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THE WOMEN, LAW AND DEVELOPMENT MOVEMENT IN AFRICA AND THE STRUGGLE FOR CUSTOMARY LAW REFORM

Takiwaah Manuh*

I. Introduction

The Women, Law and Development in Africa (WILDAF) movement emerged out of the United Nation's Decade for Women (1975-1985) as the legal counterpart to the 'women and development' (WID) approach of development agencies, governments and NGOs to improve the position of women in their communities. It is organized by local women lawyers with financial support from international groups in Europe and the US, and it has groups in several West, East and Southern African countries. WILDAF groups have focused on law reform, the popularization of the law, legal literacy and paralegal training for women as a means of "empowering" them to take control of their lives. An example of this is provided by a description of the 'Women and Law in Southern Africa' project:

The Women and Law in Southern Africa research project is a comparative survey of women's legal rights in Zimbabwe, Zambia, Swaziland, Mozambique, Lesotho and Botswana. The project aims to educate women on their legal rights, provide legal services and advocacy toward the advancement of women's status.¹

WILDAF groups have set up legal aid centers where advice is offered, counselling done, and when necessary, legal counsel is provided for court appearances. Women come to the centers seeking advice or action concerning child support, domestic violence, divorce and property issues. These centers appear to enjoy the support of the

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1. WIN 1992 "Women and Law in Southern Africa Project," *WIN NEWS*, Autumn 1992 Vol. 18 No. 4, 53.

states where they operate, and for the legal profession in particular, they are seen as evidence of the profession's public spiritedness.

In the discourses of WILDAF groups, members both invoke the unchallenged power of the law and the law as agency, enabling people, in this case women, to achieve desired ends.² Thus in their view, if the "right" laws were to be passed and widely disseminated, and appropriate sanctions applied, many of the cases involving, for example, fathers who wilfully neglect to provide for their children, would decrease. They also raise the question of the nature of customary law and its position in the modern legal systems of Africa, and its definitions of women and their capacities.³ In the view of these groups, customary law is seen as oppressive of women, and responsible for the low status of women and the discriminations that women face in many areas of life. The groups advocate a reform of the customary law, particularly in the areas relating to family law. Finally, they suggest in undefined ways, their visions of the relationship between the law and women in a modern legal system unfettered by customary law.

These are important issues, some of which I explore in this paper by means of an extended and rather wide-ranging discussion on the nature of law and power, discourses and resistances, and the experience of women with the customary law.⁴ I begin with a discussion of recent debates in legal pluralism to demonstrate what Chanock⁵ calls the false dichotomies that are often asserted by both the proponents and opponents of change.

2. Collier, J. *History and Power in the Study of Law*, Cornell University Press, Ithaca (1989) 9, 10.

3. Chanock, M. *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge University Press (1985); M. Chanock "Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform," 3 *International Journal of Law and the Family*, (1989) 72-88.

4. I draw on a number of sources, in particular on McKenzie's contribution in Manuh, T.J. Songsore and Fiona McKenzie "Gender and the Access to Land: The Interface Between Legislative Initiatives, Customary Tenure and Land Use and Management in Ghana," Report to WEDNET, ELC, Nairobi (1993).

5. Chanock, M. "Neither Customary nor Legal," Note 3.

II. Legal Pluralism

The recognition of the existence of a multiplicity of legal systems within a single state has engaged the attention of scholars for some time.⁶ Whether described and analyzed in terms of legal dualism, legal pluralism or legal plurality, the various accounts have sought to establish the relation of "other" systems of law to the state or "dominant" legal system. While the general view has been that the "other" legal orders created within given social fields are subordinate to the state legal system, in recent years there have been vigorous debates among scholars, and there appears to be a marked tendency to move away from the dualism implicit in classical legal anthropology to more discursive analysis.⁷ Peter Fitzpatrick argues for a radical legal pluralism, for which he adopts the term "legal plurality," and which does not assume such an hierarchical ordering of laws, nor does it assume the working of legal orders in isolation from each other. Each one, he argues, is constituted interactively with the other.

Fitzpatrick pursues this argument within a theoretical framework of theories of articulation of modes of production. Precapitalist modes persist in the South, in his view, retaining a degree of autonomy and energy that ensures the continued production of use-value, and interact with the capitalist mode of production rather than being subsumed within it.⁸ The articulation of modes, he argues, "gives rise to forms of economic, political and legal organization that cannot be reduced to either the capitalist mode or a precapitalist mode."⁹

Employing a more Foucaultian language, Starr and Collier advance a similar position in the introduction to *History and Power in the Study of the Law* as follows:

6. Santos, B.S. "Law: A map of Misreading Toward A Postmodern Conception of Law," *Journal of Law and Society*, Vol. 14 No. 3 (1987) 279-302; Merry, S.E. *Getting Justice and Getting Even: The Legal Consciousness of Working Class Americans*, University of Chicago Press (1990).

7. Moore, S.F. "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *7 Law and Society Review* (1973) 719-746; Moore, S.F. *Social Facts and Fabrications: Customary Law on Kilamarjaro 1880-1980*, Cambridge University Press (1986); Starr, June and J. Collier *History and Power in the Study of Law*, Cornell University Press (1989).

8. P. Fitzpatrick "Law, Plurality and Underdevelopment," in D. Sugarman *Legality, Ideology and the State*, Academic Press, London, 159 at 166.

9. *Ibid.* at 168.

Legal orders should not be treated as closed cultural systems that one group can impose on another, but rather as "codes," discourses, and languages in which people pursue their varying and often antagonistic interests.¹⁰

More important, they introduce a view of the law as a resource:

The view that rules are systemic resources permits analysis both of the power of law to shape events and of the fact that legal rules do not exist except as evoked by people pursuing particular ends.¹¹

And, in what he proposes as key components in a "postmodern conception of law," Bonaventura dos Santos proposes the term "interlegality" to capture the nature of the "interaction and intersection among legal spaces," the "uneven and unstable mixing of legal codes."¹² For him legal pluralism itself is the key concept in a postmodern view of law, but this is

not the legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same legal space, but rather the conception of different legal spaces superimposed, interpenetrated and mixed in our minds as much as in our actions, ...incrises as in the dull routine of eventless everyday life.¹³

These views of law as resources, manipulable, and subject to various and contradictory uses and as interpenetrating various fields are key to the analysis that I make in this paper, in trying to understand the uses, place and role of customary law in the new states of Africa and in campaigns for law reform.

10. Star and Collier op.cit. Note 7 at 9.

11. *Ibid.* at 10.

12. Santos op.cit. Note 6 at 298.

13. *Ibid.*

III. Law, Power and Discourse

In his paper "Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform" Martin Chanock brings out what he sees as false dichotomies between the upholders of "tradition" in modern African states ("the symbolical politics of modern Africa") and their opposers, those who espouse the modern and foreign. According to Chanock, instead of viewing the problems of so-called plural systems and custom as unique to Africa, one should locate it as a "problem arising out of the growth of the state and its modes of regulation everywhere, both where communities are relatively homogeneous and where they are culturally and religiously diverse,"¹⁴ and he uses Australian and European examples to illustrate his positions.¹⁵ Drawing on his earlier work on the theme of the "invention" of tradition and customary law, Chanock refers to what he calls "definitional strategies" arising from particular choices of a view of law.¹⁶ Essentially, his view is that the development of customary law was a vital part of African political self-assertion under colonialism. In the post-colonial period also, customary law is a way of making demands and mapping out political positions. Thus, for him, customary law is to be treated as a matter of "current politics and not of culture," and to resist its continuing operation in the post-colonial state involves a "resistance to the political premises and demands, and not on the basis of the denial of viability or dignity to an indigenous culture," i.e. a counter-discourse.¹⁷

Although Chanock does not make reference to Foucault here or in his 1985 work, both his discussion of the colonial and post-colonial state, and of customary law as a discourse of power and resistance are clearly evocative of Foucault and his views on power, knowledge and discourses.

In his writings on power, Foucault challenges notions of power that see it in a "juridico-discursive" sense as a property that is possessed by a few or that can be appropriated by them. Thus while

14. Chanock op.cit. Note 3 (1989) at 73.

15. See also, C. Gertz *Local Knowledge*, Basic Books (1983).

16. Chanock op.cit. Note 3 (1989) at 75.

17. *Ibid.* at 76.

power implies domination, it is not centralized, and is not exercised by someone over someone else. Rather, Foucault insists, power "circulates"; it is "employed and exercised through a net-like organization." Not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising their power.¹⁸

In *Discipline and Punish*, Foucault discusses its dynamics and its dialectical nature:

"one should decipher in it a network of relations, constantly in tension, in activity, rather than a privilege that one might possess; ...one should take as its model a perpetual battle rather than a contract regulating a transaction or the conquest of a territory."¹⁹

Thus power is always relational, inhering as "relations of power" in all other social relations, and individuals are

"not only its inert or consenting target; they are also the elements of its articulation...individuals are the vehicles of power, not its points of articulation."²⁰

Power then may be conceived as a strategy exercised in a bid for greater control. But these strategies are also "norms of resistance," and the existence of power relations depends on a "multiplicity of points of resistance." Thus a dialectical relationship is established between power and resistance and "where there is power," he states, "there is resistance, and yet, this resistance is never in a position of exteriority in relation to power," and rarely does such resistance take the form of "radical ruptures" or massive binary divisions.²¹

But power, according to Foucault, also produces knowledge:

18. Foucault, M. "Two Lectures" in C. Gordon (ed.) *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* by Michael Foucault, Pantheon Books, New York (1980) 98.

19. Foucault, M. *Discipline and Punish: The Birth of the Prison*, Vintage Books, New York (1979) 26.

20. Foucault, M. op.cit. Note 18..

21. Foucault, M. *The History of Sexuality* Vol. 1, Random House, New York (1978) 95.

"power produces knowledge...power and knowledge directly imply one another; ...there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations."²²

In the construction of power/knowledge, the knowledge of those less powerful in society become silent or subjugated, and in Foucault's work the latter include the knowledge of the psychiatric patient, the criminal, the ill person. In the colonial situation that we shall be analyzing shortly, we may also add that the knowledge generally of the colonized, and specifically of particular groups-subjects, migrants, women and youth are subjugated, and their discourses become muted.

How does all of this relate to law? According to Turkel, law or laws become one element, in the "expansion of power—or, more accurately—powers" and by extension, resistances. As such, law is neither autonomous nor determined by economic and political structures; rather it "must be analysed in terms of its internal relations of power and knowledge as well as its relations to other discourses and sources of power."²³ In the same way therefore that relations of power and knowledge are articulated through discourse, so law is constructed through multiple discourses that create and thereby define socially acceptable fields of normative order.²⁴

These "normalizing discourses, grounded in dominant institutions, rationality and science" combine with "juridical categories" and state power to create interlinking patterns of knowledge and control.²⁵

IV. The Creation of Customary Law

Fitzpatrick argues that in pursuit of the imperial project, law was "operatively at the forefront," and provided the means by which colonial rule was legitimated. This resulted in a "customary world" that matched the operation of the colonial administration and that could

22. Foucault, M. op.cit. Note 19 at 27.

23. Turkel, G. "Michel Foucault: Law, Power and Knowledge," *Journal of Law and Society* Vol. 17 No. 2 (1990) 170 at 189.

24. See also Yngresson, B. *Virtuous Citizens Disruptive Subjects*, Routledge, New York (1993) 20.

25. Turkel, op.cit. Note 23 at 172.

be "elaborated on to conform to the demands of imperialism."²⁶ This creation of the customary law in specific African contexts to meet the interests of colonial authorities, chiefs, elders and men generally has been analyzed critically.

It became a political instrument, a "language of legitimation," which served the ends of both the colonial administration and chiefs in Malawi and Zambia. The creation of this legal order involved a fundamental change in the nature of law:

The essence of the customary systems may be said to have lain in their processes, but these were displaced, and the flexible principles that had guided them were now fed into a rule-honing and -using machine operating in new political circumstances.²⁷

Processes such as marriage, divorce and succession, that formerly were the concern only of kin groups and clan authorities and subject to negotiations and compromises, were transformed and their fluidity and flexibility lost as they now became matters to be heard at Native courts. New "traditions" and customs were invented to create new norms. As Chanock points out, while these previous negotiations and compromises were not necessarily consensual or egalitarian, nor more amicable than legal processes, their outcomes depended on the comparative positions of social power of the contestants.²⁸ Even more important, norms play a part in negotiations different from that which they play in legal processes, and while they may be used to stake out negotiating positions from which to proceed or as a sounding board as to the correct procedure, they cannot be cited as rules or conditions that will be imposed. When the colonial power could not find appropriate indigenous forms or laws to extend their purpose, these "might be imagined into existence," and with respect to Malawi and Zambia, a customary law was made by men both anxious and authoritarian, determined to rebuild. Their materials were the summary and technical legalism of British forms of justice, a remote

26. Fitzpatrick *op.cit.* Note 8 at 12.

27. Chanock *op.cit.* Note 3 (1985) at 62.

28. *Ibid.* at 80.

and despotic legal style, a fiery view of sin, and above all, the vision of a strict and moral golden age.²⁹

Customary law was treated as "foreign law" and had to be proved in successive cases until it had gained sufficient notoriety. According to Woodman, this illustrated the distance created between "lawyers' customary law" and "sociologists' customary law," the former referring to that law applied within the state courts, the latter to that is "socially recognized outside."³⁰ This was to change further the nature of "true custom," which was indistinguishable from social relations. The lawyers' customary law that emerged, Woodman argues, had a "creative function": a discourse more in tune with the values of a "modern bourgeois society" was created compared to that found outside the courts; and the "certainty" of such a legal order served the imperial enterprise.³¹ Following Ranger,³² McKenzie notes that the codification of "customary law" in Africa silenced particular knowledges, and disadvantaged four particular groups of indigenous people: youth vis à vis elders; women vis à vis men; "subjects' vis à vis chiefs; and migrants vis à vis an indigenous population, as new traditions were invented to bring these groups firmly under control. For women, these concerned mostly claims over their sexuality in marriage, their right to divorce, and their labor. Chanock details the many attempts and uncertainties of a period in transition in both rural and urban areas, as customs were invented and the powers of chiefs inflated to control female "indiscipline."³³

Throughout the 1920s and 1930s around Africa, such creations and inventions were underway. Reports record attempts by the Sefwi state in the Gold Coast (Ghana) to control women's sexuality, and attempts by chiefs to round up spinsters in parts of colonial Ashanti (Ghana) and imprison them until they would name a man to be

29. *Ibid.*

30. Woodman, G. "Customary Law, State Courts and the Notion of Institutionalization of Norms in Ghana and Nigeria," in A. Allot and G.R. Woodman (eds.) *People's Law and the State*, Foris Publications (1985) 143 cited in T. Manuh op.cit. Note 4.

31. *Ibid.*

32. Ranger, T. "The Invention of Tradition in Colonial Africa" in E. Hobsbaum and T. Ranger (eds.) *The Invention of Tradition*, Cambridge University Press (1983) 254.

33. Chanock op.cit. Note 3 (1985).

released to. These examples show the extremities of such attempts, which even the colonial administration felt unable to support.³⁴

Chanock documents a strong element of gender and generational conflict in the creation and enforcement of customary law, as well as a disintegration of the community in which law emerged. At the same time, a counter discourse was set up, and Chanock writes: "an emerging class conflict, conflict between generations and between genders are all apparent, and claims about custom were a way of legitimating positions in all three."³⁵ Thus although law was an imposed form, it was also logically adopted by many Africans, and became part of their own strategies for staking out claims, and women as well as men utilized these discourses, as we see in the next section.

V. Women's Use of the Customary Law

According to McKenzie and others, the evidence is overwhelming that customary law was constructed to further the ends of male control over women, and women's knowledges were suppressed as their knowledge and experience of legal order went unrecorded. At the same time however, there were also opportunities for women to use this legal order for their own purposes.³⁶

To quote Foucault again:

we must conceive discourse as a series of discontinuous segments whose tactical function is neither uniform nor stable. To be more precise, we must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated one; but as a multiplicity of discursive elements that can come into play in various strategies. It is this distribution that we must reconstruct, with the things said

34. Jean Allman found a reference to this while researching Meyer Fortes' papers at Cambridge, and using oral histories has been able to track down some women who were victims of this practice - ASA 1993 Panel on "Women's Search for Autonomy in C19th and C20th Ghana - Marriage and Non-Marriage as Options."

35. Chanock op.cit. Note 3 (1985) at 236.

36. McKenzie, F. "Gender and Land Rights in Murang's District, Kenya," *Journal of Peasant Studies* Vol. 17 No. 4 (1990) 609; Manuh, T. "The Asantehemaa's Court and Its Jurisdiction Over Women: A Study in Legal Pluralism," *Research Review* Vol. 4 No. 2 (1988) 50.

and those concealed, the enunciations required and those forbidden, which it comprises; with the variants and different effects—according to who is speaking, his (sic) position of power, the institutional context in which he (sic) happens to be situated—that it implies; and with the shifts and reutilisations of identical formulas for contrary objectives that it also includes.³⁷

While many Africans avoided the use of Native Authority courts in Central Africa for sensitive family and property cases, to avoid the "judgment by decree which has become a feature of the Native Courts," research on women's recourse to colonial courts has shown that they were able at times, and with some ambiguity, to use the courts to their advantage.³⁸

Vaughan's analysis of district court divorce cases in Southern Malawi illustrates how women used the colonial legal system to resist male efforts to undermine the matrilineal system, and also took advantage of the colonial juridical tendency to push for male familial responsibility. Thus women expanded the duties of a husband to include paying tax on the hut built for them, while they resisted the husbands' insistence that they live virilocally. The non-payment of tax was generally sufficient grounds for a woman to obtain a divorce in a district court, whereas ill-treatment was not, and a woman could obtain a divorce on the grounds of her husband's tax evasion even where she refused his offer of such payment.³⁹

McKenzie also cites Mbilinyi to show women's resistance to a "customary marriage," which was a central component of the organization of the labour process under colonial rule. This resistance commonly took the form of running away from husbands or male kin to another man. While the discourse in the courts "reflect(ed) the repressive reality" of the marriage system, some women used this legal order to their advantage, for example through the manipulation

37. Foucault op.cit. Note 21 at 101.

38. Chanock op.cit. Note 3 (1985) 229.

39. Vaughn, M. *The Story of an African Famine: Gender and Famine in Twentieth-Century Malawi*, Cambridge University Press (1987) cited in McKenzie op.cit. Note 36.

of claims of violence, one of the few acceptable grounds for divorce.⁴⁰

McKenzie's work in Kenya demonstrates the use of the discourse of custom by women and men as one strategy among many to exert pressure in disputes over land and labour, in a changed situation of the commodification of agricultural production in Murang'a district.⁴¹ Through engaging in practices such as that of female husbands, women have made up for lack of male heirs, and have circumvented the claims of brothers-in-law and other affines to inherit clan land in the absence of male heirs.

In parts of Ghana, women have resisted the demands of husbands to extend their labor obligations to producing cash crops. While married, women as well as men have to contribute food and other goods for the upkeep of families. Women work on farms or sell produce to be able to fulfil these demands. With the introduction of cocoa and the increasing commoditization of agricultural production in the 1920s, husbands expected wives to contribute labor to the making of farms, under the fiction of their labor contributions as part of the marriage contract; but this produced property that could only be inherited by blood relations. In Asante, where cocoa production was important, these demands came to a head, when women distinguished their "customary" labor obligations to produce food for their households from the new wealth that was being created. Women argued that in Asante custom, husbands had control over the labor of women they had married as pawns, while "free" women were not under similar obligations. These free women would contribute their labor only if they were assured that their husbands would give them a share of the farm, or if he would purchase land for them elsewhere to start their own farms.⁴² Where they did not see this as

40. McKenzie op.cit. Note 36 citing Mbilinyi, M. "Runaway Wives in Colonial Tanganyika: Forced Labour and Forced Marriage in Rungwe District 1919-1961," *International Journal of the Sociology of Law* Vol. 16 No. 1, 1.

41. *Ibid.*

42. These women were aware that they were not creating a joint enterprise with their husbands nor even desired that it be so. What they were concerned with was to create property which was clearly divisible and not merged in the enterprise of the husband, and to secure what they regarded as a fair share. Failure to do so created problems with the husband's kin in the event of his death. (cf. *Abebrese v. Kaah* [1972 GLR]).

forthcoming, women might resort to a divorce, or go to court to claim a share of the product created by their labor. These problems were extremely acute among the Akan where matrilineal succession was the norm, and neither wives nor their children were "customary" inheritors. Attempts in the 1930s and 1940s by various state councils of chiefs to change the customary law to allow wives and children to inherit parts of property were resisted by the colonial administration, and judgements of the Native Courts based on these resolutions were set aside on appeal. It was stated in *Kosia & others v. Nimo* that "the recommendations had at no time received the sanction of the Governor-in-Council {and} the native customary law as to inheritance stands as it did upon the foundation of ancient custom and that is the law by which the native courts in Ashanti are bound to administer, whatever may be the private views of individual members of those courts."⁴³ This was despite the fact that the colonial administration itself had introduced a new form of marriage under the Ordinance that gave the parties married thereunder new property rights, obviously not founded on the "ancient custom" of any Ghanaian groups. The refusal of the colonial administration to permit changes in the "customary law" was to lead to a movement for reform in the family law. The Federation of Gold Coast Women, formed in 1951, was led by elite women, many of whom were married under the Ordinance. Nevertheless, they identified with the many women in both matrilineal and patrilineal inheritance systems who had no heritable rights in the estates of their husbands. They submitted several petitions to the colonial government, to no avail, asking for uniformity in inheritance rights for women. It was not until 1985 that a law was passed giving spouses and children rights to the estate of the other spouse and parent respectively, on their death intestate.⁴⁴

It is instructive that the women making demands couched them in terms of custom, relying in this case on what was "reasonable" according to customary law, and clearly evoking flexible and fluid versions of customary law that required what was "reasonable" under the circumstances, rather than a fixed adherence to some immutable principles. In this way custom becomes what Chanock calls a political

43. Laws of the Gold Coast 1951, Revised Edition, Vol. III, Accra.

44. This is the Intestate Succession Law 1985, PNDCL 111.

instrument and customary law a strategy for "making demands and mapping out political positions." This "symbolic framework" becomes an arena to reinterpret or create elements of custom in the attempt by women and men, differentiated by class, to gain access to land, labor and other productive resources as these take on different value with the commodification of agricultural production.⁴⁵

These accounts of the struggles by women around Africa are important means to recapture the agency of women themselves, and serve as a corrective to the "woman-as-victim" depiction in several accounts of the lives of African women. They also challenge views of the universal subordination of women and the discourse of the "other" in the construction of a monolithic "third world woman."⁴⁶

VI. The Movement for Law Reform

Since independence, under various guises of Africanization or modernization, the claims of customary law have been pushed or disallowed, and its use as discourse has never been clearer. These discourses are not perceived as all of one order or equally useful in particular contexts. As Foucault puts it:

'amongst the discourses of previous epochs or of foreign cultures, which are the ones that are retained, which are valued, which are imported, which one tries, to reconstitute?'⁴⁷

And who can appropriate which discourses?:

'what individuals, what groups, what classes have access to such a kind of discourse? In what way is the relationship between the discourse and he who gives it, and he who receives it institutionalized? (and among) classes, nations, linguistic, cultural

45. Chanock op.cit. Note 3 (1989) at 78.

46. Mohanty, C. "Under Western Eyes" in Chandra T. Mohanty and others (eds.) *Third World Women and the Politics of Feminism*, Indiana University Press (1991).

47. Foucault, M. "History, Discourse and Discontinuity," *Salmanagundi* 20 (1972) 225, 234.

or ethnic collectivities' (how is the struggle to define the discourse effected?).⁴⁸

Chanock brings out the appropriation of customary law at the national level by states intent on showing the "continuities" between the African past and the present. This "symbolic capital of tradition" is opposed on the other hand by the modernisers, those from the law and development perspective who see customary law as a "traditional obstacle," a "survival" which needs to be modernised, and press for reforms in marriage and family life among others.⁴⁹

But as is obvious, customary law can hardly be regarded as the "dead hand of tradition." On the contrary, it has represented the responses of living interests, and it may be "convenient to depict them as traditional and on the way out because they are often not interests which coincide with those of the developers."⁵⁰

What is clear though is that many reformers challenge what may be termed the authoritarian legalism of neo-traditional customary law, and the use of custom to defend conservative positions, as a defensive response by elements in several African societies to try to erect and emphasize particular forms of family, marriage, duty, right and obligation. Under colonialism, family law became the one area where custom was allowed unlimited sway, and the neo-traditional customary law has been preserved in most modern African constitutions through the exemption of customary law as applied to marriage, divorce and devolution of property from any general application of discriminatory principles. To be sure, attempts at reform have been made, most notably in the countries that achieved independence through armed struggle, where a type of revolutionary legality was introduced that explicitly ignored many customary rules and promoted legalistic informalism. In Tanzania, attempts have been made to unify customary law and to strengthen the power of formal courts. In Zimbabwe, attempts at reform have been more complicated, and an amended version of customary law was introduced, to free the Primary Courts from the taints of cooperation with the former settler, racist

48. *Ibid.*

49. Chanock op.cit. Note 3.

50. Chanock op.cit. Note 3 (1985) at 237.

regime, while important elements of customary law were retained in family law. But changes in the law affecting the maintenance of wives and children, made in 1981, and the Legal Age of Majority Act 1982 giving full legal majority to women at 18 seem to have undermined the marriage regime based on bridewealth and courts have been flooded with petitions by women seeking relief. As well, there is active debate on the practice of *lobola*, bridewealth payments, not only in Zimbabwe but in the Southern African region, where vestiges of Roman-Dutch law also remain to reinforce women's minority in the law, and this is very much a focus of the work of the Women and Law in Southern Africa Project.

Presently, there is active debate also on the future of customary law in a democratic South Africa, which covers similar grounds, but also takes in the peculiarities of the South African state that fostered a version of customary law suited to its apartheid policy.⁵¹ In his discussion, Chanock raises an important issue that is applicable by extension not only to South Africa but to the circumstances of many African states, and the prospects of successful law reform. According to him, the major issues as far as family law is concerned are not only customary law and pluralism, but also the pattern of urbanization that developed in South Africa under a system of strict influx control. Effectively, it has given women few alternatives to unwanted marriages as it has drastically limited their labor-market opportunities, and made the rights of women who remain in town dependent on marriage. Within this framework, neither the civil law nor customary law has served women's interests. He cautions against the repetition of the colonial tactic of imposing laws on African societies under the guise of the protection of women.⁵²

This caution is necessary and raises the issue of whose vision of change and progress is advanced in the demands for law reform. On the one hand, there are the everyday resistances of rural and poor urban women who actively manipulate the practices, rules, prohibitions and norms that collectively could be said to be their

51. Chanock, M. "Law, State and Culture: Thinking About 'Customary Law' After Apartheid," *Acta Juridica* (1992) 52.

52. *Ibid.* at 63-64.

experience of customary law, as they demand access to some resource or refuse their labor for some enterprise. The evasions of parental control over marriage, through elopements and other means to avoid the payment of bridewealth, and the subversion of male control through adultery or divorce, must be seen as attempts, however muted, to engage in other discourses and practices, other traditions of customary marriage and living arrangements. These are highly contested, subject to negotiation and constantly evolving.

On the other hand are the discourses of the modernisers, often rooted in discourses removed from the time and place, and likely to be opposed as the introduction of "foreign" practices. While many of the reformers genuinely believe in the justice of their cause, often they fail to see that these new ideas, these new visions also embody particular ideological assumptions, and are as much inventions as the customary law they oppose. As Chanock puts it graphically, the

ideas embodied in the critique of the view of the traditional and the reformist thrust toward gender and social equality, ...are also products of a particular political and ideological milieu...we must [therefore] try to understand these current ideas as part of history, applying to them the same kind of analysis that we do to those of the past.⁵³

In the movements for reform, there has been a reliance on the state to support and initiate reforms, reflecting perhaps the weakness of the forces of reform. However, this seems to be part of a worldwide trend as the state has emerged as a large force in people's lives, and seems to be the arbiter in intimate family relations. Thus Chanock comments on the role of the state that as 'initiator, developer, reformer and protector' in Western Europe over the course of the last century. The state now protects children's rights even against parents', and the rights of wives against husbands, and has taken on redistributive roles to foster or create gender equity.⁵⁴ This has led to some 'suspicion' over the role of 'patriarchy', and certainly over the ceding so much of 'private' ground to the 'public', and this

53. Chanock op.cit. Note 3 (1989) at 86.

54. *Ibid.* at 88.

is seen as an incomplete strategy.⁵⁵ Happily, Chanock suggests that some of this might be avoided in Africa because of the vibrancy of alternative institutions outside the law and the state, institutions which might provide better building blocks than those legitimated by the colonial state. However, it is doubtful how many of these views are shared by the advocates of change, many of them lawyers, whose discourse is still very much part of the dominant discourse of law and legality. Such discourses, with their focus on the legal, often do not take in the counter-discourses and cultures of the poor and the dispossessed, which utilize the language of custom and of customary law itself to struggle against aspects they consider oppressive or unresponsive to their needs. The vision, as Santos prophesies, cannot be an "either/or," "tradition vs. modernity," but the metamorphosis of forms into the chameleon, ever-changing and adaptable, a new customary law, seen clearly as an "invention," of a broad swell of the population, but an invention nevertheless.⁵⁶ There have never been certainties of the outcomes of reforms, as the contrasting experiences of women across the globe exhibit. The experiences of women in several African states that have been recounted here demonstrate adaptability to change, engagement in discourses, agencies and knowledge that must be harnessed in any movements for change. The content of this change cannot be determined in advance but, like the customary law that these women have often sought to recapture, it is flexible and adaptable.

55. MacKinnon, C. "Feminism, Marxism and the State," *Signs* (1982).

56. Santos op.cit. Note 6.