the "opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship.")

26. Oren argues that

[b]y reducing parentage to the opportunity to be present at birth, the Court denies respect to a man who was a true father to his son, but it also limits the sphere of motherhood as well (to mere presence at birth). . . . The dissent's second criticism is even more persuasive: How can the mere "opportunity" to develop a parent-child relationship be more important than the reality?

Oren, *supra* note 23, at 197.

27. *See id.* at 197-98.

Even if opportunity counts, Congress could choose a sex-neutral alternative that required that a parent be present at birth or have knowledge of the birth. Instead, it adopted a rule that only crudely fit the means to the purported ends, something that may be acceptable in ordinary constitutional review, but which is banned when a classification meriting heightened scrutiny, such as gender, is at issue. Stereotypes, not physical differences between men and women, underlay the statute and therefore the dissent would find it invalid. The dissenting Justices were unconvinced that the sex-based difference in the law "substantially relate[d] to the achievement of the goal of a 'real, practical relationship'" between citizen parent and child. Instead, they saw a stereotype in action—"the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children."

*Id.* (citations omitted).

28. *See id.* at 197-98. Oren noted that the stereotype identified by the dissenters in *Nguyen*—that mothers are more likely to develop intimate relationships with their children, "brings us back to the heart of the debate over unmarried motherhood versus unwed fatherhood: are mothers parents in the 'biological and in the spiritual sense,' while fathers who do not marry the mothers or timely legitimate their children are different?" *Id.* (citations omitted); Oren discussed an earlier application of this generalization:

with her biological offspring, one that the law may presume and that the terms of citizenship may properly reinforce. The child of the citizen mother is automatically considered a citizen upon birth, whether or not the mother pursues a parenting relationship with the child.<sup>29</sup> Indeed, the mother need not show any willingness or capacity to provide financial support, though she might have a legal obligation to do so. The citizen father, in contrast, has substantially more control over his child's access to citizenship. He may deny paternity and/or refuse financial support. Although paternity might be legally adjudicated without his cooperation, the adjudicating court must have some basis to exercise jurisdiction over him, making such adjudication unlikely, if not impossible.

In short, motherhood naturally follows from biological parenthood and childbirth. Fatherhood does not. Citizenship, in turn, flows naturally from maternity but not paternity. Citizen fathers maintain the option of excluding their offspring from the family of citizens, citizen mothers do not. Note also that, in contrast to citizen fathers who face greater obstacles to passing citizenship to their children when *not* married to the child's mother, citizen mothers face fewer obstacles.<sup>30</sup> Specifically, the residency requirement for citizen mothers is reduced from five years if they are married to a noncitizen to one year if they are not married to the father of the child.<sup>31</sup> By marrying a non-citizen then, the mother reduces the ease with which she may pass citizenship, perhaps reflecting a notion that women's citizenship follows that of her husband.<sup>32</sup>

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In *Caban v. Mohammed*, the majority was impressed with the quality of Mr. Caban's relationship to his older non-marital children: his name was on their birth certificates; he had lived with them; and he continued to visit and contribute to their support even after his separation from their mother and the marriages each parent contracted with someone else. Having "come forward to participate in the rearing of his child" in this fashion, Mr. Caban earned the perquisites of true fatherhood and could block adoption by another man.

*Id.* at 194 (citing *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)).

29. *See id.* at 195-96.

Children born abroad to an unmarried American citizen mother (and alien father) were eligible for United States citizenship upon simple proof of the biological relationship, without much more. Reverse the circumstances, however, and the children of unmarried American men faced substantially greater obstacles to derivative citizenship. In this case, the majority equated biology to destiny for both mothers and fathers. Congress was allowed to differentiate based on the "incontrovertible" fact that mothers and fathers are not similarly situated. While the majority held that a woman who gives birth to a child is clearly her biological mother, they ruled that even in this day of DNA testing, the proof of paternity is less secure.

*Id.* (citations omitted).

30. 8 U.S.C. § 1409(c) (2000). A child is held to have the mother's nationality if the mother is a citizen of the United States at the time of the birth and has "previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." *Id.*

31. Under § 1409(c) the mother of a child born out of wedlock must have been present one year whereas under § 1401(g) her marriage to a non-national brings her requirement of physical presence up to no less than five years. Technically the one year requirement seems to apply to mothers who are married though not to the father of the child whose citizenship is at issue.

32. For an early twentieth century reflection on women's citizenship following that of her husband, see J. S. Reeves, *Nationality of Married Women*, 17 AM. J. OF INT'L L. 97 (1923). Reeves writes:

The idea that a married woman assumes the nationality of her husband has been traced back to the Code of Justinian and finds justification in the *Siete Partidas*. The modern foundation for the rule is in Article 12 of the Code Napoleon: "The alien woman who marries a

The statute can perhaps be explained most easily as a means of affording fathers control over their relationships with their non-marital children. Put more starkly, the statute excludes the children of soldiers and sex tourists who may prefer not to be confronted with the inconvenient reality of offspring of which they were unaware. The statute also clearly allows fathers significantly greater power than mothers to define the contours of their individual families and, in turn, the national family. On a more symbolic level, the statute's gender distinction loosely tracks a distinction between ethnic and civic nationalism. The former premises national identity on a backward-looking, pre-political connection rooted in blood ties, the latter on a forward-looking, modern, legal conception of equal political citizenship.<sup>33</sup> By emphasizing women's

Frenchman follows the condition of her husband." This provision of the Code Napoleon was copied in the legislation of many states, particularly of Latin America. It being shown that the municipal law of France could not operate to give foreign nationality to a French woman married to an alien but could only operate in so far as to deprive her of French nationality, the Code Napoleon was changed in 1889 adding a provision to this effect: "The French woman married to an alien preserves her French nationality if the law of her husband does not confer upon her his nationality." This provision had been anticipated or was followed by the following countries: Portugal, Italy, Switzerland, Bulgaria, China, and in Latin America probably by Costa Rica, Mexico, and Nicaragua.

A few countries show the influence of domicile but the majority provide an automatic expatriation of the woman national marrying an alien: Germany, Austria, Belgium, Denmark, Spain, Finland, Greece, Hungary, Japan, Liechtenstein, Luxemburg, The Netherlands, Russia (at least prior to 1918), and in Latin America it would appear that the same rule was followed without any condition in Brazil, Bolivia, Cuba, the Dominican Republic, Guatemala, Haiti, Honduras, Peru, and Venezuela. The British law of 1914 appears likewise to be unconditional and automatic.

The repeal of the section of the United States Statutes by which an alien woman eligible to naturalization acquired American citizenship by marrying an American citizen likewise comes in conflict with the legislation of practically all countries. It would appear that so far as legislation goes Ecuador and Salvador alone provide that the wife preserves her original nationality; Chile, Colombia, Panama, and Paraguay having no express laws upon the subject, and the law of Argentina as to loss and gain of a woman's nationality by marriage being a matter of dispute.

*Id.* at 98-99.

33. Mrinalini Sinha, *Nations in an Imperial Crucible*, in *GENDER AND EMPIRE* 181, 187 (Philippa Levine ed., 2004).

The discourses of the nation in turn have been vehicles for the consolidation of dichotomized notions of "men" and "women" and of "masculinity" and "femininity." This is the sense in which ideas about gender and the nation have been seen as symbiotic: national narratives rely heavily on the supposedly natural logic of gender differences to consolidate new political identities around the nation; yet the discourse of nationalism itself provides legitimacy to normative constructions of masculinity and femininity. The implications of this scholarship may be seen in three broad areas of inquiry: (1) the construction of nations through gender differences; (2) the impact of gendered modes of belonging on "men" and "women"; and (3) the complex relationship between feminisms and nationalisms.

*Id.*; see also Yuval-Davis, *Women, Citizenship and Difference*, *supra* note 8, at 4-6.

The interest in citizenship is not just in the narrow formalistic meaning of having the right to carry a specific passport. It addresses an overall concept encapsulating the relationship between the individual, state and society.

biological and men's legal tie to children, the scheme thus reinforces the role of women, especially mothers, as the source and guardians of ethnic rather than civic nationalism.<sup>34</sup> We will have more to say about the gender implications of this distinction in Part IV.

### III. FAMILY AS FOUNDATION

A second way in which family law might be regarded as part of the legal architecture of nation-building concerns the relationship between family structure and the overarching social structure of the nation-state. Put differently, it concerns the ways, both overt and subtle, in which the private sphere and the public sphere define each other.<sup>35</sup> Two points are worth making in this connection. First, although often

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[A] comparative study of citizenship should consider the issue of women's citizenship not only by contrast to that of men, but also in relation to women's affiliation to dominant or subordinate groups, their ethnicity, origin, and urban or rural residence. It should also take into consideration global and transnational positionings of these citizenships. . . . [T]he notion of citizenship cannot encapsulate adequately all the dimensions of control and negotiations which take place in different areas of social life, nor can it adequately address the ways the state itself forms its political project. Studying citizenship, however, can throw light on some of the major issues which are involved in the complex relationships between individuals, collectivities and the state, and the ways gender relations (as well as other social divisions) affect and are affected by them.

*Id.* (citation omitted).

34. See Anne McClintock, *Family Feuds: Gender, Nationalism and the Family*, 44 FEMINIST REV. 61, 66 (1993).

Women are represented as the atavistic and authentic "body" of national tradition (inert, backward-looking, and natural), embodying nationalism's conservative principle of continuity. Men, by contrast, represent the progressive agent of national modernity (forward-thrusting, potent and historic), embodying nationalism's progressive, or revolutionary principle of discontinuity. Nationalism's anomalous relation to time is thus managed as a natural relation to gender.

*Id.*

35. In their introduction to a volume devoted to a historical study on the connection between gender and citizenship, Kathleen Canning and Sonya O. Rose write:

The articles collected here examine how race, ethnicity, gender, and marital status combine to shape the rhetorics and practices of citizenship in different time periods and locations. Collectively these studies demonstrate the critical but ironic place of the public/private divide in the histories of gender and citizenship. The so-called public/private dichotomy remains significant as women, often viewed as symbiotically attached to domesticity and outside the public realm, have acted to secure a variety of competencies and immunities, thereby placing the domestic, including biological reproduction, at the centre of numerous, recurring public debates. . . . The notion of citizenship as a subjectivity has made clear the arbitrariness of any imagined line distinguishing public and private.

Canning & Rose, *supra* note 3, at 440-41 (citations omitted). Citizenship is both "a prescribed (legal) status" and "a set of social practices," in which "gendered and racialised historical subjects have taken up the discourses of citizenship to make claims about rights, belonging, participation and recognition and, in the process, have also transformed subjectivities." *Id.* at 441; see also Karyn Stapleton & John Wilson, *Gender, Nationality, and Identity: A Discursive Study*, 11 EUR. J. OF WOMEN'S STUD. 45 (2004). As Stapleton and Wilson observe,

Both individual and collective identities are located within a range of overlapping contexts and sociocultural categories, e.g. gender, class, race, nationality, age, and ethnicity. . . . Any expression of identity, then, involves the negotiation of an existing set of culturally defined

understood as natural or pre-political, the family is a legal construct, not a preexisting entity which the law regulates in some respects and fails to regulate in others. Second, hierarchy within the family both reflects and reinforces hierarchy within the larger society. If both of these claims are true, family law will have much broader implications for the social structure of the nation-state than may be initially apparent.

This Part first briefly sketches the ways that feminist legal and political theorists have articulated a mutually reinforcing relationship between hierarchy within the family on one hand, and hierarchy within the public sphere on the other. It suggests that family law can thus be understood as the site of political/legal intersection between these domains. It then explores the interplay of family structures, law, and political power in colonial Africa as an example of the interconnectedness of gender hierarchy across the public/private divide.

#### A. *The Myth of the Natural Family*

The family comprises the fundamental principle of social organization in all societies, across a wide range of culture and political forms.<sup>36</sup> Although regulated—indeed defined—by law, the family is also widely understood as natural or pre-political. Family bonds are seen first as biological or emotional, not legal. The law

labels, concepts, and discursive positionings, thereby generating variable and contextualized constructions of the categories in question. . . . Moreover, identity categories within this context are interdependent and mutually constraining, such that they cannot be fully understood in isolation from one another. My national identity is shaped by my gendered location within the national context; while my gender identity is at least partly defined by national and cultural conceptions of masculinity/femininity. Of course, gender and nationality are imbricated within a complex of other categories, such as race, ethnicity, class, political and religious beliefs, all of which converge to produce specific forms of identity and subjectivity.

*Id.* at 46-48 (citations omitted).

36. See McClintock, *supra* note 34, at 63-65.

A paradox lies at the heart of most national narratives. Nations are frequently figured through the iconography of familial and domestic space. The term “nation” derives from “natio:” to be born. We speak of nations as “motherlands” and “fatherlands.” Foreigners “adopt” countries that are not their native homes, and are “naturalized” into the national family. We talk of the Family of Nations, of “homelands” and “native” lands. . . . [N]ations are symbolically figured as *domestic genealogies*. Yet, at the same time, since the mid nineteenth century in the West, “the family” itself has been figured as the antithesis of history.

The family trope is important in at least two ways. First, the family offers a “natural” figure for sanctioning social *hierarchy* within a putative organic *unity* of interests. Second, it offers a “natural” trope for figuring historical *time*. . . . Yet a curious paradox emerges. The family as a metaphor offered a single genesis narrative for national history, while, at the same time, the family as an *institution* became voided of history. As the nineteenth century drew on, the family as an institution was figured as existing, by natural decree, beyond the commodity market, beyond politics, and beyond history proper. The family thus became, at one and the same time, both the organizing figure for national *history*, as well as its *anti-thesis*. . . . The evolutionary family thus captured, in one potent trope, the idea of *social discontinuity* (hierarchy through space) and *temporal discontinuity* (hierarchy across time) as a natural, organic continuity. The idea of the Family of Man became invaluable in its capacity to give state and imperial intervention the alibi of nature.

*Id.* (citations omitted).

is understood as ratifying and regulating, perhaps protecting, those pre-existing relationships. Indeed, the reliance on family ties as a marker of citizenship eligibility, as discussed above, reflects, and in some sense depends upon, this notion of family as pre-existing the nation-state. If it were not so regarded, the concept of family could not provide an independent justification for the boundary of the national family.<sup>37</sup> Similarly, the concept of the natural family informs the relationship between family and nationalism discussed below, providing a pre-political connection from which national identity can be drawn and bounded.<sup>38</sup>

Feminist theorists have challenged the myth of the natural family, arguing instead that the putatively “unregulated” sphere of the family is profoundly regulated—even constituted by—the state through law and other economic, administrative, and political institutions of state power.<sup>39</sup> This regulation is apparent both through direct state intervention and regulation as well as the refusal to regulate or intervene.<sup>40</sup> In some contexts, power of men over women in the home is explicitly authorized by the law of marriage.<sup>41</sup> In other contexts, it may be a product of property law that reinforces men’s economic power over women.<sup>42</sup> It may also derive in part from legal or social norms

37. See *supra* Part II.

38. See *infra* Part III.B-C.

39. See generally Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985) [hereinafter Olsen, *Myth of State Intervention*].

40. See Olsen, *Myth of State Intervention*, *supra* note 39.

41. See Elizabeth Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000). Scott writes that

[t]raditional law reinforced and prescribed both gender norms and commitment norms in marriage. Gender norms prescribed hierarchical and differentiated roles for husbands and wives, while commitment norms defined marriage as a cooperative relationship of lifelong obligation. The law also privileged marriage and stigmatized other intimate relationships. This duality reinforced the elevated social status of marriage.

*Id.* at 1904.

42. Pamela Symes, *Property, Power and Dependence: Critical Family Law*, 14 J.L. SOC’Y 199, 200-01 (1987).

The perceived link between property and power scarcely needs expansion here. Renner described it thus: “power over matter begets personal power.” But we know, too, that ideas concerning the nature of property and property rights are constantly undergoing change and are not confined to crude notions of ownership of “things” or “matter.” Perceptions of property alter with time and with changes in social conditions and are themselves, of course, a political expression. . . . The absence of property leads to dependence and therefore any analysis of property can, by extension, reveal as much about dependence as it does about power. Both are aspects of the same picture, a picture which shows the unequal distribution of that which is valued in any society and obviously can be analysed according to groups or class, stages in the life-cycle, or, for our purpose, according to the distribution between family members.

*Id.* at 200. Rather than “power over matter,” increasingly property has come to be viewed as a right of access, or a right to exercise choice, rather than a right of exclusion, which has been analyzed “in terms of a political power relation, providing access to the valued goods of life . . . [as] ‘political power then becomes the most important kind of property . . . [which] as an individual right, becomes essentially the individual’s share in political power.’” *Id.* at 201 (quoting C.B. MacPherson, *Capitalism and the Changing Concept of Property* in FEUDALISM, CAPITALISM AND BEYOND 120 (Eugene Kameka & R.S. Neale eds., 1975)).

of family privacy that limit state intervention in the private sphere.<sup>43</sup> In any case, direct legal regulation (or failure to regulate) reinforces gender hierarchy within the family to a greater or lesser degree across all states. The fiction of the *unregulated* private sphere of family functions reinforces the status quo level of regulation by characterizing the existing power structure within the nuclear family as a reflection of a pre-political social order.<sup>44</sup>

The family everywhere is also profoundly hierarchical, with parents exercising virtually unchecked power over children in many states, and men (whether fathers or husbands) exercising considerable power over women.<sup>45</sup> The myth of the natural, or naturally hierarchical, family normalizes power relations within the family by treating them either as a product of natural social organization, or perhaps as divinely ordained.<sup>46</sup> The ideology of the liberal state exacerbates this problem by regarding

43. See Scott, *supra* note 41, at 1903-04.

Regulation of family relationships is the domain of social norms and not of formal legal enforcement. Thus, the argument goes, the law does not (and perhaps should not) regulate behavior in intimate relationships. This response has some truth, but ultimately it is unsatisfactory. Legal regulation of family obligations is both accepted and effective in some contexts. For example, although parental responsibilities in intact families are generally regulated by informal social norms, the law prescribes minimal parental duties and intervenes readily when parents deviate from accepted norms. Further, legal reforms designed to reinforce desirable social norms of parental obligation, such as the recent child support enforcement legislation, have been at least somewhat effective and relatively uncontroversial. So it would seem that sometimes the law functions usefully as a “norm manage[r],” reinforcing norms of family obligation, and that at other times norm management efforts meet resistance and are ineffective (as many people predict will be the fate of the covenant marriage laws).

Marriage is thus a particularly fertile environment in which to explore the influence of law on norms, a subject attracting much interest in the legal literature. Legal scholars have tended to analyze the state’s role in shaping norms in terms of isolated rules directed at discrete social problems such as littering or smoking in public places. In the domain of marriage, however, law and social norms have been intricately interwoven to form a complex scheme of social regulation.

*Id.* (citations omitted). But see Yuval-Davis, *The Citizenship Debate*, *supra* note 8. Yuval-Davis argues:

The differentiation between the public and private domain plays a central role in delineating boundaries of citizenship in the literature. . . . It is the state and the public arena which structures and determines the boundaries of the private domain—it is not pre-given. . . . This does not mean that the state is unitary in its practices, its intentions or its effects . . . it is important to retain the concept of the state, in order to be able to retain an adequate political analysis of the power relations involved.

*Id.* at 63.

44. See Scott, *supra* note 41, at 1903-04.

45. See McClintock, *supra* note 34, at 64.

[The first trope was that of the family offering] an indispensable figure for sanctioning social *hierarchy* within a putative *organic unity* of interests. Since the subordination of woman to man, and child to adult, was deemed a natural fact, other forms of social hierarchy could be depicted in familial terms to guarantee social difference as a category of nature. . . . The metaphoric depiction of social hierarchy as natural and familial—the “national family,” the global “family of nations,” the colony as a “family of black children ruled over by a white father”—thus depended on the prior naturalizing of the social subordination of women and children within the domestic sphere.

*Id.*

46. Wendy Brown identifies this position as central to reconciling the tension between the individual and the family within liberalism: “Only by assuming women’s *natural* subordination, by assuming woman

family structure as a matter of private choice, subject to only limited state regulation. To the extent that it is characterized by unequal power relations, family structure is seen as a product of individual self-determination, and not as implicating guarantees of equal citizenship.<sup>47</sup> Liberalism thus defines the family as private and properly outside the bounds of state regulation, except at the margins.<sup>48</sup>

This stance towards legal regulation of the family has the effect of isolating women and children within the home and rendering them vulnerable to violence at the hands of husbands and fathers.<sup>49</sup> Yet, treating the hierarchical organization of the family as natural or pre-political also naturalizes family hierarchies of age and gender *outside* the home. As Patricia Hill Collins has explained, “the traditional family ideal assumes a male headship that privileges and naturalizes masculinity as a source of authority. Similarly, parental control over dependent children reproduces age and seniority as fundamental principles of social organization.”<sup>50</sup> Insofar as individuals come to understand their location within social hierarchies first from within their own family structure, these power relationships transcend the public/private boundary.<sup>51</sup> And, as Collins further observes, “they learn to view such hierarchies as natural social arrangements, as compared to socially constructed ones.”<sup>52</sup> That these power relations are assumed to emerge naturally within the family renders them less suspect when they recur throughout the social structure. As Anne McClintock has noted, “[t]he family was thus drawn on to figure *hierarchy within unity* as an ‘organic’ element of historical progress, and thereby became indispensable for legitimizing exclusion and hierarchy within non-familial social (affiliative) formations such as nationalism, liberal indivi-

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as supplement to man, can the apparent tension between liberal individualism and liberal familism be reconciled.” WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 149-50 (1995) (emphasis added).

47. See, e.g., John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 788 (1997) (“The principles of political justice are to apply directly to [the basic] structure [of society], but are not to apply directly to the internal life of the many associations within it.”).

48. See, e.g., JEAN BETHKE ELSHTAIN, *PUBLIC MAN PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* (1981). Elshtain suggests that

[b]y failing to come up with a vocabulary rich enough to account for the centrality of the social relationship of the family, even as they “depoliticized” these relationships, thinkers within the liberal tradition adopted a set of assumptions which required the “systematic setting to one side of the fundamental facts of birth, childhood, parenthood, old age, and death.”

*Id.* at 106-07.

49. For over two decades, feminist legal scholars have produced a great deal of excellent work on the causes and consequences of domestic violence. See, e.g., ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* (2000) (exploring some of the challenges of developing effective feminist responses to domestic violence and emphasizing the interrelatedness of women’s rights claims to be free of violence with reproductive rights, employment, child care, and economic and social rights).

50. Patricia Hill Collins, *It’s All in the Family: Intersections of Gender, Races and Nation*, 13 HYPATIA 65 (1998).

51. See McClintock, *supra* note 34, at 63 (“The family offers a natural figure for sanctioning social *hierarchy* within a putative organic *unity* of interests.”).

52. Collins, *supra* note 50, at 64 (“Individuals typically learn their assigned place in hierarchies of race, gender, ethnicity, sexuality, nation, and social class in their families of origin. . . . Hierarchy in this sense becomes ‘naturalized’ because it is associated with seemingly ‘natural’ processes of the family.”).



dualism, and imperialism.”<sup>53</sup> In short, law helps to structure the family as hierarchical; the family, in turn, “naturalizes” this hierarchy and reinforces it as the social baseline.

*B. Family Law, Social Hierarchy, and Public Policy*

One way to illustrate the relationship between the regulation of the family and the structure of power within the nation-state is to examine a context in which the manipulation of family structures through law was designed deliberately to accomplish particular political objectives. Consider, for example, the treatment by the British of family structures in Africa, in particular the differences between settler territories (such as South Africa) and nonsettler territories (such as Ghana). In nonsettler territories, the goal of the British was to enhance the productivity of Africans to fuel the export market.<sup>54</sup> As a result, customary law governing the family developed in a way that would secure land titles (fostering investment in long-term crops such as cocoa and palm oil) and ensuring alienability of land.<sup>55</sup> In settler colonies, the rural areas served as a labor reserve for colonial enterprises such as mining.<sup>56</sup> In these areas, colonial interests were served by reducing the productivity of land held by Africans (either by

53. McClintock, *supra* note 34, at 64.

54. See generally Ann Seidman & Robert Seidman, *The Political Economy of Customary Law in the Former British Territories of Africa*, 28 J. AFR. L. 44 (1984).

55. MARTIN CHANOCK, *LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* 230-32 (1998).

As land came to be seen as a scarce economic resource the control of which could be turned to monetary advantage, competition to use and control it grew. And, in a process which I suggest was to replicate that of the development of the customary law of persons (through a process of the interaction of British institutions and legal ideas with African social and economic needs), the customary law of land tenure began to develop. . . . Rights in people as a resource were becoming less enforceable and negotiable, which meant that rights in property had gradually to be differentiated from rights in person. As control of land, particularly once it could be worked by contract labour, became an important source of wealth, it became the subject of specific rights. . . . As Colson points out there was an analogy also with political authority in that, as it was assumed that people must have chiefs even where they had none, so it was assumed that land must have an owner, even where rights had never been defined. The search for owners created systems of communal tenure “with precisely defined rules.” “The newly created system was described as resting on tradition and presumably derived its legitimacy from immemorial custom. The degree to which it was a reflection of the contemporary situation and the joint creation of colonial officials and African leaders . . . was unlikely to be recognized.”

*Id.* (citing Elizabeth Colson, *The Impact of the Colonial Period on the Definition of Land Rights, in COLONIALISM IN AFRICA* 193, 196-97 (Victor Turner ed., 1971)).

56. See Moitsadi Moeti, *The Origins of Forced Labor in the Witwatersrand*, 47 *PHYLON* 276 (1986). In South Africa, for example,

[t]he origins of the forced labor system in . . . can be traced back to the opening up of intensive gold mining in [the Witwatersrand] region during the 1880s. For almost a century since then, forced labor in the mining industries of the Witwatersrand has characterized the South African economy. In the early years of the present century, European farmers and companies forced a large number of Africans into wage-earning jobs. By 1910, the Witwatersrand mines had created a forced-labor system which delivered hundreds of thousands of African laborers from the hinterland to the mines. Even today, after many years of rapid economic growth and diversification, forced labor in these mines still persists.

*Id.* at 276.

taking it away or by limiting its alienability), and thereby forcing Africans to engage in wage labor to pay head taxes.<sup>57</sup>

In South Africa, as one leading scholar of customary law observes, “[t]he first consideration was to keep control of the African population.”<sup>58</sup> To this end, and after experimenting with a policy of nonrecognition, the British eventually settled on a policy of co-opting the traditional leaders and empowering them with jurisdiction over civil and criminal disputes to be adjudicated according to customary law. Yet, even this strategic recognition was grudging and always subject to the qualification that the law not be “repugnant to the general principles of humanity observed throughout the civilized world.”<sup>59</sup> This so-called “repugnancy clause” often came into play in the context of family law, specifically with respect to the recognition of potentially polygynous customary marriages and the payment of *lobolo* or “bridewealth.”<sup>60</sup> Although the secular colonial administration might have tolerated such marriages, pressure from religious interests led to sustained periods of nonrecognition of African marriages in many areas.<sup>61</sup>

A second factor that is important to an understanding of the relationship between colonialism and customary law of the family is the impact of economic changes that were taking place.<sup>62</sup> The development of the exchange of goods and labor through the

57. *See id.* Moeti elaborates:

[A] central problem for the Europeans in the Transvaal was how to secure an ever-increasing supply of laborers for the mines who would work at subsistence wages.

Some indirect methods were employed by the Europeans in the Witwatersrand to force the unwilling Africans into mine labor. One such method was the imposition of various taxes on the Africans, payable only in cash. Another method which forced the Africans into mine labor and a cash economy was simply the European-designed rural impoverishment of the African population. It must also be noted that the punitive raids and wars waged by the Europeans against the Africans resulted in the destruction not only of life but also of African farms, gardens, and food supplies. The Europeans brought about the peonage of the Africans in the Transvaal by forcing them on to native locations which were less fertile and much smaller than the lands they had occupied traditionally. A special European commission was appointed to take charge of the delimitation of native locations. . . .

*Id.* at 276-77.

58. T.W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA 38 (2004).

59. *Id.*

60. *Id.* at 220-21 (defining *lobolo* as one of “various terms used to denote a transfer of property, preferably livestock, by a husband (or his guardian) to his wife’s family as part of the process of constituting a marriage,” though qualifying the English translation to “brideprice, bridewealth, childprice, dowry, etc.”).

61. *Id.* at 43.

62. *See id.* at 375.

Herding and agriculture normally occur together with another economic condition vital to the creation of individual property rights: scarcity. When goods are freely available, they have little social or economic importance, and so access and control need no legal protection. When there is competition for resources, however, access must be legally regulated.

*Id.* (citations omitted). Chanock describes the impact of economic changes:

The legal history is a part of the transforming of the societies of Central Africa by colonial capitalism and is comprehensible only as a part of that process. . . . The increasing involvement in markets for agricultural products and for labour and the new subordination to the state which this leads to are clearly at the heart of the transformation of “customary” legal relations in African societies. Thinking about law in terms of legal classifications tends

emerging market economy altered the kinship foundation in a way that shifted power in traditional communities.<sup>63</sup> Before the development of wage labor, elders in the community could control the labor power of younger men by controlling access to family land.<sup>64</sup> The gradual commodification of labor and goods in the emerging cash economy created new opportunities for the exploitation of the labor of young men (and women) while simultaneously increasing the independence of the younger generation from the family and community.<sup>65</sup> The intensification of claims of kinship obligation based on tradition can be understood as a means of challenging this independence and maintaining or restoring traditional power hierarchies.<sup>66</sup> Similarly, younger men,

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to obscure what is involved in this. Lawyers conceptually shrink the major area of “customary law” into a category thought of as the law of the family, which does not adequately encompass what family law was about. The control of reproduction and of work and the appropriation of the surplus were all inextricably tied into what administrators and lawyers innocently conceived of as marriage. The disruptive effects of capitalist relations were also, to a large extent, combated by Africans on this conceptual territory.

CHANOCK, *supra* note 55, at 11-12.

63. See BENNETT, *supra* note 58, at 375.

The great watershed in the formation of a fully-fledged concept of ownership was clearly trade. Before this occurred, property of economic significance attracted many highly specific rights, each of which could vest in a different person. Regular commerce, however, presupposed a situation where every commodity had an exchange value relative to all the others circulating in the market. If the optimum condition of a free market was to be realized, these goods had to be loosened from the specific rights of particular interest holders. Ownership provided the answer. It was a concept applicable to any type of property and it was available to all traders.

One of the distinctive features of ownership is its “absoluteness,” a quality that implies the concentration of all entitlements in one person, who, in consequence, is free to use and dispose of the property at will. The proprietary rights of the pre-trade era can be distinguished from ownership by the fact that the former usually implied a number of specific interests vesting in various different holders, whereas ownership implies a collection of interests vesting in a single holder.

*Id.* (citations omitted).

64. See *id.* at 382 (explaining the power to allot land); see also *id.* at 222 (discussing the control elders had on marriage through *lobolo*).

65. See, e.g., *id.* at 223, 230. For example:

Originally, the social and ritual significance of *lobolo* outweighed its economic value. . . . Indeed, the long-term effect of regularly giving and receiving livestock as *lobolo* was to withdraw livestock from the economy and dedicate them to a closed system of marriage exchanges. All this was to change, however, with the arrival of capitalism. Cattle and other property that had formerly been reserved for transacting marriages, acquired a new value, measurable in cash and imported trade goods. On the one hand, exotic commodities were readily assimilated to the category of marriage goods, and, on the other, *lobolo* cattle could be traded for cash. As its social and ritual functions declined, *lobolo* began to appear more like an ordinary commercial transaction. . . . As family ties have weakened, however, so too has the sense of obligation to contribute towards a kinsman’s *lobolo*. Instead, the tendency has been for payment to become an individual responsibility, a development that has been encouraged by young men becoming economically independent of their families.

*Id.*

66. This may take the form of expecting women to forego their constitutional rights and remain subject to a traditional system, within which their role and rights are highly circumscribed. Similarly, “[a]ctions brought for repayment of contributions toward *lobolo* are not subject to rules of prescription . . . the debt may still be recovered from his estate when he dies.” *Id.* at 230. Further, “[m]en may be sued for *lobolo*

whose ability to sell their labor freed them from economic dependence on family land and cattle, also needed to be able to harness labor power that could be used for commodity production for the market.<sup>67</sup> This economic pressure, in turn, translated into an assertion of tradition with respect to control over the labor of wives and children.<sup>68</sup> As Martin Chanock explains,

[w]here a husband may not have exercised any “rights” to property in the form of food before, and had been obliged to leave control of its use to his wife, he now assumed that money from the sale of food was his alone, and both husbands and their relatives took food to sell. Here the possibility of an outside market was creating a proprietary right which had not existed before.<sup>69</sup>

This account of the interplay between customary law and colonial power illustrates the relationship between family law and family forms, and political and economic control of the state. Family structures and the legal norms that defined and regulated them were understood by the colonizer as a tool of economic and political control

that was borrowed by their grandfathers or even great-grandfathers,” as “[i]n this way, obligations to repay pass from one generation to the next,” which “doubtless contribute to a sense of family solidarity” but “have also been described as ‘ropes which start from the neck of one and go to the neck of the other.’” *Id.* (citations omitted).

67. CHANOCK, *supra* note 55, at 13-14.

It was not only migrant labour which had disruptive consequences. . . . [O]ne alternative strategy in the colonial economy was to grow cash crops for the market and this also involved considerable change and struggle at the level of production. Over most of the area and period with which I deal in this book the availability of land for expanded agricultural production was not a crucial issue, though after the second world war there were signs that it was beginning to become one. The central issue was, therefore, the use and control of labour in the new venture. One of the ways in which the customary law must be understood is as a product of the struggle for control of labour in the changing conditions of the rural economy. The loss of control over the labour of slaves, the potential competition for male labour with the mining sector, and the gradual replacing of kinship obligations by cash payments, all meant that the mobilisation of labour resources for cash-crop farming was taking place in an unfavourable environment (though of course not all these factors were contemporaneously present in all areas).

*Id.*

68. *Id.* at 13. Chanock writes that

[t]he penetration of capitalism relations meant not the creation of classes in an innocent world but the changing of the bases of inequality and power, and the challenging and disturbing of hierarchies. These pre-colonial hierarchies had had their justifications in the ideologies of kinship and custom, and the controls imposed by beliefs in sorcery. Under colonial pressures, these were thrown into prominence as the ideological (and, in the case of customary law, also the practical) lines of defence.

*Id.*

69. *Id.* at 14. The impact of this economic pressure was great:

[S]queezing household labour was in many ways a more convenient strategy than finding scarce and comparatively expensive labour outside of the household. This meant first that the labour of wives became vital: its withdrawal at crucial times . . . could ruin an entire crop. Wives’ work could be secured by an emphasis on marital ties. Secondly it meant that a man striving to become a commercial farmer would be engaged in a struggle to maintain control over the labour of his offspring, and consequently that conflict within marriage was aggravated by quarrels over rights to children and the product of their labour.

*Id.*

insofar as the colonizing power could manipulate the power hierarchy within those structures. Conversely, political manipulation of the family and customary law altered the nature of the underlying relationships, changing power dynamics within the family and, in some sense, the definition of tradition and family obligation. Finally, as modified hierarchical arrangements are normalized within the family, they in turn reinforce social hierarchy in the service of colonial power.

The relationship between family hierarchy and a broader social hierarchy illustrated above is especially important to consider in situations where nation-building is undertaken today.<sup>70</sup> In post-conflict states, pre-existing law governing family structures may offer a superficially appealing source of social stability and continuity. Indeed, this type of informal legal system, including not only substantive norms but also traditional procedures and forums for adjudication, may be the only surviving legal structure in the context of a failed state.<sup>71</sup> Yet, the sources of such law, often

70. SHIRIN M. RAI, *GENDER AND THE POLITICAL ECONOMY OF DEVELOPMENT: FROM NATIONALISM TO GLOBALIZATION* (2002). Rai argues,

The discourses of nationalism did not disappear with the decolonization of the 1940s to 1960s. They are again with us in complex and contemporaneous forms in the post-Cold War Period—through the seeking of nationhood on the basis of race, ethnicity, religion, and economy. The process of “othering” communities populations and groups continues to affect the drawing up of development agendas in Eastern and Central Europe, in parts of Africa and of Asia. Women have had to pay a high price for this new wave of nationalism and have confronted issues very similar to those faced by women during anti-colonial struggles—rape, war, homelessness, insecurity, and being constructed without their consent as threats to, and symbols of, the new nations and national identities.

*Id.* at 15-16; see also Sukanya Banerjee et al., *Engendering Violence: Boundaries, Histories, and the Everyday*, 16 *CULTURAL DYNAMICS* 125 (2004).

[A]cts of violence and “boundary-making” that marked women as signifiers of cultural essence and (racial) purity are not confined to the historical moment of decolonization. Continued in an era of transnational capital, which professes to have exceeded the nation state in both material and conceptual terms, gendered identities are constantly deployed to mediate the incommensurate between global capital and national particularisms. While the overwhelming sense of *trans*-nationalism permeating the current global scenario has led many to conjecture the demise of the nation state, in reality it is far from “dead.” As Aihwa Ong points out, “despite frequent assertions about the demise of the state, the issue of the state remains central when it comes to the rearrangements of global spaces, and the restructuring of social and political relations.” In fact, Ong alerts us to be vigilant to the “mutations” of political and social power, of the ways in which the nation state, far from receding into obsolescence, *remorphs* itself.

*Id.* at 126 (citations omitted).

71. OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: MONITORING LEGAL SYSTEMS* (2006), available at <http://www.ohchr.org/Documents/Publications/RuleoflawMonitoringen.pdf>.

Post-conflict justice systems are characterized by severe dysfunction, low levels of human and material resources, destroyed infrastructure and lack of public trust. The past failure of the legal system to protect individual rights, prosecute violators and balance executive power is often either a direct cause of, or a substantial contributing factor to, the conflict. A history of corruption, discrimination and abuse of power within the institutions of justice can destroy public confidence and perpetuate lawlessness and chaos.

Property law and family relations, including child protection, can have particular relevance for insecure post-conflict contexts and the use of informal or alternative (usually

religious or customary, very often presuppose and reinforce strict gender hierarchy within the family.<sup>72</sup> It is unlikely that a progressive, democratic conception of equal citizenship can be built upon such a foundation.

#### IV. FAMILY, NATION-BUILDING, AND NATIONALISM

The third and perhaps most subtle way that the legal regulation of the family informs the legal architecture of nation-building concerns the relationship between family and nationalism, or the “imagined community”<sup>73</sup> of the nation. Although our

unregulated) traditional methods and practices for resolving otherwise criminal and civil disputes can be prevalent.

*Id.* at 5-6; see also Ewa Wojkowska, *Doing Justice: How Informal Justice Systems Can Contribute* (U.N. Dev. Programme, Oslo Governance Centre, 2006), available at <http://www.undp.org/oslocentre/docs07/DoingJusticeEwaWojkowska130307.pdf> (discussing the strengths and weaknesses of informal justice systems in post-conflict states and the developing world). Wojkowska provides the following examples of non-violent dispute resolution in post-conflict states:

[I]n Afghanistan court officials regularly refer cases to the informal sector or accept and record their decisions to end pending cases. Part of this is the result of more than two decades of war in which alternative forms of dispute resolution became the norm. During this period without formal government institutions it was often necessary to seek solutions based on consensus and this tradition has remained strong even as government institutions have reappeared.

After September 1999 in the villages in East Timor, it was the informal justice systems that asserted themselves quickly. “This was natural and not surprising because—though everything had been destroyed—through tradition and culture the local law lived on in strength inside people’s heads.”

*Id.* at 18 (citations omitted). Such informal legal systems are subject to unequal power relations, susceptibility to elite capture, unfair and unequal treatment of women and disadvantaged groups, lack of accountability, and non-adherence to international human rights standards, among other problems. As Wojkowska notes,

These systems are often dominated by men of high status and tend to exclude women, minorities, young people and disadvantaged groups. As a result, existing social hierarchies and inequalities are often reflected and reinforced in the dispute resolution system. Informal systems generally reflect the thinking of a cross section of the population and their decisions for example do not recognize the equal rights of both genders to inherit.

*Id.* at 21 (citations omitted).

72. See also McClintock, *supra* note 34, at 78.

All too often, the doors of tradition are slammed in women’s faces. Yet traditions are both the outcome and the record of past political contests, as well as the sites of present contest. In a nationalist revolution, both women and men should be empowered to decide which traditions are outmoded, which should be transformed, and which should be preserved. Male nationalists frequently argue that colonialism or capitalism has been women’s ruin, with patriarchy merely a nasty second cousin destined to wither away when the real villain finally expires. Yet nowhere has a national or socialist revolution brought a full feminist revolution in its train. . . . Nowhere has feminism in its own right been allowed to be more than the maidservant to nationalism. A crucial question remains for progressive nationalism: can the iconography of the family be retained as the figure for national unity, or must an alternative radical iconography be developed?

*Id.*

73. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 5-7 (rev. ed. 1991).

In an anthropological spirit, then, I propose the following definition of the nation: it is an imagined political community—and imagined as both inherently limited and sovereign.

focus is nation-building, not nationalism per se, the emergence and consolidation of national identity is a process that informs the nation-building enterprise. And, as we argue below, family often figures in this process as a central trope of nationalism. Family law, in turn, may function as an important—and gendered—site of intersection between nationalism and nation-building.

The modern nation-state has famously been described as Janus-faced, simultaneously looking forward toward the formation of new political identities and backward toward a shared, “authentic,” history upon which nationhood might be grounded.<sup>74</sup> Sometimes called “civic” and “ethnic” nationalism, these two types of

It is *imagined* because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion. . . . Communities are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined. Javanese villagers have always known that they are connected to people they have never seen, but these ties were once imagined particularistically—as indefinitely stretchable nets of kinship and clientship. Until quite recently, the Javanese language had no word meaning the abstraction “society.”

The nation is imagined as *limited* because even the largest of them encompassing perhaps a billion living human beings, has finite, if elastic boundaries, beyond which lie other nations. No nation imagines itself coterminous with mankind. . . .

It is imagined as *sovereign* because the concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely-ordained, hierarchical dynastic realm. . . .

Finally, it is imagined as a *community*, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship.

*Id.*

74. TOM NAIRN, *FACES OF NATIONALISM: JANUS REVISITED* 67, 71 (1997); TOM NAIRN, *THE BREAKUP OF BRITAIN* (1977); see also McClintock, *supra* note 34, at 61, 65.

All nationalisms are gendered, all are invented, and all are dangerous—dangerous, not in Eric Hobsbawm’s sense as having to be opposed, but in the sense of representing relations to political power and to the technologies of violence. Nationalism, as Ernest Gellner notes, invents nations where they do not exist, and most modern nations, despite their appeal to an august and immemorial past, are of recent invention. Benedict Anderson warns, however, that Gellner tends to assimilate “invention” to “falsity” rather than to “imagining” and “creation.” Anderson, by contrast, views nations as “imagined communities” in the sense that they are systems of cultural representation whereby people come to imagine a shared experience of identification with an extended community. As such, nations are not simply phantasmagoria of the mind, but are historical and institutional practices through which social difference is invented and performed. Nationalism becomes, as a result, radically constitutive of people’s identities, through social contests that are frequently violent and always gendered. . . .

In [Walter] Benjamin’s insight, the mapping of “Progress” depends on systematically *inventing* images of archaic time to identify what is historically “new” about enlightened, national progress.

*Id.* (citations omitted); see also Homi K. Bhabha, *Narrating the Nation*, *Introduction to NATION AND NARRATION 1* (Homi K. Bhabha ed., 1990). Bhabha argues:

It is the project of *Nation and Narration* to explore the Janus-faced ambivalence of language itself in the construction of the Janus-faced discourse of the nation. This turns the familiar two-faced god into a figure of prodigious doubling that investigates the nation-space in the *process* of the articulation of elements: where meanings may be partial because they are *in medias res*; and history may be half-made because it is in the process of being made; and the

national identity formation depend on different terms of membership, the former premised on a political process of assimilation, the latter on pre-existing linguistic or ethnic bonds.<sup>75</sup> Although gender transcends these categories and informs both types of nationalism or nation formation, as we suggested above in Part II, women—and in particular mothers—have figured centrally in ethnic nationalist ideology.<sup>76</sup> As Tricia Cusack has argued, “women are defined through their familial role as retaining the traces of the putatively historical, quasi-organic community within the modern state.”<sup>77</sup>

In times of transition, for example in post-colonial, post-conflict, or post-Soviet states, the traditional family (whether real or imagined) may come to represent the microcosm of the new nation, metaphorically rather than literally defining the

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image of cultural authority may be ambivalent because it is caught, uncertainly, in the act of “composing” its powerful image. Without such an understanding of the performativity of language in the narratives of the nation, it would be difficult to understand why Edward Said prescribes a kind of “analytic pluralism” as the *form* of critical attention appropriate to the cultural effects of the nation. For the nation, as a form of cultural *elaboration* (in the Gramscian sense), is an agency of *ambivalent* narration that holds culture at its most productive position, as a force for “subordination, fracturing, diffusing, reproducing as much as producing, creating, forcing, guiding.”

*Id.* at 3-4 (citations omitted).

75. See, e.g., Tim Neiguth, *Beyond Dichotomy: Concepts of the Nation and the Distribution of Membership*, 5 *NATIONS AND NATIONALISM* 155, 157-58 (1999) (“Ethnic nations are perceived as social groups that exist prior to and independently from particular states, while the definition of civic nations emphasizes the crucial role of political institutions in forming a nation.”).

76. McClintock, *supra* note 34, at 61.

All nations depend on powerful constructions of gender. Despite nationalisms’ ideological investment in the idea of popular *unity*, nations have historically amounted to the sanctioned institutionalization of gender *difference*. No nation in the world gives women and men the same access to the rights and resources of the nation-state. Rather than expressing the flowering into time of the organic essence of a timeless people, nations are contested systems of cultural representation that limit and legitimize peoples’ access to the resources of the nation-state.

*Id.*; see also Sinha, *supra* note 33, at 187-88.

Nations have typically been imagined as “domestic genealogies”. Terms such as motherlands or fathers lands; mother-tongues; mother-cultures; “founding fathers,” and “mothers of the nation” are used to capture the relations of peoples to specific lands, languages, cultures, or shared histories. Critical attention to these kinds of gendered and familial imagery around the nation reveals much about the nature of the nation as a historical project constituted in the crucible of empire.

...  
The history of the modern nation . . . has been closely associated with a particular historical form of the family—the heterosexual, bourgeois, nuclear family—and the normative constructions of sexuality and gender identities that sustain this family-form.

*Id.* (citations omitted).

77. Tricia Cusack, *Janus and Gender: Women and the Nation’s Backward Look*, 6 *NATIONS AND NATIONALISM* 541, 543 (2000). Consider, for example, the Taliban’s assertion of control over women and the domestic sphere as a means of distinguishing its rule from that of its more secular predecessors. Conversely, and in response, the U.S. military action in Afghanistan was justified, in part, as an effort to liberate Afghan women from this control (and thus implicitly altering the power relationship within families). More generally, debates about the universality of liberal human rights norms very often center on the structure of the family and the status of women. Cultural (or national) distinctiveness is expressed in this debate through claims about family formation.



boundaries of citizenship and belonging.<sup>78</sup> The cultural or religious traditions associated with that family, and in particular its gender roles, provide a blueprint for national identity.<sup>79</sup> Here again, the status of customary law in South Africa provides an apt example. During the post-apartheid period, the recognition of African customary law became a highly contested political question.<sup>80</sup> As described above,

78. *Id.* Cusack notes that

“ethnic” or “ethno-cultural” nationalism has invariably invoked a traditional and “natural” domestic role for women. Women in particular tend to be perceived in ethnic nationalist ideology as having an existence “prior to” the particular state, as the mothers of the tribe. Subsequently, women are defined through their familiar role as retaining the traces of the putatively historical, quasi-organic community within the modern state. The burden of national “parenthood” is carried by women, although the head of the “family” is generally male.

“Civic” nationalism has also been conceived and practiced in gendered, not universalist, terms in so far as political activity has been represented as a masculine prerogative, and the modern model of the civic nation, since the late eighteenth century, has taken men as the norm for the making of citizens. . . . [M]en have based their authority on heading the family, which in turn has been portrayed as a microcosm of the social order: women’s “disorderliness” has been represented as a threat to the nation, including their participation in the public sphere.

*Id.* at 543 (citations omitted). Family and kinship relations are “codified and appropriated by the state, while the state, representing itself as a large family, effects a ‘naturalisation of belonging,’” of which Etienne Balibar wrote that the national form is characterized by “a nationalization of the family, which has as its counterpart the identification of the national community with a symbolic kinship.” *Id.* at 545 (citations omitted).

79. *Id.*

Etienne Balibar has emphasised the nation-state’s inclination to construct itself as a familial or “racial” community, based on national kinship, and encouraging “endogamy” among its citizens, but he also pointed to the state’s multiple interventions in and penetration of social and family life. The nation inserts itself into every aspect of social and family life, covering the intrusion with the ideology of caring and protection. . . . Thus, “both [ethnic and civic nationalism] employ, in their mythology and symbolism, the language of the family.”

*Id.* at 545-46 (citations omitted); see also Nadjie Al-Ali, *Review Article: Nationalisms, National Identities and Nation States: Gendered Perspectives*, 6 *NATIONS AND NATIONALISM* 631, 633 (2000).

The public/private dichotomy, which has women within the sphere of the family and men in public life, has been a highly contested issue among feminist scholars. Yuval-Davis cautions us to look more carefully into this dichotomy, and contends that the division between the “public” and the “private” constitutes “a political act in and of itself.” States have the power to demarcate that which is “private,” thereby justifying intervention and non-intervention alike. Accordingly, comparative theories of citizenship need “to include an examination of the individual autonomy allowed to citizens (of different gender, ethnicity, region, class, stage in the life cycle, and so on) vis-à-vis their families, civil society organizations, and state agencies.”

*Id.* (citations omitted).

80. See South African Law Commission, Project 90, *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* (Aug. 1998) [hereinafter SALRC 90], available at [http://www.doj.gov.za/salrc/reports/r\\_prj90\\_cstm\\_1998aug.pdf](http://www.doj.gov.za/salrc/reports/r_prj90_cstm_1998aug.pdf). In the context of customary marriage, the South African Law Commission acknowledged the imperatives of gender equality but noted that “cultural pluralism is guaranteed by §§ 30 and 31 of the Bill of Rights and . . . [that] we need to eradicate former prejudices against African cultural institutions.” *Id.* at 11. Further,

[a]lthough the Constitution has no provisions specifically aimed at marriage, the various rights and freedoms enshrined in the Bill of Rights, such as freedom of association and the freedom to pursue a religion or culture of choice, provide the foundations of a basic family law.

customary law had never been treated on par with the common law by colonial and apartheid courts, despite the fact that a large majority of Africans understood their relationships to be structured by the imperatives of customary law.<sup>81</sup> Thus, the legal recognition of customary law was regarded as an important step in reclaiming authentically African norms that had been disrupted by colonialism and apartheid.

Although part of the political struggle over customary law can be explained by the efforts of traditional leaders to increase their power in the new constitutional order, it is also clear that customary law and the family structures upon which it is based provided a potentially powerful and unifying metaphor for an authentic national identity.<sup>82</sup> Customary law, if viewed at a sufficiently high level of abstraction, could unify Black South Africans not as victims of colonialism and apartheid, but as bearers of distinctive and shared cultural traditions. To function in this way, customary law had to be regarded as both legitimate on its own terms and reasonably uniform across ethnic groups. Accepting the legitimacy of customary law depended, in turn, on

Of special relevance in this regard are the principles of equality and nondiscrimination. Section 9(1) of the Constitution declares that “Every person shall have the right to equality before the law and to equal protection of the law,” and § 9(2) provides that “No person shall be unfairly discriminated against, directly or indirectly” on grounds, *inter alia*, of gender, sex or age. Many aspects of customary law—which generally endorses the patriarchal traditions of Africa - could now be in conflict with these provisions.

*Id.* at 93 (citations omitted); *see also* BENNETT, *supra* note 58, at 250. Bennett explains:

Customary law was defended as traditionally allowing a woman “a fair measure of security and protection,” but, in practice, she had to keep in favour with her guardian. For instance, while a wife had a well-recognized right to support, if her husband neglected his duty, she had no direct legal action against him. She was expected to appeal to his senior kinsmen, to her own father and, only as a last resort, to her headman. Although the guarantors of female welfare were obliged to protect their dependants, the duty was a nebulous one; and, of course, a woman who complained too often or too vociferously risked being branded a “troublemaker.”

*Id.* (citations omitted).

81. According to the SALRC 90:

Recognition of the cultural differences underlying this division would perhaps have been unobjectionable, if difference had implied equal treatment. But, in South Africa, the general policy of legal dualism was part and parcel of apartheid: one advanced law applicable to whites and a “poor” law applicable to Blacks. Thus, for most Africans the enforcement of customary law implied the oppressive regime of the Department of Native Affairs and the Native Administration Act.

SALRC 90, *supra* note 80, at 9.

82. Both concerns can be discerned in the following quote from the South African Law Commission’s *Report on Customary Marriage*:

[T]he House of Traditional Leaders (Eastern Cape), [called] . . . for any reforms in marriage law to use African values as the starting point, encouraging “cultural borrowing” from western values only when those values are not repugnant to African norms and when their incorporation improves the quality of life of indigenous people. Secondly, in more concrete terms, the concern is that the Commission’s proposals on spousal and parental consent, on marital power, property and ante-nuptial contracts are concepts alien to African culture and to customary law. This goes hand in hand with an argument, [sic] by the Bisho Round Table Discussion for instance, which sees these proposals as so radical that what is created is no longer a customary marriage but a new South African “statutory marriage”, which needs only to be extended to civil marriages to qualify as the country’s uniform code.

SALRC 90, *supra* note 80, at 5.

ignoring or denying the interplay of customary law and colonial interests described above, and on the collaboration of traditional leaders with colonial and apartheid regimes.<sup>83</sup> Regarding customary law as even remotely uniform across ethnic groups required a focus on the shared elements of *lobolo* (sometimes translated as bridewealth) and polygyny, elevating the symbolic importance of these practices and changing their meaning to reflect a national rather than (or in addition to) an ethnic identity.<sup>84</sup>

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83. CHANOCK, *supra* note 55, at 44-47.

To an awareness of the processes of economic transformation and of legislation and their effects we must add an understanding of the place of custom in connection with images of government and authority. For custom is not simply either practice or a collection of rules for enforcement or guidance but is the language of legitimation. What is accepted as customary or traditional depends on the total image of the "customary" society, on the image or model of political authority which prevailed, of the model of relationships between the sexes and between different classes of people. And we will find that in each case we are dealing with not one set of models but several. European colonizers had their own models of African societies, of what chiefs were and did, of what primitive marriage meant, of how rights to use land could be conceptualised. The colonized had their models of chiefly authority and of the nature of traditional rights in and over persons and land.

.....

The weight of the authoritarian model of African society, espoused by both colonizers and colonized, and the institutions of colonial government which activated it, changed the nature and use of custom. It could no longer be primarily a political resource in a continuing re-negotiation of statuses and access to resources. Legislation led to a freezing of rural status and stratification, henceforth defined and not negotiated. Custom became a resource of governments, rather than a resource of the people. Instead of being something that was popular and beyond government, it was gradually incorporated by it. Colonial and post-colonial governments made the same use of custom, both favouring the monarchist model of authority in society.

*Id.* at 44-47 (citations omitted).

84. See SALRC 90, *supra* note 80, at 43. The very existence of legislation determining the recognition of marriages under customary law presumes a focus on shared elements and national identity. See Recognition of Customary Marriages Act 120 of 1998, available at <http://www.info.gov.za/gazette/acts/1998/a120-98.pdf>. The South African Law Commission's *Report on Customary Law* stated:

In order to define customary marriage it is recommended that legislative provision be made for a minimum set of essential requirements, chief amongst which should be the consent of the prospective spouses. In most cases the "customary" nature of a marriage may be inferred from the inclusion of certain typical practices, such as a lobolo agreement, a traditional wedding ceremony or the involvement of the spouses' families. But since these differ among the various systems of customary law in South Africa, it is accordingly recommended that any legislative provision adopted should display a flexibility that allows for groups to marry according to their own customary laws. . . . The vast majority of respondents indicated that [lobolo] should be an optional cultural attribute of the marriage with no legal effect on either the children of the marriage or the validity of the marriage.

SALRC 90, *supra* note 80, at vii, 5; see McClintock, *supra* note 34, at 62, 73. McClintock argues:

Excluded from direct action as national citizens, women are subsumed symbolically into the national body politic as its boundary and metaphoric limit . . . . Women are typically construed as the symbolic bearers of the nation, but are denied any direct relation to national agency. . . .

.....

African nationalism has roughly the same historic vintage as Afrikaner nationalism. Forged in the crucible of imperial thuggery, mining capitalism and rapid industrialization, African nationalism was, like its Afrikaner counterpart, the product of conscious reinvention, the enactment of a new political collectivity by specific cultural and political

For their part, women's groups were highly critical of the patriarchal nature of customary law, particularly with respect to marriage, and insisted that traditional legal norms and institutions be measured against the equality guarantees of the new constitution.<sup>85</sup> In their view, the right to culture, recognized in the constitution, had to yield to robust guarantees of gender equality contained in the Bill of Rights.<sup>86</sup> Advocates of gender equality had to contend, however, with the recasting of the debate in terms of national identity: authentic African family forms versus Western-inspired (colonial) notions of gender equality. The analogy between race and gender equality was undercut and gender equality was pitted against the goal of a new African nationalism.

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agents. But its racial and gender components were very different, and African nationalism would describe its own distinct trajectory across the century.

*Id.*; see also BENNETT, *supra* note 58, at 22-23. Bennett writes on the link between tradition, culture, and legitimacy:

Culture is closely linked to tradition. In a general sense, tradition means no more than the transmission of culture from one generation to the next; but it also carries connotations of unquestioned legitimacy (as in the case of 'traditional leaders' and 'traditional marriage') or backwardness and conservatism (as in the case of 'traditional farming practices'). The common element in these meanings is 'unchanged.'

Tradition operates to give people a sense of continuity in their lives, especially when they are experiencing the stress of change. Recent works on the subject treat it, like culture, as an ideological construct, as a resource to which appeal may be made in struggles for power. Hence, tradition is used, on the one hand, by people caught up in the process of change to make sense of new situations, and, on the other hand, by colonial, and indeed many post-colonial African governments, to give legitimacy to state policies. Tradition may also be asserted to resist these policies. In either event, because it is constantly being contested in the struggle between dominant and subordinate groups, tradition is continually being adapted and reworked.

*Id.* (citations omitted).

85. S. AFR. CONST. 1996 § 15(3)(a)(i) ("This section does not prevent legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law . . ."). The South African Constitution assumes the enactment of legislation recognizing cultural and religious marriages. When "interpreting any legislation" or "developing . . . customary law," however, courts must promote the "spirit, purport and objects of the Bill of Rights." *Id.* § 39(2).

According to the SALRC 90, "most of the criticisms from women's groups" target the practice of "de facto polygyny" (the most usual form, "whereby migrant workers marry a wife in the rural areas and later informally cohabit with a second woman in the city") and "highlight the plight of the rural wife." SALRC 90, *supra* note 80, at 84 n.4. It also noted that "the freedom to have more than one wife has long been condemned, and heated debate on the issue persists, as was indicated by the fact that nearly all replies to the Issue and Discussion Papers dealt with this topic [and that] [p]redictably, very few women were in favour of polygyny." *Id.* at 84 (noting specifically in footnote 6 that Adv J Y de Koker, the Women's Lobby and the Rural Women's Movement, came out against polygyny). The Commission also explicitly noted that:

The trend set by the written responses was confirmed by the workshops: there was general agreement that recognition of customary marriages was long overdue; that these marriages should be registered; that they should be governed by rules relating to consent and minimum age; that the reality of polygyny should be acknowledged; that the legal capacity of women should be improved; that lobolo should be optional and that divorces should be granted only by courts of law. The disagreements, too, tended to follow the same pattern as the letters.

*Id.* at 6 (citations omitted).

86. S. AFR. CONST. 1996 § 9(1)-(2). Further, the constitution requires courts to apply customary law where it is applicable to an extent "consistent with the Bill [of Rights]." *Id.* § 39(3).

Perhaps in response to the struggle between feminists and traditionalists described above, a system of formal legal pluralism coupled with a rhetoric of choice with respect to family structures has emerged in South Africa.<sup>87</sup> This choice paradigm is consistent with liberal individualism as described above: within certain bounds, individuals are imagined as able to define contractually what the family relationship might look like as it pertains to obligations between spouses, the economic consequences of the marital relationship (through the use of prenuptial agreements), and inheritance (making a will rather than relying on the rules of intestate succession). Given that the family is regarded as subject to private ordering through individual choice, the state's interest is limited to ensuring that those choices are freely made and subsequently honored.

In contrast, in the domain of customary law the family is not constructed as private in this way. Though family is thought to precede law, it is not because family is natural and the law is a social construct that regulates it. Rather, family gives rise to law (and legal/political power); these are a product of kinship ties, not the reverse.<sup>88</sup> For example, the creation of nuclear families is not seen primarily as the union of two

87. The South African Constitution provides:

Section 30: Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Section 31: (1) Persons belonging to a cultural, religious, or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practice their religion and use their language; and . . . (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

. . . .

Section 211(3): The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

S. AFR. CONST. 1996, §§ 30, 31, 211.

88. BENNETT, *supra* note 58, at 294-96. Bennett writes:

The common law and customary law hold widely differing views as to when legal personality begins and ends. The common law is prepared to attribute rights to a child, even unborn, whereas customary law would consider survival at birth a minimum condition. On the question of death, the positions are reversed. According to the common law, physical death marks the termination of personality, whereas in customary law death is not an instant event that is measured physically. Instead, it is a process which is marked by its own special rites of passage. Thus, the spirit of a socially important person [will] remain indefinitely attached to its family and continue to take an interest in the family's well-being.

The patriarchal structure of traditional African societies gives senior males a privileged position. . . .

Although customary law is not insensitive to the vulnerability of children, they are not chosen for preferential treatment, as is the case in Western legal systems. Rather, customary law realistically appreciates that their welfare is inseparable from that of their families. It follows that, in the short term, children may be required to sacrifice their interests for what, in the long term, will be the common good. This possibility is apparent in several practices, which would be considered unacceptable under common law.

. . . .

Whenever social life depends on mutual support and sharing, the risk of conflict between the individual and the group is minimized by underplaying individual interests.

*Id.* (citations omitted). A system of succession, for example, has as one of its functions "to preserve the purity of a family's bloodline. Thus, children who are biologically related to a deceased are preferred to those whose relationship is only social or legal." *Id.* at 315 (citations omitted).

individuals but rather the linking of two families or clans.<sup>89</sup> Cattle and land are at stake as well as the lineage. In this sense, family formation is a political and legal act that has potentially broad implications. The particulars of this act are therefore not understood as properly under the control of the individuals who form the marital couple but rather the extended family and community.<sup>90</sup> Moreover, the idealized family under customary law is characterized by both generational and gender hierarchy, with parents and other elders within the family exercising considerable control over younger members and men exercising control over women.<sup>91</sup>

These two systems can coexist within a constitutional regime premised on equality only by “civilizing” customary law through the quintessentially liberal palliative of individual choice. In other words, insofar as the family is regarded by the dominant liberal-legal culture as a domain that can (and should) be organized privately, customary family structures can be treated as legitimate (from a constitutional standpoint) if voluntarily entered.<sup>92</sup> If individuals choose to embrace customary law within

89. *Id.* at 217. Bennett explains that

[c]ustomary marriage is not completed by the performance of a single act nor does it need the approval of a public authority. Instead, it can best be described as a (potentially lengthy) process that affects only the spouses and their families . . . [for the Tswana], this process begins with a series of meetings between two families at which they negotiate terms. . . . Go-betweens and family elders are always available to testify to the celebration of a marriage, and the status of the union will be a matter of general repute, since members of the community have witnessed the negotiations, the wedding ceremony and the delivery of lobolo.

*Id.* (citations omitted).

90. *Id.* at 180-81.

It seems that the vertical extension of the nuclear family, in the form of eponymous, patrilineal clans, is still prevalent today. Currently, however, these units serve few functions, apart from determining a permissible range of marriage partners. Clans normally segment into more manageable units—lineages—which are generally four to six generations deep.

*Id.* (citations omitted); *see also, supra* notes 61, 64 (discussion of *lobolo*).

91. BENNETT, *supra* note 58, at 248-49. (“The term “patriarchy” signifies the authority and the range of special rights and privileges enjoyed by senior males. By implication, all women, as well as junior men, are subordinate. Patriarchal societies are remarkably common, and, in precolonial times, they were present in all parts of southern Africa.”).

92. Interview with Sibongile Ndashe, Women’s Legal Centre, in Cape Town, S. Afr. (June 1, 2006) (on file with author). As Ms. Ndashe asserts,

There needs to be clarity and certainty about what customary law is. It impacts citizenship for one. To say because I belong to a particular group, that they have agreed not to have certain fundamental rights applicable to them, and I find myself in this situation that I was born into, that I married into. People need to be able to get out when they wish to. Women are given one job, one choice. If they can articulate it, “I like being here, I’m more comfortable here,” okay. My problem is that everyone who is similarly situated should be able to leave it. That is the promise of the constitution. If that is your respect, your dignity, your choice at an individual level, but the broader constitution is promising you can remove yourself. Women walked around [Jacob] Zuma’s trial with signs saying no women presidents. When you’re ready to remove yourself that is the ideal. They need the certainty that something else will be able to protect them. Is equality going to put food on my table? That’s the power of the mind—all sorts of factors collude. The social and the culture are more compelling than the economic and constitutional. This must be understood. They collude to put women in a space that’s not comfortable. It is very important that they always be given the opportunity to say this does not work for me. Those women with the signs at Zuma’s trial can come back next month and be a candidate for presidency.

*Id.*

the privacy of the family, the patriarchal character of that law does not create a problem for public norms of equality.

This compromise is evident in South Africa's Recognition of Customary Marriages Act (RCMA), legislation intended to incorporate customary marriages into the formal regulatory sphere of family law.<sup>93</sup> By expanding recognition of customary marriages, the RCMA improved the status of women in these marriages by allowing married women (and widows) to protect their legal rights and ensure that their spouses meet their legal obligations. Yet, the Act also grants legal sanction to an institution that is highly patriarchal. The RCMA attempts to mitigate this problem by ensuring that the participants enter the marriage by choice and, to a lesser degree, by regulating the institution directly to make it somewhat more egalitarian. For example, the Act makes the consent of the parties themselves (as opposed to their families) a necessary element of customary marriage.<sup>94</sup> Additionally, the statute establishes a minimum age requirement for the parties to marry, though with the parents consent, the minimum age can be waived.<sup>95</sup> The statute also alters, formally at least, the terms upon which the individuals may exit the marriage by providing for dissolution of customary marriages on the same terms as civil marriages, including "irretrievable breakdown" or "no-fault."<sup>96</sup>

But where customary law operates most comprehensively, it defines status and relationships within the broader family and community, governing hierarchies, including mechanisms for the allocation of land, for the determination of inheritance rights, and for dispute resolution more broadly.<sup>97</sup> Choosing between customary marriage and civil marriage is therefore not simply a matter of choosing the set of legal obligations that attach to the marital relationship. Rather, opting out of customary marriage means exiting the larger social system that is comprehensively structured by customary law. Indeed, the decision to enter customary marriage often does not rest

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93. Recognition of Customary Marriages Act 120 of 1998. The Act responds to the longstanding refusal of colonial and apartheid regimes to recognize fully marriages celebrated under African customary law. As such, it was intended to "bring[] to an end the tyranny of a dictatorial recognition of civil and other Eurocentric faith based marriages at the expense of marriages concluded in accordance with customary law." Cheryl Gillwald, South African Deputy Minister of Justice and Constitutional Development, Keynote Address at the Launch of the Recognition of Customary Marriages Act No. 120 of 1998 (Nov. 15, 2000), available at <http://www.info.gov.za/speeches/2000/0011211010a1006.htm>. To this end, the Act recognizes two types of customary marriages: those valid under customary law and existing prior to passage of the RCMA, and those entered into subsequent to the passage of the RCMA that comply with the Act's requirements. See Recognition of Customary Marriages Act 120 of 1998, § 2(1)-(2). The Act also explicitly recognizes polygamous customary marriages, and does not subject customary matrimonial law to a repugnancy clause. *Id.* § 2(3)-(4).

94. Recognition of Customary Marriages Act 120 of 1998, § 3(1)(a)(ii).

95. *Id.* § 3(3)(a).

96. *Id.* § 8(1)-(2).

97. See BENNETT, *supra* note 58, at 164-66.

The absence of fully centralized state structures in most precolonial African societies meant that courts could not force litigants to accept the win-or-lose decisions associated with adjudication. Instead, the courts tended to mediate or arbitrate, thereby seeking to reconcile the disputing parties in a compromise of interests. Rules were not essential for this type of settlement.

*Id.* (citations omitted).

with the individuals themselves.<sup>98</sup> Rather, male members of the two families negotiate the terms of the marriage, sometimes without the knowledge of the individuals involved.<sup>99</sup> The transaction is in part an economic one, with significant bridewealth or *lobolo* paid by the groom's family to the bride's family.<sup>100</sup> In return, the groom's family secures the labor of the wife as part of their community and in support of their household.<sup>101</sup> Conflicts within marriage are mediated within the larger family and the communities with an emphasis on reconciliation.<sup>102</sup> If the wife leaves her husband, she

98. *See id.* at 209.

Because the young have no legal power to negotiate a marriage, customary law takes no cognizance of their promises to marry. Legal consequences are attached only to an agreement between their parents. This agreement, which is often termed an "affinitation" contract, should not be confused with a common-law engagement agreement. While breach of the latter entitles the injured party to damages for both hurt feelings and patrimonial loss, customary law allows no such claim.

*Id.*

99. *See id.* Bennett notes that

[t]raditionally, customary law treated marriage as an agreement between families, to be negotiated by senior males and sealed by payment of lobolo. Strictly speaking, the consent of the spouses, especially the bride, was irrelevant.

.....

A father's control over the marriages of his children is synonymous with the African cultural tradition. Hence, in the official version of customary law, the consent of a father, especially the bride's father, is regarded as an essential ingredient of a valid marriage.

*Id.* at 199, 204 (citations omitted).

100. A "typical contemporary explanation for the practice" involves compensating the loss of a daughter which in large part includes "the expenditure on her upbringing and education" to the bride's family. *Id.* at 224. It is also defended as a benign "language that the ancestors understand and bless." *Id.* at 224 n.312 (citing P. Whooley, *Marriage in Africa: A Study in the Ciskei*, in *CHURCH AND MARRIAGE IN MODERN AFRICA* 245 (T.D. Verryn ed., 1975)). Nevertheless, it also reflects an economic transaction between the families that constrains entry into marriage as well as the terms of the marriage itself. As an institution, *lobolo* is "central to the African conception of marriage." *Id.* at 220. Bennett describes *lobolo*'s durability, "whatever its social, economic and political functions," noting it "has survived major transformations in the economy and society, not to mention the determined onslaught of missionaries, colonial governments and the courts," although it has changed "in form, composition, and function." *Id.* at 223 (citations omitted). "Whatever its social and economic disadvantages, however, very few people would be prepared to support" its abolition, as "[i]ts symbolic functions remain a powerful force" and "[e]qually important, today, is its function to mark marriages as distinctively African." *Id.* at 224 (citations omitted).

101. *See id.* at 213.

According to all the systems of customary law in South Africa, marriage is patri- or virilocal. In other words, a bride is expected to live with her husband, either at his own or his father's homestead. Tradition dictated that her introduction to her new family should be marked by a ceremony, which, however, modest, helped to signify the start of the marital consortium. This ceremony performed at least three functions. It separated the socially significant from the everyday; it manifested in physical form a change of legal status; and, because those participating had to collaborate to perform the rituals correctly, it signified their common intent.

*Id.* (citations omitted).

102. R.B.G. Choudree, *Traditions of Conflict Resolution in South Africa* (1996) (unpublished LL.M. dissertation) (on file with the University of Durban-Westville, Durban, South Africa), available at [http://www.accord.org.za/ajcr/1999-1/accordr\\_v1\\_n1\\_a2.pdf](http://www.accord.org.za/ajcr/1999-1/accordr_v1_n1_a2.pdf). Choudree writes that

[t]raditional courts have a major advantage in comparison with other types of courts in that their processes are substantially informal and less intimidating, with the people who utilise these courts being more at ease in an environment that is not foreboding. . . .



must leave the community, including her children (who, in patrilineal societies, are regarded as part of the father's family), and her own family may be compelled to return the *lobolo* payment.<sup>103</sup>

Under these circumstances, regarding an individual's decision to enter and remain in a customary marriage as signifying an expression of cultural preference seems problematic. Moreover, adding to these economic and structural constraints on choice is the subtle but substantial pressure that comes from the very compression of customary law into the domain of the liberal individualism. In view of the political significance of customary law as a marker of African cultural authenticity, the "choice" between customary and civil marriage becomes a signifier of the individual's attachment not just to family and community but to nation. In other words, to be for the preservation of African cultural values (as opposed to Western/outsider/imperialist values) means to be for the maintenance of a particular form of family and community structure, one that has been contained, preserved, and altered by the very outsider legal regime that it is meant to resist. This, of course, creates problems for women who

The headmen or chiefs who preside over traditional courts are generally charismatic and familiar with the populace that use the courts, are revered to an extent that judges are not, are wont to play an active role in the proceedings and are not shy to suggest mediation at almost any point in the proceedings in matters susceptible to that form of resolution.

*Id.* at 13-14. In late 1999, it was estimated that customary law "is probably the only form of justice known to many South Africans" and that "about half the population lives in the countryside where traditional courts administer customary law in over 80 per cent of villages." Ferial Haffajee, *South Africa: Blending Tradition and Change*, UNESCO COURIER, Nov. 1999, at 33, available at <http://unesdoc.unesco.org/images/0011/001178/117896e.pdf>. These courts, "which are also found in some urban townships, deal with everyday disputes like petty theft, property disagreements and domestic affairs—from marriage to divorce and succession" and "justice is swift and cheap as the courts are run with minimal formalities and charge less than a dollar for a hearing." *Id.* Their importance extended from their proximity to people without "money or time to travel to town for formal courts" to the fact that "judges use everyday language, and the rules of evidence allow the community to interject and question testimonies." *Id.* Important dialogues and disagreements around gender had already begun:

Yet the system is not without its critics—namely women, who are barred from serving as judges and often discriminated against as litigants. Paradoxically, women's groups, under the umbrella of the Rural Women's Movement, have been in the vanguard of efforts to recognize customary law and adapt it to post-apartheid society. Discussions about ways of elevating customary law are intertwined with debates on making it gender-neutral. Three issues top the agenda: traditional marriages, inheritance rights and the status of traditional courts.

*Id.* at 33-34.

103. BENNETT, *supra* note 58, at 277.

In customary divorces, the central issue is return of lobolo . . . [w]hich tends to confound the argument that the function of lobolo is to provide for the wife's maintenance when her marriage ends. . . . Although the full amount is seldom given back, return of at least some is an important token of dissolution of the marriage. To this end, the husband could demand the same cattle that he had originally given.

Depending on the extent to which the parties had fulfilled their marital obligations, however, the wife's guardian may retain a certain portion. The first criterion for determining how much might be retained is related to the main purpose of marriage: procreation. Thus, a guardian is entitled to keep one head of cattle for every child born by his daughter. This rule holds good even for miscarriages, and even for children fathered by men other than the husband.

*Id.* at 277 & n.103 (citations omitted).

would imagine an alternative conception of the family from within a particular cultural location that they too would like to claim as African.

#### V. CONCLUSION

This Essay has attempted to make the case that family law should be understood as part of the legal architecture of nation-building. In many post-conflict situations, the pre-existing family structure may emerge as a suitable (and perhaps the only available) foundation from which the nation-building project may begin. After all, family membership may provide a standard (both literal and metaphorical) for national belonging and may offer coherence and stability as a result of its rootedness in shared culture. Yet, unless the enterprise of nation-building responds affirmatively to counter gender hierarchy within the family, that hierarchy will itself be reproduced in the structure of the nation.