SUBMISSIONS TO THE AD HOC COMMITTEE ON FUNDAMENTAL HUMAN RIGHTS

THE IMPACT OF THE BILL OF RIGHTS ON CUSTOMARY LAW

FRIDAY 27 AUGUST 1993

INDEX

FUNDAMENTAL HUMAN RIGHTS: THE EFFECT ON CUSTOMARY LAW

1. Clause 2 of the draft Bill of Fundamental Rights contained in the Seventh Progress Report of the Technical Committee on Fundamental Rights During The Transition provides as follows:

Equality

(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating in any way from the generality of this provision, on the grounds of race, gender, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, creed, culture or language in particular.

(3) This section shall permit measures aimed at the adequate protection and advancement of persons disadvantaged by discrimination in order to enable their full and equal enjoyment of all rights and freedoms.

(4) In any action in which unfair discrimination is alleged, prima facie proof of such discrimination shall be sufficient to bring it within the class of conduct contemplated in subsection (2), until the contrary is established.

2. In terms of clause 28 of the draft Bill of Fundamental Rights the rights set out in the Bill may be limited by a law applying generally and not solely to an individual case, provided that such limitation -

(a) shall be permissible only to the extent that it is -

(i) reasonable; and

(ii) justifiable in a free, open and democratic society based on the principle of equality; and

(b) shall not negate the essential content of the right in question.

3. The question is what the effect of these provisions would be on customary law, and in particular on -

(1) the law of succession and inheritance;

(2) marriage; and

(3) the authority of chiefs in relation to -

* legal succession,
* the institution of chieftainship, and
* the allocation of communal land and rights to property and their traditional functions.

CUSTOMARY LAW OF SUCCESSION

4. The law of succession in traditional customary law is closely interwoven with the family structure, in which collective rights and obligations play an important role. Succession is primarily concerned with the perpetuation of the family unit and the name of the family head.[1] Succession, therefore, involves mainly succeeding to the position and status of the family head. The heir steps, as it were, into the shoes of the family head.[2] He acquires all the rights and becomes subject to all the obligations of the family head. The members of the family, including the deceased's wife (wives), who were under the guardianship of the deceased come under the guardianship of the heir, who has the duty to maintain and support them.[3] Customary law has detailed rules in accordance with which the heir of a family head is determined. Although these rules differ among different tribes, the general rule is that only a male who is related to the deceased through a male can succeed to the position of family head.[4] In other words, in terms of this general rule women, including the deceased's wife (wives), may not in any circumstances inherit as heirs or succeed to the position of family head.[5] According to Professor Bennett, "(i)f they were to do so, the family estate (which the customary law of succession is at pains to keep within the patriline) would pass out of the control of the deceased's family."[6] The principle of primogeniture is generally applied.[7] Testation and the

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1 J C Bekker Seymour's Customary Law in Southern Africa (5th edition) Cape Town: Juta 1989 at 273.

2 Mgoza v Mgoza 1967 2 SA 436 (A).

3 Cindi v Cindi 1939 NAC (N & T) 38; J C Bekker Seymour's Customary Law in Southern Africa at 297 et seq; T W Bennett A Sourcebook of African Customary Law for Southern Africa Cape Town: Juta 1991 at 416 and N J J Olivier et al Die Privaatreg van die Suid-Afrikaanse Bantoetaal-sprekendes (3rd edition) Durban: Butterworths 1989 at 484 et seq.

4 Sigcau v Sigcau 1944 AD 67; J C Bekker Seymour's Customary Law in Southern Africa at 273; T W Bennett A Sourcebook of African Customary Law for Southern Africa at 416.

appointment of an heir by will are unknown to customary law.[8] Procedures exist for the disherison of the person who is to succeed in accordance with customary law.[9] A family head also has limited powers to determine how property shall be disposed of after his death.[10] In the case where the family head dies without having any sons or known male relatives the inheritance devolves upon the Paramount Chief of the family head's tribe, who assumes the office of guardian of the female wards of the deceased.[11] Nevertheless, in terms of section 81(5) of the Natal and KwaZulu Codes any property in the estate of the deceased family head, who does not have a male heir, devolves according to the rules of intestate succession applicable to civil marriages. According to Professor Bennett "(t)his, of course, would allow inheritance by the deceased's wife and/or daughter(s), an impossibility under customary law."[12] Moreover, in Lesotho, the non-existence of a male heir entitles the widow of the family head to inherit.[13]

5. Section 23 of the Black Administration Act 38 of 1927 and the regulations promulgated under GN R200 of 6 February 1987 regulate the present position with regard to the application of the customary law of succession. The said position may be summarised as follows:

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5 Ibid.

6 T W Bennett A Sourcebook of African Customary Law for Southern Africa at 416.

7 J C Bekker Seymour's Customary Law of Southern Africa at 273: "The customary law of succession is fundamentally a system of primogeniture ... ."

8 J C Bekker Seymour's Customary Law of Southern Africa at 311 and N J J Olivier et al Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes at 436.

9 T W Bennett A Sourcebook of African Customary Law for Southern Africa at 405 et seq; J C Bekker Seymour's Customary Law in Southern Africa at 303 et seq; and N J J Olivier et al Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes at 474 et seq.

10 J C Bekker Seymour's Customary Law in Southern Africa at 311; T W Bennett A Sourcebook of African Customary Law for Southern Africa at 408; and N J J Olivier et al Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes at 450 et seq.

11 J C Bekker Seymour's Customary Law in Southern Africa at 275; T W Bennett A Sourcebook of African Customary Law for Southern Africa at 416 footnote 200.

12 T W Bennett A Sourcebook of African Customary Law for Southern Africa at 401.

13 Ibid.

(a) Property allotted or accruing to a House in accordance with customary law and land in a location held under quitrent conditions may not be disposed of by will. Such property devolves in accordance with customary law and in the case of land, in accordance with the table of succession contained in Proclamation R188 of 1969.

(b) All other property may be disposed of by will. Where the deceased has left a valid will but has not disposed of all his property the common law of intestate succession is applied also in respect of property not disposed of by will, excluding of course property referred to in paragraph (a) above.

(c) Where the deceased has died intestate the law to be applied is determined by section 2 of the regulations. The common law is applied where the deceased -

(i) had been exempted from the operation of the Code of Zulu Law under the provisions of section 31 of the Black Administration Act, 38 of 1927;

(ii) was married in community of property or under antenuptial contract;

(iii) was a widower, widow or divorcee of a marriage in community of property or under antenuptial contract and was not survived by a partner in a customary marriage entered into subsequent to the dissolution of the common law marriage.

(d) The Minister concerned may direct that the common law be applied to the devolution of the whole or part of the property if he is of the opinion that the application of customary law would be inequitable or inappropriate where the deceased Black person is survived by -

(i) a spouse in a marriage out of community of property;

(ii) a customary law spouse;

(iii) a person with whom he was living in a putative marriage;

or any issue of any such marriage or union.

(e) In terms of section 2(3) of the regulations customary law is applied in respect of all other cases. It is interesting to note that the Minister has a discretion to direct on an equitable basis that the common law be applied in the case of a deceased who was married only in accordance with customary law - regulation 2(d)(ii). This could produce an equitable result where the spouses, although only married in accordance with customary law, lived in a westernised society and in accordance with the common law.

6. Nevertheless, it should be noted that in terms of section 11A of the Black Administration Act 38 of 1927 a Black woman has the capacity to acquire rights of leasehold, sectional leasehold or ownership in property and to dispose of such rights, including the disposal of such rights by means of a will.

MARRIAGE

7. While the South African civil marriage is based on the concept of the nuclear family, the customary marriage is based on the concept of the extended family.

8. A customary marriage is a relationship which concerns not only the husband and wife, but also the family groups to which they belong. The consummation of a customary marriage brings into being reciprocal rights and obligations between the spouses for which their respective family groups are collectively responsible.

9. The wife's family group, primarily represented by her guardian, implicitly holds itself responsible to the husband's group for the sufficient fulfilment by the wife of her main functions, which are the bearing and rearing of children and the proper keeping of a home for effecting this purpose. On the other hand the husband's family group, represented in the first place by the husband and after his death by his heir, gives the implied undertaking that the wife will be so kept and treated as to enable her reasonably and adequately to keep a home and rear children. Although the personal relationship between husband and wife is an important part of the customary marriage, in a wider sense the wife is, in fact, united to the husband's family group;

after his death she continues to be a wife of his family home until the customary marriage has been dissolved in a manner valid in customary law.

10. The nature of the indigenous law adversely affects the status of a woman married in accordance with this system and in particular her capacity to hold, acquire and dispose of property.

11. Moreover, section 11(3)(b) of the Black Administration Act 38 of 1937 provides that:

> The capacity of a Black person to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Black, be determined as if he were a European; Provided that -
>
> (a) ...;
>
> (b) a Black woman (excluding a Black woman who permanently resides in the province of Natal) who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.

12. The South African Law Commission has already recommended that the customary "marriage" should be recognised as a valid marriage and also recommended that section 11(3)(b) of the Black Administration Act 38 of 1927 should be repealed. In addition provision has been made in the Bill that notwithstanding customary law the wife of a customary marriage shall be competent to acquire and possess property in her own name to dispose of property so acquired and to enforce or defend her rights in respect thereof in a court of law without the assistance of her husband. Provision has also been made in the proposed Bill that property acquired by a wife of a customary marriage shall vest in her as if she were not subject to customary law and that her husband shall not be entitled to deal with such property in any manner without her consent.

13. Except in Natal, there are no formal requirements for the dissolution of a customary marriage. The marriage is dissolved extra-judicially by agreement between the parties concerned. These parties are the husband (or his heir if he is deceased)

and the wife's father or his heir. The wife is not a party to the agreement. The basis of the marriage is the marriage goods agreement which implies that the husband and wife and their respective family groups will fulfil their respective duties underlying the marriage.

14. Failure on the part of any of these parties to fulfil these duties brings the continued existence of the agreement (and therefore the marriage) into issue. It follows, therefore, that the dissolution of a customary marriage is dependent upon the termination of the marriage goods agreement. As soon as the marriage goods agreement is terminated the wife reverts to her own family group and again comes under the guardianship of her father or his heir.

THE TRADITIONAL GOVERNMENT STRUCTURES IN CUSTOMARY LAW: AUTHORITY OF CHIEFS

15. The traditional authorities in customary law are the chief and headman.[14] The chief's territory is divided into districts or wards and the head of a ward is referred to as the headman. The chief's position is hereditary and the general rule governing succession to this position is that the genealogically highest ranking among the male adults of the ruling family is the successor.[15]

16. The chief is the legislator and the administrative and judicial head of the realm.[16] The chief rules in consultation with the private council and the representative council. The private council consists of men of the reigning family while the representative council comprises members of the private council and the headmen of the wards as representatives of the people. The private council is consulted by the chief on practically all matters. The most important function of the private council is to protect and control the chieftainship.[17] In this regard it ensures that the succession to the chieftainship takes place in accordance with the law, that the chief

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14 A C Myburgh and M W Prinsloo Indigenous Public Law in KwaNdebele Pretoria: JL van Schaik 1985 5. M W Prinsloo Inheemse Publiekreg in Lebowa Pretoria: JL van Schaik 1983; M W Prinsloo Die Inheemse Administratiefreg van 'n Noord-Sothostam Pretoria: University of Pretoria 1981; N J J Olivier Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes 3rd edition Durban: Butterworths 1989.

15 A C Myburgh and M W Prinsloo Indigenous Public Law 6.

16 N J J Olivier Die Privaatreg van die Bantoetaalsprekendes 4.

17 M W Prinsloo Inheemse Publiekreg in Lebowa 93.

exercises his powers properly and that intercession is open to an aggrieved member of the chiefdom.

17. The representative council is consulted on matters having important consequences such as moving or expulsion of followers and announcing the commencement of seasonal activities.[18]

18. Both councils are consulted on the matter of convening a general assembly, and the chief's action is invalid if he has not consulted the appropriate council.

A. Judicial powers of the chief

The court of the chiefdom

19. The court of the chiefdom comprises the chief and the available men.[19] The chief is the president of the court and he pronounces the verdict. Nowadays the court of the chiefdom comprises members of the statutory tribal authority of whom one is appointed by the chief to act as presiding officer.[20]

The headman's court

20. In civil cases in which the defendants reside within the ward the headman (as presiding officer), his regular advisers and the other men present may hear such cases.[21] They may also hear cases involving crimes committed within the area. Serious crimes such as disobedience to the chief or crimes for which the death penalty could be ordered are excluded from the court's jurisdiction. The court can give a verdict or refer the matter to the court of the chiefdom. If a person fails to comply with the verdict, the matter is also referred to the chief.

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18 A C Myburgh and M W Prinsloo Indigenous Public Law in KwaNdebele 52.

19 Ibid 13.

20 In terms of the KwaNdebele Act 3 of 1984, the chief must be authorised by the Minister of Justice before he can hear cases. See in this regard A C Myburgh and M W Prinsloo Indigenous Public Law 14.

21 Ibid 15.

B. Legislative powers

21. The legislative council (the representative council or general assembly) considers legislation after it has been discussed with the private council. The chief convenes a session of the legislative council. The chief adviser opens the session by outlining the purpose of the meeting. The chief decides when the discussion is to be closed, whereafter he asks the councillors to express themselves in favour or against the proposed measure. Finally the chief announces whether or not he has decided to proceed with the legislation. Legislation comes into operation after announcement to the general assembly or to the people by the headman and private councillors or on a specified future date.[22]

C. Executive powers

Central government

22. The chief is the executive head of his chiefdom and his functions comprise the following:[23]

(i) Convening the different councils

(ii) Control of officials and headmen

(iii) Maintenance of order and execution of judgments

(iv) Control of public land and agriculture

(v) Control of initiation

(vi) Control of immigration, emigration and visits.

In short, he is responsible for the material, moral and social well-being of his people and the development of the land in his area.

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22 Ibid 16.

23 A C Myburgh and M W Prinsloo Indigenous Public Law in KwaNdebele 17; see also M W Prinsloo Inheemse Publiekreg in Lebowa 93.

Decentralised government

23. The territory of each chiefdom is divided into administrative units known as wards or districts. The ward is controlled by a headman assisted by an advisory council (available heads of the villages in his ward). The headman is the representative of the chief in his ward and he also represents the people in the central government. His functions comprise the following:[24]

(i) To maintain law and order in his ward.

(ii) To carry out orders of the chief and the resolutions of the representative council.

(iii) To assist the chief in controlling land in his ward.

(iv) To control visitors in his ward.

(v) To hold court and to dispense justice.

D. Administrative functions[25]

24. This power of the chief includes control over immigration, emigration, allocation of land, petitions, death notices, revenue, ceremonies, poor relief, medication, initiation schools, the army, public works, staffing and law and order. Consultation with the private council is considered proper when the chief appoints the traditional officials of the central government.

25. Land matters are controlled by the chief and his councils. The area of a chiefdom may consist of tribal land, trust land and privately owned land.

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24 A C Myburgh and M W Prinsloo Indigenous Public Law in KwaNdebele 18.

25 See in general M W Prinsloo Inheemse Publiekreg in Lebowa 80-169.

Tribal land[26]

26. All land that is allotted to and occupied by the chiefdom is controlled by the chief as the constitutional head. He divides the land into separate areas for residential, agricultural, and grazing purposes. He may also grant residential and agricultural allotments to families. Before dividing the land the chief consults the representative council.

27. Heads of families who are members of the chiefdom may apply for residential and agricultural land while deserving non-members such as teachers may apply for residential and arable land.[27]

28. No written record of allocations is kept and no rental is payable for residential and agricultural allotments. The allotment cannot be sold or exchanged but it can be lent provided that the chief is informed. After the death of the head of the family the eldest son controls the land. When land is needed for public purposes such as a dam or a road the family may be removed.

Trust land[28]

29. This type of land is that portion of the area of a chiefdom which is registered in the name of the South African Development Trust. The Minister on authority of the State President controls and administers Trust land. A commissioner inquires into and defines in any specified area of Trust land areas for residential and arable allotments.[29] The Commissioner may collaborate with the chief and tribal authority and a register of all the allocations and transfers of residential and arable allotments is kept. Only the head of a family qualifies for a residential and an arable allotment. Applications must be in writing and the form together with the recommendation of the chief is handed to the Commissioner.

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26 Ibid 131.

27 A C Myburgh and M W Prinsloo Indigenous Public Law in KwaNdebele 39.

28 Ibid 44.

29 M W Prinsloo Inheemse Publiekreg in Lebowa 142.

30. The registered holder has the following duties with regard to his residential or arable allotment:[30]

(i) To preserve and maintain the beacons by which the allotment is defined.

(ii) To make available a portion of the allotment against payment of compensation for a public road, aqueducts, electrical power or a telephone line.

Privately owned land[31]

31. Owners of private land are under the control of a headman and subject to the chief and councils of the chiefdom. The occupation and use of the land are, however, not controlled by the chief but by the owners.

32. It is clear from a historical point of view that it is essential to protect and promote the chieftaincy. The following features require consideration:[32]

(a) Hereditary succession

33. The argument is put forward that democratic principles suggest the removal of the exclusion of commoners from the office of the chief. K B Motshabi and S G Volks are of the opinion that heredity should be retained as the sole determinant of succession.[33] According to the writers, the mystical and religious qualities clothe the institution with a special legitimacy and authority that secures obedience. With reference to the Zimbabwe experience they indicate that the removal of the judicial authority from the chief was short-lived.[34]

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30 Ibid 144.

31 Ibid 148.

32 K B Motshabi and S G Volks "Towards Democratic Chieftaincy: Principles and Procedures" 1991 Acta Juridica 104 on 110.

33 1991 Acta Juridica 110.

34 1991 Acta Juridica 111.

(b) Primogeniture

34. Here the argument is that the system of primogeniture violates the democratic principle that people should have a choice concerning the identity or the policy of their ruler. K B Motshabi and S G Volks feel that in order to retain tradition membership of the royal family could be placed as a prerequisite for candidature but that qualifications for office should be broadened.[35]

(c) Patriarchy

35. In this regard the writers warn that gender discrimination is odious and undemocratic.[36] They warn that this issue has to be approached with caution. According to them the fear has surfaced that discussions on this topic would reveal a majority opposition to female chiefs. The solution seems to be to exempt chieftaincy from the standard of gender equality as contained in the constitution. The writers are of the opinion that this can be effected in two ways: first, by means of a specific exemption and, secondly, by means of a general exemption of particular cultures from some constitutional norms.[37] The judiciary might then interpret this to release chieftaincy from the principle of non-discrimination.[38]

(d) Selection of a chief and period of office

36. K B Motshabi and S G Volks do not anticipate election of the chief by the whole tribe but they prefer a limited electorate consisting of district heads. Women would also qualify as head of a district, since according to them "it has become increasingly common for women to act as headmen".[39] Since the heads would be decided by the inhabitants of a district, the views of the entire community would have some indirect influence on the selection of the chief. They also recommend a five-year period of office.

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35 1991 Acta Juridica 111.

36 1991 Acta Juridica 111.

37 1991 Acta Juridica 111.

38 The writers however prefer to leave the matter open for women to become chiefs.

39 1991 Acta Juridica 112.

ISLAMIC LAW

37. Although the questions posed relate only to matters of customary law, similar questions might arise in respect of laws of religion. Aspects of Islamic law that appear to be in conflict with the proposed equality clause of the draft Bill of Fundamental Rights are set out below.

(a) Islamic law permits a guardian the right to contract his ward in marriage, although the ward has, on attaining puberty, a right to avoid the union by exercising an option to repudiate the marriage *(khiyâr al-bulûgh)*. In classical Hanafi law this option was available only where the child had been married by a guardian other than the father or grandfather. The option falls away if consummation of the marriage takes place. In contrast to Hanafi law, an adult virgin woman has no capacity to contract herself in marriage in Shafi'i law. She requires the consent of her guardian and it is possible for a guardian to contract his daughter, who has attained puberty, into marriage without her consent. A girl only becomes capable of contracting herself into marriage when she ceases to be a virgin either by reason of a consummated marriage or an illicit sexual relationship.

(b) All Sunni schools of law agree that a Muslim male may marry a second or subsequent wife up to a maximum of four. The requirement laid down by the *Qur'an* is that the husband must treat all his wives equally. Islamic law does not recognise polyandry and a Muslim woman may not be married to more than one husband at the same time. Although the practice of polygamy is on the decline in the Muslim world and elsewhere as a result of social and economic factors, it remains a sensitive issue in Islam. The arguments advanced in defence of polygamy from an Islamic point of view have been, first, that it is endowed with Divine authority in the *Qur'an*. Second, it has been argued that polygamy is justified when the wife is barren or unwell because, from the husband's point of view, it will enable him to have children without discarding his wife. Third, polygamy is defended because it protects widows and orphans and caters for the possibility of an excess of women over men in time of war by providing them with greater opportunities of marriage, maintenance and care than they would otherwise enjoy. Lastly, it is argued that polygamy helps to prevent immorality.

(c) Islamic law requires the payment of dower *(mahr)* by the husband to the wife. In return, the husband acquires the right of control over his wife. It is not regarded as a consideration of the marriage but is a consequence of a valid *(ṣaḥîḥ)* marriage.

(d) In terms of Islamic law a married woman has contractual capacity and can acquire, own and dispose of property, movable as well as immovable, without the assistance of her husband. The marital power of the husband over the person and property of his wife is foreign and the concept of community of property is in direct conflict with Islamic law.

(e) A marriage is terminated by the death of either spouse. A widower may remarry at once but a widow must observe a period of waiting *(ᶜidda)*.

(f) The most frequent form of divorce in Islamic law is the *talâq* which constitutes the unilateral repudiation of a wife by her husband without her consent. The exercise of *talâq* is extra-judicial and no formalities are required. The repudiation need not be addressed to the wife who may be absent and the husband may, if he chooses, use an agent or messenger to convey the pronouncement.

(g) In all the Sunni schools of law the custody *(ḥaḍâna)* of the child is vested in the mother for the first few years of the child's life. Hanafi law usually awards the mother custody until the age of seven years if it is a son or until puberty in the case of a daughter, whereupon custody is transferred to the father. In classical Islamic law the mother's custody can be terminated on the occurrence of certain events. For instance, if the mother abandons Islam, neglects the child or leads an immoral life the mother's custody is terminated in favour of the father.

(h) The law of succession is a very important part of Islamic law. Rules of succession are framed in the *Qur'an* which imposes an absolute obligation on a Muslim to adhere to the *Qur'anic* injunctions. Disobedience is subject to Divine penalty and is regarded as a serious transgression. Unlike Western law, Islamic law does not recognise the principle of freedom of testation. Succession is based on blood relationship. In intestate succession, as a general rule, male heirs receive twice that of female heirs

in the same class, the primary heirs are the descendants and ascendants, and relatives nearer in degree to the deceased exclude the more remote.

38. Muslims regard the prescripts of the Holy *Qur'an* as absolutely binding upon them. They regard these prescripts in particular and Islamic law in general as immutable. In so far as there might be conflict between rules of Islamic law and the law of the land, including human rights provisions, the Muslim view seems to be that any adaptation of the law that might be necessary must be made to the law of the land.

THE POSITION IN SOME NEIGHBOURING STATES

Malawi

39. In Malawi a traditional court system, with chiefs as judges, administering an unwritten customary law, was established for various reasons.[40] All Africans, and those who had civil suits with Africans, were potentially subject to the jurisdiction of the traditional courts, but beyond them a fully-fledged imported legal system operated, governing the affairs of corporations and expatriates.

Mozambique

40. In Mozambique, the government sought to base its power on popular mobilisation. Traditional law and traditional courts were swept aside and were replaced by a law created through Popular Assemblies and administered by Popular Tribunals. This unwritten law supposedly incorporated aspects of traditional law but rejected, in the name of national unity, separatist ethnic varieties of traditional law. It was based on the principles of what was called Popular Justice and ignored many customary rules, specifically those which clashed with the new normative standards of human rights and gender equality espoused by the new State. This approach shared with the Malawian system an absence of legalistic formality.

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40 See, for instance, M Chanock "Law, State and Culture: Thinking about 'Customary Law' after Apartheid" 1991 Acta Juridica 52 at 58 for some of the reasons.

Zimbabwe

41. The processes of transition after majority rule in Zimbabwe reflect circumstances that are a little closer to the South African case. The Zimbabwean constitution does not contain a prohibition on discrimination on the basis of gender. Though it mentions race, tribe and creed, it also specifically excludes customary law relating to marriage, divorce, devolution of property, and personal laws in general, from any general application of the non-discrimination principles. Customary law no longer applies to Africans only nor is race a factor in access to any part of the law. Nevertheless, protection was given to customary law which made it difficult for Africans to evade its applicability.[41] The effect is that in matters of family and personal law most of the population remains subject to customary law.

42. It is, however, a customary law which was substantially amended. The war destroyed the legitimacy of the state-sponsored chiefs' courts. For a period a competing, though unofficial, system of party-political courts assumed the functions of the former local courts in many rural areas. But, unlike Mozambique, the new Zimbabwean Government took a sharp step back from a politicised system of party committees functioning as 'popular' courts.[42] This was largely because of the much greater degree of political pluralism in Zimbabwe, and the consequent necessity that State rather than party institutions should rule. The chiefs were replaced by an elected structure of local government, and by state-appointed judicial officials. (The connection between the creation of democratic structures of local government and the position of chiefs and headmen, and, therefore, of customary law, must not pass unnoticed.) The new Primary Courts also administer a substantially amended customary law. Amendments made in 1981, and inserted in the Act that created the new courts, made the husband of a woman responsible for her maintenance not only during marriage but 'after the dissolution of their marriage, until their re-marriage'.[43] It also, in a provision that was to have far-reaching effects, made the father 'primarily responsible' for the maintenance of his children until the age of majority. And, of

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41 The Customary Law and Primary Courts Act 6 of 1981 made customary law applicable where the parties agreed; or where it appeared as though the parties agree in the light of the surrounding circumstances; or when it appeared "just and proper" that it should apply.

42 See A Ladley "Changing the courts in Zimbabwe: the Customary Law and Primary Courts Act" 1982 Journal of African Law 95.

43 Section 12(4) of the Customary Law and Primary Courts Act 6 of 1981.

great significance, the following year saw the introduction of the Legal Age of Majority Act 15 of 1982.

43. Taken together these changes had a critical impact on life and law in Zimbabwe, which was devastating to the customary law regime. By giving full legal majority to women at 18, the new law undermined the marriage regime based on bride-wealth. It did not make bridewealth payments illegal, but its effect (though this had to be confirmed by the Supreme Court in Katekwe v Muchabaiwa SC87/1984) was to make it possible for a woman to marry without the consent of her guardian, and without the payment of bridewealth, which had validated a customary law marriage. This meant the end of the father's seduction action in the case of a marriage he had not authorised; and the end of the transfer of guardianship of the wife, and of her children, from father to husband. In combination with the new maintenance law this had far-reaching consequences. On divorce a woman no longer became once again the responsibility of her father, but now looked to the former husband for maintenance. The husband's liability to maintain her also made it feasible to give mothers the custody of children after divorce. This was reinforced by the fact that the father had no longer necessarily bought the right to custody or guardianship with his bridewealth payment. Fathers had potentially lost control over their daughters' marriages (and the wealth that accrued therefrom) and husbands over their wives, and children, and future rights to bridewealth.[44] Fathers were also now liable to maintain illegitimate children, previously the responsibility of the mother's family. The result was a flooding of the courts by women seeking relief: divorce, or maintenance of illegitimate children. As the Primary Courts and the State buckled under the strain there has been powerful male reaction.[45]

Zambia

44. The Zambian bill of rights does not make specific provision for rights

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44 The customary law relating to the custody of children had already been qualified by the principle of the best interests of the child, but this had been applied in the light of the bridewealth payment and the consequent - father's right to arrange marriage, of existing general practice, and of male economic superiority in the absence of a liability for maintenance not linked to custody. It appears still to be the case that the Guardianship of Minors Act (ch 34) does not necessarily apply to customary marriages. See A Armstrong "Zimbabwe: away from the customary law" 1988 Journal of Family Law 344-5.

45 One might note also that male power has prevented any change of Zambian law relating to the family and family property.

relating to culture, language and tradition, although freedom of conscience is protected.[46] Article 25 of the bill of rights contains the non-discrimination clause. Discrimination is defined as "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject to or are accorded privileges or advantages which are not accorded to persons of another such description."[47] No law shall make any provision that is discriminatory either of itself or in its effect.[48] This clause does not, however, apply to any law so far as that law makes provision -

(a) for the appropriation of general revenues;

(b) with respect to persons who are not citizens of Zambia;

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(d) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons, or

(e) whereby persons may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons, is reasonably justifiable in a democratic society.[49]

45. In addition, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of

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46 Article 21.

47 Article 25(3).

48 Article 25(1).

49 Article 25(4).

any public officer or any public authority.[50]

46. The constitution also makes elaborate provisions for an advisory body called the House of Chiefs.[51]

47. The equality clause is severely qualified by, inter alia, customary law, and conflict between customary law and the equality clause appears unlikely.

Namibia

48. The Namibian bill of rights protects rights relating to culture, language, tradition and religion in Article 19 subject to the condition that such rights do not impinge upon the rights of others or the national interest. Traditions and practices which would be regarded as primitive or barbaric in modern society are therefore outlawed. Interestingly, freedom of religion is protected both as a cultural right and as a fundamental freedom.[52] Article 10 deals with equality before the law and freedom from discrimination on the grounds of sex, race, religion, colour, ethnic origin, creed and social or economic status. It should be noted that age and physical disability are not mentioned.

49. Customary law and the common law are dealt with in the constitution and not in the bill of rights. Article 66 states that customary law and the common law in force on the date of independence[53] shall remain valid to the extent to which such customary or common law does not conflict with the constitution or any other statutory law. Any part of the customary or common law may be repealed or modified by an Act of Parliament. Article 102(5) makes provision for the establishment of a Council of Traditional Leaders in order to advise the President on the control and utilisation of communal land and on all such other matters as may be referred to it by the President for advice.

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50 Article 25(2).

51 Part VII of the Constitution.

52 Article 21.

53 21 March 1990.

50. Conflict between customary law and the equality clause appears unlikely as customary law is subjected to the constitution or any other statutory law.

Bophuthatswana

51. The Constitution of the Republic of Bophuthatswana Act No 18 of 1977 declares in section 9 that all people shall be equal before the law and no-one shall merely because of his sex, his descent, his race, his language, his origin or his religious beliefs be favoured or prejudiced.

52. Article 56 states that the chiefs in Bophuthatswana shall retain their status and chiefs and headmen shall exercise their authority in terms of an Act of Parliament.

53. Section 67(1) - (3) reads as follows:

"(1) In all proceedings involving questions of tribal customs followed by persons in Bophuthatswana it shall be in the discretion of the court to decide such questions in accordance with the tribal law applying to such customs except in so far as the court may find that such law has been repealed or modified or is contrary to public policy or opposed to the principles of natural justice: Provided that no such finding shall be made by any court in respect of the custom providing for the payment of *bogadi*.

(2) The court shall not, in the absence of any agreement between the parties regarding the system of law to be applied in any such proceedings, apply any system of customary law other than that

(a) which is observed at the place in Bophuthatswana where the defendant or respondent resides, carries on business or is employed, or

(b) if more than one system of customary law is in operation at that place, which is observed by the tribe to which the defendant or respondent belongs.

(3) For the purpose of subsection (1) a court including the Supreme Court in applications, trials and appeals may summon to its assistance in an advisory

capacity such assessors as the court may deem necessary and the opinions of any such assessors shall be recorded and shall form part of the record of the proceedings."

54. The question arises as to what happens if there is a conflict between the equality clause as set out in Article 9 of the constitution and the court's discretion to decide the matter in accordance with the tribal law. The Constitution itself does not provide a solution except in respect of the custom providing for the payment of bogadi.

CONVENTIONS

55. The South African government signed[54] the following four international instruments regarding women on 29 January 1993:

(a) The Convention on the Elimination of all Forms of Discrimination against Women;[55]

(b) The Convention on the Political Rights of Women;[56]

(c) The Convention on the Nationality of Married Women;[57] and

(d) The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.[58]

56. The Convention on the Elimination of all forms of Discrimination against Women (1979) defines the term "discrimination against women" as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective

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54 For the implications of signature, see Paul Sieghart The International Law of Human Rights Oxford: Clarendon Press 1983, 35.

55 Adopted in 1979; entered into force in 1981.

56 Adopted in 1952; entered into force in 1954.

57 Adopted in 1957; entered into force in 1958.

58 Adopted in 1962; entered into force in 1964.

of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in any field. This broad definition of "discrimination against women" would suggest that practices of customary law whereby women are placed in an inferior position will be in conflict with a member party's obligations in terms of this Convention. Article 5 of the Convention places a positive obligation on State Parties to take all appropriate measures to modify the social and cultural patterns of conduct of men and women with a view to achieving "the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women" and supports such a contention.

57. For the sake of easy reference the full text of the Convention on the Elimination of all Forms of Discrimination Against Women is attached as Annexure A.

COMMENTS OF SOME EXPERTS

58. Professor T W Bennett[59] summarises the conflict between customary law and human rights as follows:

(i) Human rights emphasise the individual while customary law emphasises the group or community.

(ii) Customary law stresses duties while human rights regimes naturally stress rights.

(iii) Customary law is imbued with the principle of patriarchy which means that any freedoms of thought, speech, movement or association are qualified by the respect due to all senior men.

59. Professor Bennett warns that more areas of conflict may be identified. If a bill of rights is adopted the courts will be confronted with questions such as whether a husband is entitled to chastise his wife, or whether corporal punishment should be treated as a serious derogation from human dignity.[60] The writer is of the opinion

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59 "The Compatibility of African Customary Law and Human Rights" 1991 Acta Juridica 23.

60 1991 Acta Juridica 23.

that the "decision whether to favour customary law or human rights is obviously a question of policy that must be decided on political and ideological grounds."[61]

60. Professor Bennett sees the solution to this problem in the following manner:

> "Between the two poles of cultural and human rights there is a continuum, suggesting that 'a weak cultural relativism' is feasible. In other words, not all the norms currently grouped under the role of human rights are so fundamental that they must be applied in South Africa. Nor should all the norms of the current version of customary law be recognised. This would suggest that a less intransigent approach be adopted, and available techniques of the existing system be used to ameliorate the situation."[62]

61. Professor J D van der Vyver[63] accepts that any meaningful protection of human rights presupposes adherence to the principle of equality which requires the equal treatment of every individual within a particular community by and before the law and which permits a classification of persons and differentiation between groups of persons for purposes of the law only in cases where a definite reasonable foundation for classification and differentiation in question can be demonstrated.

62. With regard to equality of treatment he states that in cases where a reasonable foundation for distinct differentiation is found to be present, justice will in fact not be satisfied by absolute uniformity in the arithmetical sense.[64] According to Professor Van der Vyver distributive justice requires equals to be treated equally, although Aristotle also emphasised that unequals should not receive equal shares but ought to be treated "according to merit".[65]

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61 1991 Acta Juridica 34.

62 1991 Acta Juridica 35.

63 "Human rights aspects of dual system applying to Blacks in South Africa" 1982 CILSA 311.

64 1982 CILSA 315.

65 1982 CILSA 315.

63. Professor C R M Dlamini states that although there may well be certain institutions of customary law which do not pass the test when judged according to current human rights notions, customary law is in itself not in conflict with the idea of human rights.[66] He further states that customary law has as much potential for development and adaptation to altered circumstances as any other system.[67] He concludes that "(e)quality of treatment should not be confused with equality of people. As human beings, all people should be treated with respect and dignity. But people are not equal in many respects. Equality of treatment simply implies that no person should be subjected to invidious discrimination on the ground of some involuntary attribute."[68]

64. For K B Motshabi and S G Volks the solution seems to be the exemption of the chieftaincy from the standard of gender equality. Since this solution will deal with only one problem area the question arises whether the exemption should not be extended to all the areas of the customary law, for example in case of the family law - polygyny, marriage, lobolo, and unkungena, should also be exempt from the equality clause.

CONCLUSION

65. The question whether the equality clause in a Bill of Fundamental Rights should override any conflicting rules of customary law or religion or whether that clause should be qualified so as to accommodate such rules is a question of policy that must be decided on political and ideological grounds. The options seem to be the following:

(a) Retain the equality clause essentially in its present form.

(b) Make the equality clause subject to rules of customary law and religion.

(c) In clause 2(2), leave out the reference to gender (in accordance with the Zambian example).

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66 "The role of Customary Law in Meeting Social Needs" 1991 Acta Juridica 73.

67 1991 Acta Juridica 74.

68 1991 Acta Juridica 84.

(d) Add to clause 2 another subsection to the effect that this section shall not be construed so as to override or restrict any rule of customary law or religion for the currency of the Interim Constitution.

66. The result of option (a) would be that the equality clause would (subject to the proviso relating to affirmative action) take precedence over all other laws and customs that differentiate on the grounds of gender. The limitation clause (clause 28) provides in effect that the principle of equality may not be deviated from and that no limitation may negate the essential content of the right of equality before the law. Likewise in terms of the interpretation clause (clause 30(1)) the provisions of the Bill should be given a meaning that would be consonant with the underlying principle of equality.

67. A strict application of these provisions might have the result that the greater part of customary law would fall foul of the equality clause and would therefore be in danger of being declared null and void. This would apply to the position of authority of Chiefs and headmen, the hereditary rules of succession in the male line only, guardianship, the position of authority of a family head, powers relating to dissolution of customary marriages and the subordinate position of women in customary law.

68. From a policy point of view it could well be asked whether such a drastic inroad into customary law can be justified on the ground of efforts to attain gender equality. There are millions of people still living in accordance with customary law and abiding by its rules - especially people in rural areas, in self-governing territories and in the TBVC States. Somehow the views of these people ought to be taken into account before introducing a law that might have a drastic effect on their social structure.

69. Option (b) would seriously undermine the principle embodied in the equality clause. It means that rules of customary law and of religion would take precedence over the equality clause. As far as gender equality is concerned it would mean that different criteria would be applied to different sections of the population. Such a

step would also be totally irreconcilable with the Convention on the Elimination of All Forms of Discrimination Against Women which South Africa has in fact signed.

70. Option (c) suggests that it might be possible to apply the principle of equality in some matters (those enumerated) but not in others (those not mentioned). This is, however, a false premise. Clause 2(2) merely enumerates a number of instances in which discrimination can occur, but does not purport to give an exhaustive list of such instances. It in fact states that the subclause does not derogate from the principle stated in subclause (1). It would, moreover, not make sense to enact a strong equality clause but exclude its application in the case of discrimination on grounds of gender.

71. Option (d) leaves room for the duly elected Constitution Making Body to give proper consideration to the matter and to reconcile the ideal of equality and the cultural values embodied in customary law. The matter cannot now be decided finally and extensive consultation is essential. This option recognises the existence of the problem, retains, for the interim the status quo, and delegates to the Constitution Making Body the opportunity to reform the rules under discussion after proper research, consultation and mature reflection.

MR JUSTICE P J J OLIVIER
VICE-CHAIRMAN, S A LAW COMMISSION

AUGUST 1993

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2. In order to prevent discrimination against women on account of marriage or maternity and to ensure their effective right to work, measures shall be taken to prevent their dismissal in the event of marriage or maternity and to provide paid maternity leave, with the guarantee of returning to former employment, and to provide the necessary social services, including child-care facilities.

3. Measures taken to protect women in certain types of work, for reasons inherent in their physical nature, shall not be regarded as discriminatory.

Article 11

1. The principle of equality of rights of men and women demands implementation in all States in accordance with the principles of the Charter of the United Nations and of the Universal Declaration of Human Rights.

2. Governments, non-governmental organizations and individuals are urged, therefore, to do all in their power to promote the implementation of the principles contained in this Declaration.

5. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1979)

G.A. Res. 34/180, 34 U.N. GAOR, Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979). In force 3 September 1981 in accordance with Article 27.

THE STATES PARTIES TO THE PRESENT CONVENTION,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal right of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equality and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of *apartheid*, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

PART I

Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on

a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

a. To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

b. To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

c. To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

d. To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

e. To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

f. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

g. To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5

States Parties shall take all appropriate measures:

a. To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

b. To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

a. To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

b. To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

c. To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men in respect to the nationality of their children.

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

a. The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

b. Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

c. The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

d. The same opportunities to benefit from scholarships and other study grants;

e. The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

f. The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;

g. The same opportunities to participate actively in sports and physical education;

h. Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

a. The right to work as an inalienable right of all human beings;

b. The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

c. The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

d. The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

e. The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

f. The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

a. To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

b. To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

c. To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

d. To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

a. The right to family benefits;

b. The right to bank loans, mortgages and other forms of financial credit;

c. The right to participate in recreational activities, sports and all aspects of cultural life.

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Article 14

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

a. To participate in the elaboration and implementation of development planning at all levels;

b. To have access to adequate health care facilities, including information, counselling and services in family planning;

c. To benefit directly from social security programmes;

d. To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency;

e. To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;

f. To participate in all community activities;

g. To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

h. To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

PART IV

Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

a. The same right to enter into marriage;

b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

c. The same rights and responsibilities during marriage and at its dissolution;

d. The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

e. The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

f. The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

g. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

h. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

* * *

[For omitted procedural provisions, Articles 17–22, see below, Chapter IV.A.8.]

PART VI

Article 23

Nothing in this Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

(*a*) In the legislation of a State Party; or

(*b*) In any other international convention, treaty or agreement in force for that State.

Article 24

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

Article 25

1. The present Convention shall be open for signature by all States.

2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.

3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

* * *

[For omitted procedural provisions, Article 29, see below, Chapter IV.A.8.)

Article 30

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

22

Article 25

1. The present Convention shall be open for signature by all States.
2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

* * *

[For omitted procedural provisions, Article 29, see below, Chapter IV.A.8.)

Article 30

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

6. DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF (1981)

G.A. Res. 36/55, 36 U.N. GAOR, Supp. (No. 51) 171, U.N. Doc. A/36/51 (1981).

THE GENERAL ASSEMBLY,

Considering that one of the basic principles of the Charter of the United Nations is that of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action in co-operation with the United Nations to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights and the International Covenants on Human Rights proclaim the principles of non-discrimination and equality before the law and the right to freedom of thought, conscience, religion or belief,

Considering that the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations,

Considering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed,

Considering that it is essential to promote understanding, tolerance and respect in matters relating to freedom of religion or belief and to ensure that the use of religion or belief for ends inconsistent with the Charter, other relevant instruments of the United Nations and the purposes and principles of the present Declaration is inadmissible,

Convinced that freedom of religion or belief should also contribute to the attainment of the goals of world peace, social justice and friendship among peoples and to the elimination of ideologies or practices of colonialism and racial discrimination,

Noting with satisfaction the adoption of several, and the coming into force of some, conventions, under the aegis of the United Nations and of the specialized agencies, for the elimination of various forms of discrimination,

Concerned by manifestations of intolerance and by the existence of discrimination in matters of religion or belief still in evidence in some areas of the world,

Resolved to adopt all necessary measures for the speedy elimination of such intolerance in all its forms and manifestations and to prevent and combat discrimination on the grounds of religion or belief,

Proclaims this Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief:

Article 1

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to a coercion which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Article 2

1. No one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or belief.

2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Article 3

Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in a Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.

Article 4

1. All states shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or belief in this matter.

Article 5

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

3. The child shall be protected from any form of discrimination on the grounds of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.

5. Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.

Article 6

In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the following freedoms:

a. To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;

b. To establish and maintain appropriate charitable or humanitarian institutions;

c. To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;

d. To write, issue and disseminate relevant publications in these areas;

e. To teach a religion or belief in places suitable for these purposes;

f. To solicit and receive voluntary financial and other contributions from individuals and institutions;

g. To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;

h. To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

i. To establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.

Article 7

The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.

34

Article 8

Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.

7. DECLARATION ON THE PARTICIPATION OF WOMEN IN PROMOTING INTERNATIONAL PEACE AND CO-OPERATION (1982) G.A. Res. 37/63, 37 U.N. GAOR, Supp. (No. 51) at 194, U.N. Doc. A/37/51 (1983).

THE GENERAL ASSEMBLY,

Considering that the Charter of the United Nations expresses the determination of the peoples of the United Nations to reaffirm faith in the equal rights of men and women and to practise tolerance and live together in peace with one another as good neighbours,

Considering also that the Universal Declaration of Human Rights proclaims that the inherent dignity and equal and inalienable rights of all members of the human family is the foundation for freedom, justice and peace in the world,

Considering further that the International Covenants on Human Rights provide for the equal right of men and women to the enjoyment of all economic, social, cultural, civil and political rights,

Reaffirming the objectives of the United Nations Decade for Women: Equality, Development and Peace,

Taking into account the resolutions, declarations, conventions, programmes and recommendations of the United Nations and the specialized agencies and international conferences designed to eliminate all forms of discrimination and to promote equal rights for men and women,

Recalling that the Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace, 1975, states that women have a vital role to play in the promotion of peace in all spheres of life; in the family, the community, the nation and the world,

Recalling that the Convention on the Elimination of All Forms of Discrimination Against Women declares that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the economic, social, cultural, civil and political life of their countries and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Recalling also that the Convention on the Elimination of All Forms of Discrimination against Women affirms that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament and in particular, nuclear disarmament under strict and effective international control, the affirmation of the principles of justice,

equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence, will contribute to the attainment of full equality between men and women,

Recognizing that the Convention on the Elimination of All Forms of Discrimination against Women obligates States Parties to take all appropriate measures to eliminate discrimination against women in all its forms and in every field of human endeavor, including politics, economic activities, law, employment, education, health care and domestic relations,

Noting that, despite progress towards the achievement of equality between men and women, considerable discrimination against women continues to exist, thereby impeding the active participation of women in promoting international peace and co-operation,

Welcoming the contribution which women have nevertheless made towards promoting international peace and co-operation, the struggle against colonialism, *apartheid*, all forms of racism and racial discrimination, foreign aggression and occupation and all forms of alien domination, and towards the unrestricted and effective enjoyment of human rights and fundamental freedoms,

Welcoming also the contribution of women for a just restructuring of international economic relations and the achievement of a new international economic order,

Convinced that women can play an important and increasing role in these areas,

Solemnly proclaims the Declaration on the Participation of Women in Promoting International Peace and Co-operation set forth in the annex to the present resolution.

ANNEX

Declaration on the Participation of Women in Promoting International Peace and Co-operation

PART I

Article 1

Women and men have an equal and vital interest in contributing to international peace and co-operation. To this end women must be enabled to exercise their right to participate in the economic, social, cultural, civil and political affairs of society on an equal footing with men.

Article 2

The full participation of women in the economic, social, cultural, civil and political affairs of society and in the endeavor to promote international peace and co-operation is dependent on a balanced and equitable distribution of roles between men and women in the family and in society as a whole.

CL
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Reference No.: 24 August 1993

FAX TO: Multi Party Negotiating Proc
FAX NO: 011-3972211 PAGE: 1 OF: 5
ATTENTION OF: Dr Theuns Eloff
FROM: Prof Moeke DATE: 24-8-93
COMPANY: University of Transkei
FAX NO: 0471-23884

Post-it Notes from 3M

Dr Theuns Eloff
Head of Administrati
Multi-Party Negotiat
P O Box 307
ISANDO
1600

Fax No.011-3972211

Dear Dr Eloff

COMMENTS ON "EQUALITY" CLAUSE IN RELATION TO CERTAIN ASPECTS OF INDIGENOUS LAW

With reference to the above please find enclosed herewith my comments on the impact of the Draft Bill on customary law and specifically on the aspects indicated in your letter. It is indeed a great pity that I did not have much time at my disposal as the matters that are the subject of discussion are issues of great moment in customary law.

Yours sincerely

RB Moeke

PROF R B MOEKE
REGISTRAR AND FORMERLY HEAD OF
DEPARTMENT OF PRIVATE AND CUSTOMARY LAW

THE EFFECT OF THE EQUALITY CLAUSE OF THE FUNDAMENTAL RIGHTS AS IT STANDS ON CUSTOMARY LAW AND WITH SPECIFIC REFERENCE TO THE FOLLOWING :

1. Law of succession and inheritance

2. Marriage

3. Authority of chiefs -

   - legal succession
   - institution of chieftainship
   - allocation of communal land and rights to property and their traditional functions

It seems that this Clause should be read together with clause 11 of the Constitutional principles which seek to prohibit racial, gender and other forms of discrimination and promote racial and gender equality and national unity.

Observations

Before commenting on the effect of the equality clause on those aspects of indigenous law indicated in this assignment I would like to make a few observations on the aforegoing clauses :

Firstly it seems that these clauses contradict the provisions of clause 26 which seek to entrench a person's right to participate in the cultural life of his or her choice. Indigenous law is largely custom based law and as such an embodiment of the cultural life as enjoyed in the rural communities. The equality clauses undermine the hierachical social structure of the rural society. It also means that the equality clause contradicts clause 8 relating to freedom of religion which is founded on ancestor worship which embraces the seniority principle in terms of which the traditional elders play an active role.

The elders are, in most countries in Africa, regarded as the repository of tradition, and as such their views are accorded great weight in the settlement of disputes. This is the position even in those African societies without chiefs. In Africa of which South Africa is part law in the African communities develop out of community needs and therefore reflects the cultural values of the African society.

2./Most .....

Most African countries including our immediate neighbours in Southern and East Africa are still grappling with the gender issue where they seek to accommodate it in their marriage legislation. Most legal disabilities of women have been adequately addressed in the 1988 South African Matrimonial Property Act in so far as it deals with the personal and the economic equality in marriage whilst retaining the husband as the head of the household.

In Africa age and gender discrimination merely underscores the hierachical nature of the social structure which is beefed up by some social practices that are still endemic in some areas such as, for example, the custom of circumcision among the Cape Nguni.

The gender and some related issues need to be vigorously canvassed at the grassroots level. At least some mechanisms for consulting the man-in-the rural homesteads need to be carefully worked out.

Specific comments

1. Law of Succession and inheritance

The indigenous law of succession throughout Southern African tribes is based on the principle of male primogeniture. This has been for centuries. The same applies to the law of inheritance in so far as the devolution of property is concerned. The rationale here is not discrimination on gender lines but the perpetuation of the headship of the family as the heir does not succeed in the common law sense but merely steps into the shoes of the deceased head in regard to the administration of the assets and payment of liabilities.

The equality clause will therefore result into a state of confusion as there will be a need to spell out the legal position by means of legislation. What should be done here perhaps would be to include the female within the principle so that in the event of absence of male issues in the Household the deceased daughters should be considered.

The exclusion of females was perhaps on the expectation that females would in any way get married and be absorbed elsewhere. This was to ensure that property should remain in the hands of the family.

3./(2).....

2. Marriage

I have already alluded to the fact that legal disabilities affecting women in marriage have already been addressed in the Matrimonial Property law of South Africa which was passed in 1988. Women could opt out of customary law by choosing to marry in terms of the Matrimonial Property Act. There are again some major cultural considerations in customary law such as the role of lobola in marriage, the influence of extended family, the centripetal position of the head of the family, vis-a-vis the other inmates of the household, the role of kinship and religion (ancestor worship). It seems that the only way in which the gender issue can be ameliorated is by means of legislation after wide consultation with all concerned instead of entrenching it in a bill of rights or constitutional provision. We say so because this is going to be a major social transformation from a marriage system of a society based on extended family system to one based on a nuclear one. Kenya's and Uganda's proposed law reform measures could not be translated into law because of serious disagreements on the gender issue. The major step which needs to be taken is the integration of marriage laws i.e. customary law system and the one based on received Western law.

3. Authority of Chiefs

The authority to chiefs does not pose a problem since a chief is merely primus inter pares (first among equals).

The question of legal succession to chieftainship is also governed by custom. The process does not only involve the family concerned but the ultimate approval of the whole tribe. Unless these matters are agreed upon at grassroots level any changes brought about from above will result into a paper law that may not be respected by the people mostly to be affected by it.

I would strongly recommend that matters relating to chieftainship be dealt with at regional level rather than at the abstract level by people who know nothing about the institution.

4./Allocation .....

Allocation of communal land and rights to property and their traditional functions

The equality clause does not seem to have a bearing on this aspect. The allocation of communal land is group oriented. The communalistic elements manifest themselves in land ownership, particularly in settlement patterns. The principle underlying land tenure among the Africans was the one that was recognised as far back as in 1883 in the 1883 Barry Commission Report: namely, that the land belongs to the tribe and that the chief has the right of giving occupation to it as between the members of the tribe and the headmen again have the right of subdividing subject to any appeal made to the chief. This means that even agricultural land was, subject to priority of individual occupation, held in common. Nowadays these communal principles are only accurate in so far as the grazing rights are concerned.

(3)

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FACSIMILE TRANSMISSION

COVER PAGE

TO: Fax No.: (011) 397-2211

Name: Dr. Theuns Eloff.

Department: Head of Administration - Multi-Party Negotiating Process.

FROM: **PROF C R M DLAMINI**
RECTOR AND VICE CHANCELLOR

REQUEST: _____

TOTAL NUMBER OF PAGES EXCLUDING COVER PAGE: 21.

N.B. If you do not receive all the pages, please fax or call back as soon as possible.

/mn

MEMORANDUM

TO: **MULTI-PARTY NEGOTIATING PROCESS**

FROM: **PROF C R M DLAMINI SC**

SUBJECT: **EQUALITY CLAUSE AND CUSTOMARY LAW**

---

1. BACKGROUND

(a) I received a brief from the Multi-Party Negotiating Council on the provisions of a proposed bill of rights and especially the "equality" clause and customary law.

(b) I had been made to understand that I would have to present *viva voce* evidence before the Council on 30 August 1993, but subsequently I was informed it was an error.

(c) Because of the limited time at my disposal, I could not provide a detailed memorandum. All I could do is to summarise my recommendations and submit two of my writings on the relevant issues. The one was published in the Acta Juridica and the other is unpublished.

(d) Should the Council require more information, I shall only be too glad to supply.

2. ISSUES FOR DISCUSSION

(a) The central issue is whether certain institutions of customary law are compatible with the provisions of a bill of rights and in particular the "equality" clause.

(b) The equality provision should not be interpreted to mean that all people are equal. Although people are equal as human beings, they are not equal in all material aspects. Equality of treatment as an ingredient of justice does not imply that people should be treated equally whatever their position in life. It

simply means that if there is disparity of treatment it should not be based on irrelevant or capricious grounds but on fair and justifiable ones. Difference in the conditions of people may merit differential treatment. What is unacceptable is invidious discrimination.

(c) Customary law is part of the culture of the black people and if the bill of rights also provides for a right to participate in the cultural life of a people, then it would be inconsistent simply to strike down customary law with the stroke of a pen. Moreover, it would be dysfunctional.

(d) Although there may be problems with certain provisions of customary law, the proper thing to do is to attend to the undesirable aspects and not to do away with customary law. The reason for this is that, as I pointed out in the attached articles, customary law still has a role to play. It is a law that is regulating the life of a number of people.

(e) The attached document deals with the law of succession and inheritance.

(f) The other attached article deals with a customary marriage, property law and to some extent the judicial function of chiefs.

(g) A project committee of the South African Law Commission is dealing with the whole of the harmonization between customary law and the common law. Its findings and recommendations would solve some of the problems raised.

3. **RECOMMENDATIONS**

(a) Briefly my recommendation is that the recognition and application of customary law in general be provided for

in a bill of rights, but this should be made dependent on the consent of the parties concerned. I would therefore support something similar to what was suggested by the South African Law Commission in clause 33 of its proposed bill of rights.

(b) On the institution of chieftainship in general I would recommend that it be retained because it still has a role to play especially in the rural areas. To attempt to supplant it would not only be dysfunctional but it would also be dangerous. The views of the people affected must be consulted before any decision is taken on it.

(c) Aspects of customary law which are regarded as being in conflict with a bill of rights can be dealt with individually and as they come up for consideration.

PROF C R M DLAMINI
RECTOR AND VICE-CHANCELLOR
/mn

26 August 1993

The Role of Customary Law in Meeting Social Needs

PROF C R M DLAMINI*
University of Zululand

I INTRODUCTION

There is no doubt that our society is in a state of flux because of the socio-economic and political changes that are taking place. Not only is a new democratic constitutional dispensation topical, but attention is also increasingly being paid to a new and legitimate legal order for a future South Africa.[1] In the debate on a new constitutional and legal dispensation, the idea of a charter of human rights has become almost non-negotiable although there is difference of emphasis between the South African Law Commission's proposed Bill of Rights and the one proposed by the African National Congress (ANC).[2]

The crucial question, therefore, is whether the promotion and protection of human rights, which will be such a feature of the new legal order, is compatible with certain institutions of African customary law. Moreover, are there any basic social needs which customary law still meets? The latter question might even seem senseless because any law can only continue as long as it has a role to play. If it no longer has any role to play, it simply dies a natural death. The very fact that customary law still exists should render that question redundant. But the matter is not as simple as that.

Some would even argue that preoccupation with customary law is a useless exercise. This view, however, is based not on the current realities but on a value judgment. Customary law is not going to die tomorrow. To address these questions is therefore not merely an academic exercise but a practical necessity. At the root of some of the questions raised above is the belief that customary law is primitive and in conflict with the notion of human rights. If we strive to protect and promote human rights in a new South Africa, we have to be consistent on this issue too.

* BProc LLM LLD (UZ) LLD (Pret); Registrar (Academic) of the University of Zululand.

[1] Two main conferences have been held on this. The first was held in Harare in February 1989; its theme was 'The Role of Law in a Society in Transition'. This conference was attended mostly by academic lawyers from South Africa and Zimbabwe and members of the ANC. A subsequent conference on a 'New Jurisprudence for a Future South Africa' was held at the University of Pretoria in October 1989.

[2] See South African Law Commission *Group and Human Rights* (1989) Working paper 25 Project 58; ANC Constitutional Committee *A Bill of Rights for a New South Africa* (1990). On the ANC's constitutional guidelines see H Corder & D Davis 'The constitutional guidelines of the African National Congress: a preliminary assessment' (1989) 106 *SALJ* 633ff. Whereas the South African Law Commission's proposed bill emphasizes civil and political rights, the ANC document stresses economic, social and cultural rights.

II THE ROLE OF LAW IN SOCIETY

In order to address these issues, one must first of all answer the question: why law? This is undoubtedly one of the fundamental questions in legal theory. Then one must ask: what is the rationale for human rights? Law generally provides a broad framework within which acceptable human conduct takes place. It must also provide rules for the settlement of disputes according to the dictates of justice.[3] Lawful human conduct is generally aimed at providing for certain basic and deeply-felt human needs. These needs may be for food, survival, marriage and companionship (as well as the procreation of offspring), the perpetuation of the human species, mutual support in times of crisis, and for many other things that make life worth living.

Because law is not predisposed to any particular set of values, it is possible to manipulate it for attaining anti-social objectives, especially objectives pursued by those in power. Although the ideal of law is to do justice, it can be used to attain other contradictory aims.[4] The idea of human rights is based on the premise that the law must serve certain fundamental interests. It must promote human welfare and development which can be realized only if people are treated as human beings, on the basis of equality or on the basis of individual merit, and not as animals or things.[5]

III HUMAN RIGHTS AND CUSTOMARY LAW

Before the advent of Whites to this part of the world African society possessed an integrated culture where the law occupied a central position. The law was known to everybody and had to maintain society in the state in which it was handed down from ancestors.[6] But law itself changed according to the needs of the people. The law was a creative response of the people to the environment in which they found themselves. As a result, African customary law embodied the common moral code of the people. There was no sharp distinction between what ordinary members of society regarded as proper conduct and what the official organs of society decreed as law. Nor were there classes or categories with critically opposed economic interests. Most interactions took place in small areas, with permanent relationships serving a variety of purposes. This integrated society was to be disrupted by the advent of white political rule, western commerce and an alien religion.[7]

Although the recognition and protection of human rights existed in traditional African society, African definitions of human rights differed

[3] J Rawls *A Theory of Justice* (1972) 236; H R Hahlo & E Kahn *The South African Legal System and its Background* (1968) 26; B N Cardozo *The Nature of the Judicial Process* (1921) 66.

[4] T Ocran 'Law, African economic development and social engineering: a theoretical nexus' (1971–2) 3–4 *Zambia Law Journal* 23.

[5] Van der Vyver in C F Forsyth & J E Schiller (eds) *Human Rights: The Cape Town Conference* (1979) 23.

[6] O C Eze *Human Rights in Africa: Some Selected Problems* (1984) 12; Marasinghe in C E Welch & R I Meltzer (eds) *Human Rights and Development in Africa* (1984) 31.

[7] Allott in J D M Derrett (ed) *An Introduction to Legal Systems* (1968) 135–6.

in important respects from those prevalent in the West.[8] The context of family, clan, and ethnic solidarity or the kinship network, provided the framework within which individuals exercised their economic, political and social liberties and abilities, and provided restraints upon arbitrary official action that might otherwise have prevailed.[9]

It is perhaps for this reason that it has often been contended that African law is essentially a law of groups in which the individual has little or no rights. Although there is some truth in this contention in that African law has been dominated by group rights, African law has none the less accorded legal capacity to individuals to have interests in property and in their lives, to contract with each other and to sue each other in court. The rights of individuals however, have often been limited by the rights of the communities of which the holders formed part. There has been no emphasis on the individual as such, because the society has been pervaded by a communitarian ethic. Many rights have to be exercised in a group context. In traditional African society in particular, family units often functioned as corporate legal entities. As a result members of the family co-operated closely in the exploitation of family resources and in the protection of their interests.[10]

From the foregoing, therefore, it is evident that African customary law is not necessarily incompatible with the idea of human rights.[11] There may well be certain institutions of customary law which do not pass the test when judged according to current human rights notions but customary law is in itself not in conflict with the idea of human rights. No doubt precolonial African societies did not have many civil rights which are now commonly demanded by black people, such as universal suffrage, separation of powers or the rights of women[12] and persons of different religious backgrounds to participate in political matters.

Another question is whether African customary law still has any role to play in providing for certain social needs. It will be argued here, that customary law still has a role to play in this regard. The reason why it is often thought that African customary law is irrelevant or no longer has any role to play is because it is competing with a well-developed legal system, the common law of this country, namely Roman-Dutch law. (Whether the appellation, 'Roman-Dutch' law is appropriate is not an issue at the moment.)

What is important is that customary law has sometimes compared unfavourably with this legal system. The presumption has been that this system adequately provides for the satisfaction of the social needs of all the black people or at least that it should. For this reason many institutions of customary law were in the past suppressed in favour of

[8] Welch in Welch & Meltzer (n 6) 11.

[9] Eze (n 6) 15.

[10] Allott (n 7) 147ff.

[11] J D van der Vyver 'Human rights aspects of the dual system applying to Blacks in South Africa' (1982) 15 *CILSA* 312ff.

[12] R Howard 'Human rights and personal law: women in sub-Saharan Africa' 1982 *Issue* 45ff; Howard in Welch & Meltzer (n 6) 46ff; Eze (n 6) 14ff.

western institutions which were regarded as civilized.[13] The word 'civilized' is not a neutral word, but a value-laden one.

That customary law has often compared unfavourably with Roman-Dutch law, is not due to its inability to develop, as has sometimes been held, but rather because of the negative attitude towards it.[14] Customary law has as much potential for development and adaptation to altered circumstances as any other system.[15] But in order to reflect social change it needs the instrumentality of state institutions. The common law has had the support of the state and the church; both of these have had a negative attitude to customary law (and so too have the legal profession and the law faculties). The courts, as part of the state apparatus, have not shown any willingness to develop or adapt customary law to altered circumstances nor have they displayed any profound insight into the institutions of customary law.[16] This in itself is understandable as the courts have largely been manned by people who had little to do with customary law.

Although many black people may find satisfaction from Roman-Dutch law, many others lead a life that is partly tribal and partly western. In the case of marriage, for instance, although black people marry by civil rites, they always include ilobolo agreements, although these agreements are not essential for its validity. An adapted customary law is therefore necessary for those black people who cannot find complete need satisfaction in Roman-Dutch law.[17]

Roman-Dutch law is often perceived to be perfect and to provide for all conceivable contingencies. This is not true. This law has its own flaws and deficiencies, some of which have received attention in contemporary society, such as the law of divorce[18] and matrimonial property.[19]

It is therefore necessary to look at certain branches of customary law which provide for certain specific social needs. These will be in family law, property, the law of contract and the law of procedure. The choice of these areas is dictated by their practical utility.

IV SELECTED AREAS OF CUSTOMARY LAW

(1) *Family law*

There is no doubt that family law is one of the most tenacious aspects of

[13] Dlamini in A J G M Sanders (ed) *The Internal Conflict of Laws* (1990) 2.

[14] Dlamini op cit 1ff.

[15] A N Allott *The Limits of Law* (1980).

[16] R S Suttner 'Towards judicial and legal integration in South Africa' (1968) 85 *SALJ* 448ff; R S Suttner 'Legal pluralism in South Africa: a reappraisal of policy' (1970) 19 *ICLQ* 141ff; R S Suttner 'Problems of African civil law today' 1974 *De Rebus* 312; Bekker in A J G M Sanders (ed) *Southern Africa in Need of Law Reform* (1981) 191; C R M Dlamini 'Maintenance of minor children: the role of the courts in updating customary law to meet socio-economic changes' (1984) 101 *SALJ* 346ff.

[17] Suttner (1968) (n 16) 151–2.

[18] The Divorce Act 70 of 1979.

[19] The Matrimonial Property Act 88 of 1984. See C R M Dlamini 'The new marriage legislation affecting Blacks in South Africa' 1989 *TSAR* 408ff.

the law. The reason is that people derive most of their emotional and material security from this branch of the law.[20]

(a) *Family system*

The family system which has been promoted in South Africa is the nuclear family of an industrialized society. The extended family of traditional society has not been really encouraged but rather discouraged for a variety of socio-economic and political reasons. But today it is becoming clear that the extended family has an important role to play in providing protection for the aged, illegitimate children and the destitute. It also provides a support system for married couples and it prevents or discourages divorce.[21] The nuclear family tends to lack all these advantages and is therefore prone to disintegrate more easily than the extended family. When a family disintegrates, society is adversely affected.

(b) *Customary marriage*

Although marriage in general has been regarded as important, a customary marriage has been shabbily treated by the courts because it compares unfavourably with a civil marriage.[22] For a long time it was not treated as a legal marriage principally because it allows polygyny while a civil marriage is regarded as essentially monogamous. Polygyny in South Africa is regarded as contrary to public policy, a notoriously vague concept as that which is contrary to public policy cannot always be equated with something which is destructive of society; divorce, for instance, although it is obviously destructive of the family and consequently of society, is not regarded in South African law as contrary to public policy. On the contrary, it is allowed.[23] What is at issue here is not really public policy, but rather state policy which represents the views of the white community on what is acceptable conduct.[24] The views of the black community are simply regarded as irrelevant. Even

[20] T W Bennett & N S Peart 'The dualism of marriage laws in Africa' 1983 *Acta Juridica* 148.

[21] C R M Dlamini 'The transformation of a customary marriage in Zulu law' (1983) 16 *CILSA* 384ff.

[22] *Ebrahim v Essop* (1905) TS 59; *R v Nulana* 1907 TS 407; *R v Estate Seedat* (1916) 37 NLR 535; *Seedat's Executors v The Master (Natal)* 1917 AD 403; *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy v Fondo* 1960 (2) SA 467 (A); *Ismail* 1983 (1) SA 1006 (A), R Verloren van Themaat 'Law Reform by Legislation in Bophuthatswana—a Valuable Product for Internal Use and for Export' (1983) (unpublished inaugural lecture University of Bophuthatswana) 16.

[23] The Divorce Act 70 of 1979; H R Hahlo & J Sinclair *Reform of the South African Law of Divorce* (1980); C R M Dlamini 'Marriage and divorce: between Scylla and Charybdis?' 1989–1990 *Obiter* 131ff.

[24] A J Kerr 'Back to the problems of a hundred or more years ago: public policy concerning contracts relating to marriages that are potentially or actually polygamous' (1984) 101 *SALJ* 447; C R M Dlamini 'The Christian v customary marriage syndrome' (1985) 102 *SALJ* 702ff.

the recognition of customary law in South Africa has been made subject to the repugnancy clause.[25]

What is anomalous is that, while a civil marriage does allow divorce, that is not taken into account in its definition. It is defined as a union for life between persons of the opposite sex, which excludes relationships with any others during its subsistence.[26] But surely a marriage that allows divorce can never be regarded as a union for life? It may be intended to last for life. Moreover, the fact that a civil marriage allows divorce and remarriage implies that it accommodates serial polygyny. For the ordinary black person it is puzzling why the law allows divorce, which is in fact serial polygyny, and at the same time frowns upon organized polygyny.

It is not denied that a civil marriage has certain advantages over a customary marriage. What needs to be pointed out is that a stable and happy marriage depends on more than the type of cultural institution. It ultimately depends on the parties. A civil marriage provides scope for a happy and fulfilling marriage relationship, but it does not guarantee it.[27] A customary marriage, on the other hand, does provide for checks and balances which tend to discourage divorce.

The differences between the two forms of marriage are not so great that the one should be legalized and the other abolished. It is instructive to note that the dissolution of a customary marriage did not depend on the mechanical proof of a ground for divorce, as did the South African divorce law of the past; customary law was more in line with the current divorce law which is based on the irretrievable marriage breakdown. Although the current divorce has been regarded as something new, it is not really new in the strict sense of the word: customary law has always followed the breakdown principle.

Sometimes a customary marriage has been criticized for the inferior position it accords the married woman. The subordinate position of women in traditional black society is not, however, a product of a customary marriage. It is to be attributed to the simple technology and subsistence economy that gave the family head control of property. By virtue of this, he would conclude contracts with outsiders, represent all the inmates of his family home in litigation and assume liability for their delicts. There would have been little sense in granting these various capacities to women if they did not have any control over property.[28]

[25] Section 11(1) of the Black Administration Act 38 of 1927; s 54A of the Magistrates' Courts Act 32 of 1944; N S Peart 'Application of the repugnancy clause' (1980) 4 *Institute for Public Service and Vocational Training Bulletin* 51.

[26] H R Hahlo *The South African Law of Husband and Wife* 5 ed (1985) 21; *Hyde v Hyde & Woodmansee* (1866) 1 R 1 P & D 130 at 133.

[27] C R M Dlamini 'Should we legalise or abolish polygamy?' (1989) 22 *CILSA* 344; Dlamini (n 24) 707–8.

[28] Bennett in A J G M Sanders (n 16) 18, Meillassoux in D Seddon (ed) *Relations of Production* (1978) 139; see also Gluckman in M Gluckman (ed) *Ideas and Procedures in African Customary Law* (1969) 252.

The position remained unaltered despite changes in the lives of black women. This has been changed to some degree[29] and even the status of a customary marriage has improved.[30]

(c) *Polygyny*

One of the institutions of customary marriage which has been heavily criticized is polygyny. This allows a man to have more than one wife at the same time, an institution that is regarded as discriminating against women. From the earliest encounter between Whites and Blacks, polygyny has been considered repugnant to the Whites' sense of propriety. But those who criticized it did not have a clear understanding of the purpose of this institution.[31] It is suggested here that polygyny is not simply an invidious discrimination against women because, despite its defects, it has certain merits.

In traditional society, where there were few job opportunities for women, polygyny enabled women to marry and to have children; marriage provided security. The alternative was life-long celibacy or spinsterhood, for which traditional society made no provision. Marriage, on the other hand, even a polygynous one, brought with it the enhanced status of wifehood and the procreation of legitimate children. The sharing of a husband, which is perceived as obnoxious by Westerners, may not have seemed too great a price to pay for the advantages of being a wife and a mother in a society where other careers were not open to women. Moreover, the co-wives benefited from the companionship and security which a large establishment provided. In addition polygyny was a form of family planning, as sexual intercourse during the period of lactation was prohibited. It also rescued women from excessive childbearing. Although jealousy, bickering and marital strife did arise in a polygynous establishment, there is no evidence that these evils were worse than in contemporary monogamous marriages.[32]

Although the incidence of polygyny may be decreasing for various reasons, it still has a role to play, not only for rural, non-literate people, but also for the educated. Polygyny may be a compromise between a happy marriage and divorce. The idea that it is a blatant degradation of or discrimination against women is therefore a misconception. In fact polygyny is calculated to protect the woman who cannot find a single man to marry and is prepared to settle for a married man. It provides her with a stable relationship and companionship. The first-married woman, although she may be aggrieved, is also protected in that she still remains

[29] The KwaZulu Act on the Code of Zulu Law 16 of 1985; The Natal Code of Zulu Law Proc R151 of 1987; see also J C Bekker & J J J Coetze 'The KwaZulu Act on the Code of Zulu Law, 1981' (1983) 46 *THRHR* 285ff; C R M Dlamini *The New Legal Status of Zulu Women* (1983) Publications of the University of Zululand Series B No 37; Dlamini (n 19) 413.

[30] Section 35(2) of Act 16 of 1985; s 1(*b*) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988; Dlamini (n 19) 411–12.

[31] For a discussion of this see G Helander *Should We Introduce Monogamy?* (1958) 9.

[32] H J Simons *African Women: their Legal Status in South Africa* (1968) 82.

practices regulating family and property relations. people need to be given the ability to challenge the existing hierarchical and discriminatory aspects of these laws, customs and practices. This refers both to challenges within the community or to the chief and resort to a third party, such as the court.

6 **How to make equality and human rights effective in customary law**

In making customary law subject to the constitutional framework of equality and human rights, one cannot lose sight of the fact that change is a process and that the mechanisms and structures that are put in place should grant the greatest degree of access, protection, involvement and certainty for the communities. Within these structures and mechanisms both the political and legal aspects of a constitutional framework of human rights should be brought into play.

We are developing a set of proposals which include the courts, legislative change and community involvement. These will be given in more detail in our second submission. These proposals will address, inter alia, the following:

6.1 the empowerment of people and communities to participate in the transformation of the system of customary law;

6.2 the need for swift remedies in some cases;

6.3 the development of authentic principles and rules which accomodate both culture and rights;

6.4 the "disarray" that some people feel may result if the court is able to strike down whole sections of customary law on the basis that they are discriminatory;

6.5 the duty and role of the legislature.

6.6 the development of a system which grants access to, and allocation of, resources in a manner which actually reflects the character of the community; and

6.7 the question of choice (whether to live under a customary or non-customary system).

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a wife and may be given the status of a great wife. Polygyny is better than an illicit relationship with a mistress (who is not legally protected) because the second woman is treated as a wife, not a concubine. Women who are involved in polygynous relationships are not forced into them. On the contrary, polygyny persists because of the support of some women.

In an imperfect world it would be unwise to abolish this institution in favour of an ideal which even western society has not attained. The escalating divorce rate, not only in South Africa but worldwide, is a damning indictment against a society that claims to be civilized. The effect of this on children is traumatic and destructive.

(d) *Ilobolo*

Another institution of customary marriage, which was heavily criticized in the past but which continues to persist, is ilobolo. The criticism was largely based on the fact that it was regarded as a purchase of a woman which in turn derogates from her status and dignity.[33] Despite this criticism, the institution of ilobolo continues to be popular in the black community. Ilobolo is widely demanded and is paid not only in the context of a customary marriage, but even in contemplation of a civil marriage although today it is a legal requirement for neither civil nor customary marriage.[34] There are various reasons for the continued popularity of ilobolo.

In traditional black society, of course, ilobolo had a number of legal functions. Its ceremonial transfer from the husband's to the wife's people was evidence of the establishment of a new matrimonial relationship. It validated the conclusion of a marriage and marked the formal creation of the husband's marital power over the wife, affording him exclusive access to her. This gave the husband parental power over the wife's children whereby they became legally affiliated to him.[35]

Because ilobolo is not a legal requirement for a marriage in contemporary customary law, its continued popularity may be attributed to a number of social reasons. Black people in general cannot conceive of a marriage as valid if ilobolo has not been paid or agreed upon, even if all the other requirements may have been complied with. Some do not even know that ilobolo is not a requirement for a civil or a customary marriage, although owing to the force of custom knowledge would make no difference. The form of marriage negotiations makes it impossible for the bridegroom to evade ilobolo, especially in the past where the consent of the bride's father was essential even for a woman

[33] For a discussion of this see: C R M Dlamini *A Juridical Analysis and Critical Evaluation of Ilobolo in a Changing Zulu Society* (1983) (unpublished LLD thesis, University of Zululand) 168; C R M Dlamini *The Significance of Ilobolo in Zulu Law* (1984) Publications of the University of Zululand Series II No 42 5ff

[34] C R M Dlamini 'The modern significance of *ilobolo* in Zulu society' 1984 *De Jure* 148ff.

[35] Allott (n 7) 153-4

who was a major.[36] The conventional way of obtaining the father's consent, especially in Zulu society, is by way of ukukhonga (to open marriage negotiations). It is interesting that ilobolo continues because it has the support of both men and women. Black women do not regard it as a sale or as derogating from their dignity. For the average black person ilobolo is evidence that he or she is married in the full sense of the word. In this way, therefore, ilobolo expresses the views and convictions of black society on what characterizes a valid marriage. Although this may seem superficial, many black people regard ilobolo as a unique African custom giving them a distinctive cultural identity as against white people.[37] And, in a world of rapidly changing norms and escalating divorce, who can blame them for this view?

Some have advocated the abolition of ilobolo,[38] on the grounds, inter alia, that it discourages marriage and excessive amounts are demanded. Moreover, delaying marriage leads to other social evils, like elopement, illegitimate children, concubinage and pre-marital sex. The answer here appears to lie in moderation and not in complete abolition. Moderation is in accord with the traditional spirit and practice of ilobolo. Operating in a money economy, as it does today, ilobolo tends to acquire mercenary features which then discredit it because it takes on the appearance of the purchase of a woman. While delaying marriage is an evil which should be guarded against, entering into marriage hastily and prematurely is equally undesirable as it leads young people to involve themselves in a serious and complex relationship without appreciating the implications thereof. (To some extent divorce has been ascribed to this.)[39] Ilobolo, on the other hand, acts as a brake as it requires tremendous responsibility before a person can marry. Abolition would therefore be dysfunctional and would lead to the creation of 'paper law'.[40] Its demise should be left to other social and economic factors.

While it might have been incorrectly inferred that my opposition to the abolition of polygyny is based on male chauvinism and selfishness, the same cannot be said of my attitude to ilobolo. When I married my wife, I paid ilobolo for her, but she got me for nothing. My opposition to the abolition of ilobolo is based on practical realities and on the fact that law reform, in order to be effective, must rest on the careful balancing of the benefits and the degree of resistance.[41]

[36] Section 22*ter* of the Black Administration Act 38 of 1927.

[37] Dlamini (n 34) 150, M Brandel 'Urban *lobolo* attitudes: a preliminary report' (1958) 17 *African Studies* 49; T N Moeno *The Urban African Family Disorganization with Special Reference to the Problem of Illegitimacy* (1969) (unpublished M A dissertation, University of Zululand) 94.

[38] J M Hlope 'The KwaZulu Act on the Code of Zulu Law, 6 of 1981—a guide to intending spouses and some comments on the custom of *ilobolo*' (1984) 17 *CILSA* 163ff.

[39] Comaroff in J J Comaroff (ed) *The Meaning of Marriage Payments* (1981) 22.

[40] Bennett & Peart (n 20) 158; Allott (n 15) 174

[41] C R N Dlamini 'Law and social change' 1988 *Transkei Law Journal* 23.

(c) *Ukungena or levirate*

In customary law a marriage is regarded as coextensive with the life of a wife. This means that the death of the husband does not necessarily terminate the marriage. A widow can retain the status of a married woman for a number of purposes despite her husband's death. The marriage is intended to be indissoluble, indefinite, measurable only by the natural life span of the wife, which is in any case the real meaning of a 'union for life.'[42]

The institution of levirate is an old one found also in Mosaic law.[43] The vexed question even among the Jews was what the purpose of the institution was.

Among the Zulus in particular this institution has been said to have as its object:

> '[T]o maintain things as they were before, to keep the children in the kraal, for the very young ones would have to go with their mother for some time at least, and to maintain friendly relations between the kraal and the people of the widow.'[44]

Traditional black people regard it as an honourable institution.[45]

The union is based on the spirit of brotherly affection and involves an act of piety, whereby a man might forego inheritance to provide an heir for his deceased brother. (He might in addition derive a measure of sexual satisfaction from the relationship.) The reasons for the existence of this institution, therefore, are to be found in a complex of religious, sexual and even economic practices and beliefs.[46] In the traditional set-up a widow could easily fall prey to unscrupulous men. The levirate practice, however, provides her with security, companionship, sexual satisfaction and the right to procreate legitimate issue as well as an assured status at her late husband's home.[47] These are important considerations if one bears in mind that in traditional society, if the widow left, she could forfeit her children, house, property, and support. In addition she would not be able to earn a living on her own because in those days there were no or few employment opportunities for women. Nor would she easily find a partner in order to marry again. As it is usually the prerogative of men to offer marriage to women, she would be doubly disadvantaged. People in traditional society were much more conscious and concerned about the emotional, sexual and social needs of a young widow. They were aware that she would not be in a position to disclose these needs. Consequently an arrangement would be made on her behalf, with her consent, for an ukungena consort.

Before leaving family law, it is important to mention that most of the institutions connected with a customary marriage have often been

[42] S N C Obi *Modern Family Law in Southern Nigeria* (1966) 158.
[43] Deuteronomy 25: 5–10; E Neufield *Ancient Hebrew Marriage Laws* (1944) 26.
[44] G M B Whitfield *South African Native Law* 2 ed (1948) 164–5.
[45] E N Braadvelt 'The Zulu customs of *ukuvusa* and *ukungena*' (1940) 3 *THRHR* 113.
[46] Simons (n 32) 250.
[47] Simons (n 32) 251.

criticized on the ground that they are contrary to Christianity. Strangely enough many of these institutions are provided for in the Bible and they are neither condemned nor abrogated in the New Testament. It therefore becomes clear that the condemnation of these institutions is based on church doctrine (reinforced by westernization) rather than on scriptural authority. The nagging question therefore is: why would the Bible allow or even advocate these institutions? The answer appears to lie in the fact that the Bible is much more concerned with the concretizing or crystallizing of the command of love for one's neighbour, rather than with aspiring to some elusive or even illusory ideal. No doubt some of these institutions could be liable to abuse, but they have a role to play. The same can be said of certain contracts in customary law.

(2) *Law of contract*

Contract plays an important economic role in the exchange of valuables. Many contracts in customary law have a social function. It will not be possible to deal with many of them.

There is no real difference between the customary-law contracts of sale, barter or loan for consumption and the common-law ones except that in customary law no interest is charged.[48]

Another customary-law contract that should be mentioned is the ukusisa contract.[49] This is a contract which shows clearly the communal approach to life of black people. In terms of this contract a person can give livestock to another to use for a considerable time without paying anything for use and enjoyment. The lender retains his ownership of the stock and its progeny. The owner may give the person to whom livestock is sisa'd any of the increase, but there is no obligation on him to do so. The increase belongs to the owner. In any case, the sisa receiver benefits from the use and enjoyment of the livestock and can be liable for the negligent or culpable loss of any stock.

The underlying philosophy of this contract is care for one's neighbour. It would usually be a well-to-do person, especially in the past, who would sisa some of his livestock to a needy relative or neighbour. In the process, however, he would benefit through the wider spread of his riches, which would be accompanied by the spread of his social or even political influence. He would be entitled to inspect his livestock and even to earmark it. The sisa receiver would obviously be called to account for any losses, or to make good such losses if they were caused culpably.

This contract is obviously gradually disappearing because it seldom happens that any one person today has enough stock to give to the needy. But in itself, by providing for poor relief among neighbours, this contract demonstrates a certain welfare function. It is also increasingly influenced by the profit motives of present society.

[48] J C Bekker *Seymour's Customary Law in Southern Africa* 5 ed (1989) 332.
[49] Bekker (n 48) 338ff; N J J Olivier et al *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 3 ed (1988) 567ff.

(3) *Law of property*

The idea of social solidarity is also evident from the customary law of property. Whereas, in the common law, land tenure for instance tends to be individualistic, the customary land tenure is pervaded by the community or communitarian ethic.[50] While the common-law tenure is often described in terms of ownership, possession or some other lesser rights, customary land tenure cannot be described by reference to any of these terms.[51]

The reason for the inapplicability of common-law terms to customary land tenure is because customary tenure in its original form entailed a variety of land-use rights which were different from common-law land rights. This is to be attributed to the legal nature and content of customary land rights which are closely connected to the traditional extended family relationship. Ownership in the common-law sense, on the other hand, has an element of individualism which is foreign to customary property relations.[52] In terms of customary law, land is either not owned at all or owned by a tribe or smaller social unit as a whole, while individuals have protected rights of occupancy, use and exploitation to certain parts of such land, within and subject to the social structure of the group in question.[53]

The customary tenure is similar to the biblical idea of land tenure in terms of which land is collectively owned by what Schluter calls a 'three-generational family unit'.[54] This land could not be alienated to outsiders and would devolve upon the next generation. This tended to keep the family together and to limit family disintegration. The land would thus be held in perpetuity by the family with all the implications that go with it, namely rootedness, the prevention of landlessness and the concentration of wealth in the hands of a few. In this land system the state played no role, the local community and kinfolk were dominant.[55]

Despite the merits of customary tenure, it is often viewed negatively because it cannot provide some of the benefits of common-law tenure. The close relationship between land rights and status in customary law tends to limit land transactions, such as sale and lease, which are typical of the common-law tradition. Because the right to occupy, use and exploit land is limited to members of a close-knit social group on account of their status in it, individuals are precluded from selling, leasing or burdening their rights as they wish. They can do so only within the

[50] Cross in C Cross and R Haines (eds) *Towards Freehold: Options for Land and Development in South Africa's Black Rural Areas* (1988) 346.

[51] A J van der Walt 'Towards the development of post-apartheid land law: an exploratory survey' 1990 *De Jure* 6–7; T W Bennett 'Terminology and land tenure in customary law: an exercise in linguistic theory' 1985 *Acta Juridica* 173ff.

[52] Van der Walt op cit 7, this does not imply that ownership is absolute—see D P Visser 'The absoluteness of ownership: the South African common law in perspective' 1988 *Acta Juridica* 39ff.

[53] A J Kerr *The Customary Law of Immovable Property and of Succession* 3 ed (1990) 29ff; Cross in Cross & Haines (n 50) 17ff.

[54] M Schluter *A Biblical critique of Forms of Land Tenure in South Africa* (1988) 4.

[55] Schluter op cit 5–8.

group and subject to the consent of the group leaders. This restraint, therefore, has prevented the development of a market in rural black land thus 'ensuring that poor black families do not lose their land rights in exchange for short term cash'.[56]

Customary land tenure is also often criticized for not providing for contemporary needs such as providing security for mortgage financing, or because of the problems connected with land survey and registration. Moreover, the poor state of agriculture in the rural areas is often blamed on customary land tenure. Some, therefore, would see abolition of customary tenure and the creation of a new form of tenure as the solution. Although this option might be attractive, it has far-reaching implications. It could lead to the loss of the social cohesion in the rural population, which in turn might exacerbate rural poverty by removing the social security system.[57]

The abolition of customary tenure will no doubt cause more problems than it will solve. A large number of poor rural people might be tempted to sell their land (which is their only security against homelessness and destitution) for short-term cash gain, without solving their long-term financial problems. Rich land owners might also exploit the poor rural people. For these reasons it has been correctly argued that the creation of a free market in rural land should be avoided, not only because it will deprive the rural poor of the land, which is their only socio-economic security, but also because the consequent increase in rural poverty will be accompanied by the demise of the social structure 'which serves as a buffer between poverty and irrevocable destitution'.[58]

(4) *Procedural law*

The customary law of procedure is one aspect of the system that has been commended. Customary procedure is inquisitorial, flexible, informal and simple. The system of evidence is free and devoid of technical rules of exclusion.[59]

In the words of Allott:[60]

> 'At the heart of African adjudication lies the notion of reconciliation or the restoration of harmony. The job of a court or an arbitrator is less to find the facts, state the rules of law, and apply them to the facts than to set right a wrong in such a way as to restore harmony within the disturbed community. Harmony will not be restored unless the parties are satisfied that justice has been done. The complainant will accordingly want to see that the legal rules, including those which specify the appropriate recompense for a given wrong, are applied by the court. But the party at fault must be brought to see how his behaviour has fallen short of the standard set for his particular role as involved

[56] Van der Walt (n 51) 9–10; D J van der Post 'Land law and registration in some of the black rural areas of Southern Africa' 1985 *Acta Juridica* 214.

[57] Van der Walt (n 51) 12–14.

[58] Van der Walt (n 51) 15.

[59] Allott et al in Gluckman (n 28) 22; Ollennu in Gluckman (n 28) 117ff; Van Velsen in Gluckman (n 28) 137ff; A C Myburgh *Papers on Indigenous Law in Southern Africa* (1985) 70; Van der Merwe in Sanders (n 16) 141–2; Van Niekerk in Sanders (n 16) 130ff.

[60] Allott (n 7) 145.

in the dispute, and he must come to accept that the decision of the court is a fair one. On his side he wants an assurance that once he has admitted his error and made recompense for it he will be re-integrated into the community.'

Despite its flexibility and informality, traditional court proceedings have been regarded as achieving the same forensic ends as those achieved for western courts by counsel or counsels' preparation of pleadings. Informality pervades the way in which litigants present their cases, in the manner that they adduce evidence, and the role which the court plays.[61] Usually evidence is heard from both litigants before the plaintiff's witnesses are called to substantiate his case. The plaintiff is allowed a great latitude to say things that are apparently irrelevant but which may turn out to be crucial. As a person acting without the advice of a lawyer, the plaintiff (or defendant) might feel that he has not been properly treated, and that justice cannot be done unless he were allowed to say what he wanted to say.[62] Complicated rules of evidence make it difficult for ordinary witnesses to comprehend why they are allowed to say some things and not others which may well be felt to be relevant by the witnesses themselves. This tends to create a distance between the people and the courts.[63] The informality and flexibility of procedure therefore enable both the litigants and the witnesses to feel that justice is done which instills confidence on the part of the litigants in the decision arrived at by the court. This is essential for social stability and harmony. In any event, these attributes are always desirable in court proceedings.

V CONCLUSION

It is well known that customary law is based on a communitarian ethic whereas the common law is based on individualism.[64] Both these approaches have merits and demerits; neither is perfect. While it might be undesirable to submerge the individual and place him or her at the mercy of the group, it would be unrealistic to expect the individual to go it alone.

Individualism is based on the false assumption that all people are equal or rather that they are equally self-sufficient in all material and non-material respects. This assumption may arise from a misinterpretation of the principle of equality of treatment. Equality of treatment should not be confused with the equality of people. As human beings, all people should be treated with respect and dignity.[65] But people are not equal in many respects. Equality of treatment simply implies that no person should be subjected to invidious discrimination on the ground of some involuntary attribute.

[61] Allott et al (n 59) 23.
[62] Ibid.
[63] Van der Merwe (n 59) 147.
[64] A J G M Sanders 'The characteristic features of Southern African law' (1981) 14 *CILSA* 328ff.
[65] Dlamini in M Robertson (ed) *Human Rights for South Africans* (1991) 19ff.

The conditions in which people live differ owing to social, economic, and political factors. Some are disadvantaged by circumstances beyond their control. Yet, although they may be more disadvantaged than others, they have the same basic human needs as all others. Any realistic legal system should accommodate these disparities and disadvantages. The world pays lip service to many ideals, but lives with a lot of hypocrisy. This is not to discredit the ideals; it simply means that we must not pretend that all people live an ideal life. At the same time it is wrong to ignore social reality. A realistic legal system must accommodate these practical problems without degenerating into baseness. Thus it must marry both the individualistic and communitarian approaches; it must take the good from both customary and common law.

South African law is often said to face a legitimacy crisis. One of the reasons for this is that black people feel that they have played no part in the making of the legal system to which they are subject. A legal system consists of more than rules. It also entails an outlook on life. The synthesis of certain principles of customary and common law could contribute towards remedying this situation. The approach of customary law has something to offer to a new legal order.[66] This is no doubt a difficult process because of a difference in the system of values.[67] But it is worth it to make black people feel that South African law is their law too.

[66] N J McNally 'Law in a changing society: a view from north of the Limpopo' (1988) 105 *SALJ* 437ff.
[67] C R M Dlamini 'The transition from a traditional to a modern legal system' (1988) 21 *CILSA* 241.

THE COMMON LAW AND CUSTOMARY LAW OF SUCCESSION: SIMILARITIES AND DIFFERENCES

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Paper delivered at Law Reform Conference on the Law of Succession on 2 March 1992 at the Holiday Inn, Pretoria.

1. INTRODUCTION

In an overdose of conferences to which I have been exposed, far too great an exposure than is good for anyone, it is customary for the speaker to preface his remarks with an expression of unmitigated joy at being present at the conference. Not being in a mood to break with this venerable tradition I have to commence ny paper by saying: I am absolutely enraptured by the invitation to participate in these deliberations.

My interest here, however, is not merely academic, but more than that because I believe the subject of customary law needs serious attention at this time in our history. Although various aspects of customary law have been singled out for criticism, I am not convinced that in many cases the criticism is based on a thorough understanding of the underlying philosophy of customary law.

2. WHY THE COMPARISON

A fundamental question to ask in discussing a topic like this is: why necessarily this comparison? What is our objective and what are we trying to achieve?

The answers to these probing questions are obviously not as simple and as brief as the questions. The answers have to be given in the light of the current and impending changes in our country. Whereas in the past, owing to the policy of apartheid, we were content to point out the differences, and remain there, today that is no longer adequate. It is essential to look at the differences and not only be complacent with them, but it is essential to pose a further probing question whether these differences are fundamental and if fundamental, whether they are so fundamental that they cannot be reconciled and if they are irreconcilable, whether they are so necessary that the two systems have of necessity to remain separate.

Today the major aim is to produce a uniform system which is going to apply equally to all the people of this country. Separate systems of law applying to the same geographical area, although nothing new, often create the impression that certain sections of the population have a raw deal. There may well be entirely justifiable reasons to retain differing personal laws, but that decision should be based on sound principles and justifiable considerations.

The present endeavour of course is based on the assumption or hope that change in this country is irreversible. It is premised on the belief that we are moving towards a legitimate legal order for this country and that sanity will prevail which will save this country from being again plunged into the doldrums of crude apartheid, international isolation and chaos.

Before we can seek to eliminate the differences and reconcile the reconcilable, we should ensure that we have a thorough grasp of the values or jural postulates that underpin the rules in question. It must be pointed out, however, that there are some differences which are relative and others which are absolute.

Another problem when it comes to a comparison between customary law and the common law is that some perceived differences may be developmental. They may be a result of the fact that customary law in many cases has not been allowed to develop according to the needs of the people it serves or to adapt to the altered circumstances of the people who are supposed to be practising it. On the contrary, its development was arrested and it was assumed to have remained immutable.[1] Before we consider the differences, let us start with the similarities.

3. SIMILARITIES

One of the major similarities between the common law and the

customary law of succession is that both of them deal with the rules on what to do with the property of a person after his death. The manner in which we do this depends on the approach to life of each society.

The rules of succession and in particular of intestate succession are largely based on what we think the deceased would have done with his estate if he was still alive, or we may say we look at what the deceased did with his property before he died and then assume that he would have done the same thing with it if he were still alive although this assumption may be wrong. There are certain things we may not be bold enough to do while we are still alive. But when we are dead, it may be something else. This is something which is common to both common law and customary law.

Another similarity between the two systems is that generally the property of the deceased usually devolves on his descendants first and only to the collaterals if there are no direct descendants.[2] Differences of detail may also arise. Generally speaking therefore we can say that in both common and customary law of succession a person's estate devolves on his descendants.

4. DIFFERENCES

When it comes to differences, there may be differences of kind and others of degree. One major difference between the two systems is that the customary law of succession is based

on the principle of make primogeniture. This means that a person who is supposed to inherit the estate of the deceased is the eldest son of the deceased, or the eldest son of the deceased's son if his eldest son is deceased and there is no other son to inherit. In the absence of a son or son's sons, it is the nearest and eldest male relative of the deceased who is usually his brother.[3] Female descendants and the widow do not generally succeed to the estate of the deceased. The common law on the other hand does not discriminate between female and male children of the deceased. They are all entitled to inherit from him ab intestato.[4] Moreover, all his children inherit in equal shares and not simply his eldest son.

The underlying reason behind the principle of male primogeniture is that the customary law of succession is based on the principle of universal succession, well known in Roman law, the idea being that the heir steps into the shoes of the deceased to continue his life for him.[5] He also has to perpetuate the deceased's name. This is why it has to be a male. A woman is regarded as not being capable of perpetuating the name of the deceased because the assumption is that she would marry and once married she would not perpetuate the name of the deceased, although if she divorced she would be entitled to come back to her maiden home and be protected by the heir.

Another important consideration is that in terms of customary law there is no individual ownership of property

in particular land. The family head is the controller of the property in respect of which the family inmates have limited rights of use and enjoyment of the property. For this reason therefore although the eldest son would inherit the property of the deceased, the other children of the deceased would still have limited rights of enjoyment of the property. Thus even the female children of the deceased would benefit from the estate by way of residence or maintenance.[6]

The common law, on the other hand, allows for individual ownership of the property. Once a person has inherited the property, it becomes his or hers and others have no similar right in it unless there was a stipulation say in a will to the contrary.

Although traditionally customary law did not allow the heir to acquire individual and exclusive ownership of the property inherited, and although the heir was supposed to maintain the widow of the deceased and his dependants, in practice the heir especially in recent times has usually abused his position by squandering the property and therefore failing to take care of his dependants as is the custom. This has some unfairness in particular to the widow of the deceased. It was for this reason therefore that in Natal and KwaZulu, while retaining the principle of male primogeniture, provision has been made that the widow can apply to the magistrate of the district where the deceased resided to hold an administrative inquiry into the estate. The purpose of this inquiry is to determine the extent of

the assets and liabilities of the estate, the extent of the widow's contribution towards the acquisition of the said assets, the heir's contribution to the said assets or welfare of the deceased's family. If he is satisfied that it would be an injustice to the widow and deprive her of the fruits of her labours if the assets were to be inherited by the heir and place the widow at the mercy of the heir, the magistrate has a discretion to order that the estate should devolve according to the common law. of intestate succession in South Africa. In that event the customary heir will share with his mother and brothers and sisters. The magistrate can only do this if the assets have not been devised by will and if the widow has given notice to the customary heir or the members of the family of the deceased husband.

Although this provision is commendable in that it ameliorates the position of the widow at customary law, it still leaves the customary widow in an invidious position. It may be difficult to establish the widow's contribution to the assets. Most customary wives do not work but are housekeepers. The very fact that a wife has to make a home while the husband is at work to secure an income is, in my opinion, a sufficient contribution to the assets of the estate. Without that contribution the husband would not have been what he was before his death, and he would not have the assets that he leaves at his death. If it be agreed that the making of the home is sufficient contribution to the assets of the deceased, it is clear that an inquiry is unnecessary. The widow should simply be declared an heir of the deceased.

The only reason why perhaps the rule of male primogeniture is retained is that some men still dislike the idea that after their death the widow can inherit the estate and then go and marry somebody else who will enjoy the benefits for which the deceased worked.

A child of the deceased is also entitled to ask for an administrative inquiry with due notice to the heir or, in the absence of the heir, to the members of the family of the deceased father. If upon inquiry the magistrate is convinced that it will be unjust to any child if the assets were to be inherited by the heir, placing such children at the mercy of the heir, he must order that the estate should devolve according to the common law of intestate succession applicable to marriages out of community of property in South Africa.[8]

A concomitant of the fact that the heir in terms of customary law steps into the shoes of the deceased is that the heir succeeds not only to the assets but also to the obligations and liabilities of the deceased.[9] In Natal, however, the liability of the heir is limited to the extent of the assets to which he succeeds except in regard to ilobolo contracts.[10] At common law the heir incurs no liability by virtue of inheriting from the estate of the deceased unless the bequest was subject to a condition or stipulation that the heir use the property in a particular way.

It is often said that the disposition of property by will is unknown to customary law. This is in marked contrast to the common law where there is freedom of testation which allows a person power to leave all his property to whomsoever he pleases! But this difference is illusory in the sense that it merely means that at customary law before the advent of whites writing was unknown so that there could be no making of a written will. But this did not mean that the deceased could not before his death make a disposition to someone other than the heir. He could do that although if he did that it was a requirement that he should publicly declare such allocation so that the heir could have due notice and an opportunity to make an objection if he wanted to.[12]

5. CONCLUSION

When one looks at the differences between the customary law and the common law of succession one gains the impression that these differences are not so fundamental. They are also not irreconcilable. It is also clear that for a variety of reasons customary law of succession has not kept pace with the changes in the social structure of the black people.

Although the law of succession is generally conservative and sensitive, like the family law, there is no doubt that the rule of male primogeniture is no longer justifiable. The gradual disappearance of a strong family ethic has weakened the heir's strong sense of obligation towards the widow and other children of the deceased. There is therefore no

justifiable reason why only the eldest male child should inherit and not the others or that the widow should be excluded.

It has been said that: "African states are interested in rapid economic growth, in the rapid spread of education, and in the multiplication of individual skills; a system of succession which inhibits individual initiative and vests an individual's wealth when he dies, in relatives for whom he cares little is an obstacle to such expansion".[13]

My reason for supporting the reform of customary law of succession is not based on this view because I do not regard the customary law of succession as always having that effect. It is only in exceptional cases that this is the case. The reason for my advocating reform of the customary law of succession is simply fairness. A person's children should be treated equally when it comes to matters of succession. The widow of the deceased should be protected from an unscrupulous heir.

If our country is going to have a Bill of Rights, the law should conform to that Bill of Rights. The essence of that Bill of Rights is equality of treatment. The common law of succession seems to conform more to this than certain aspects of the customary law. And I believe fairness dictates that we move towards the reconciliation between the common law and customary law of succession.

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TO: Melody Sieff
FROM: Thuli
FAX NO: 339-2011
DATE: 27/08/93
NUMBER OF PAGES: (Including this one): 9

Dear Melody.

I am sorry that this is being sent this late. I cannot find the original / Signed Copy that Cathi sent this morning.

Yours Sincerely
Thuli

cc ME TE

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Multi-Party Negotiating Process
Kempton Park

Telefax: 397-2211

Date:

For attention: Melody Emmett

27 August 1993

Dear Melody

I enclose the joint submission on Equality and Customary Law by Thuli Madonsela and myself. This constitutes a summary of our position. We are preparing a more detailed submission for early next week.

Please call if you have any queries.

Are we able to get copies of the submission of the other members of the ad hoc committee?

Yours sincerely

Cathi Albertyn

Dr Cathi Albertyn
CALS

64

SUBMISSION BY
THE GENDER RESEARCH PROJECT, CENTRE FOR APPLIED LEGAL STUDIES
UNIVERSITY OF THE WITWATERSRAND
TO
THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS

THE IMPACT OF THE BILL OF RIGHTS ON CUSTOMARY LAW (SUMMARY)

---

1 We have been asked to comment on the impact of the bill of rights on

1.1 the law of succession and inheritance;

1.2 marriage and family law; and

1.3 the authority of chiefs, particularly in respect of

1.3.1 legal succession;

1.3.2 the institution of chieftainship;

1.3.3 traditional functions; and

1.3.4 the allocation of land and rights to property.

In view of the shortness of time, this document will only constitute a summary of our position. We intend to submit a more detailed document of our arguments and proposals next week. We also intend to consult with a range of women and women's organisations in finalising our submission.

2 **Human rights are universally recognised norms**

Human rights are universally recognised norms governing society. Central to human rights are the principles of equality and non-discrimination enshrined in national bills of rights and in international documents such as the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Elimination of Race Discrimination. Equality requires that human rights are indivisible and that the promotion and protection of one category of rights should not exempt or excuse states from the promotion and protection of another, nor should it result in the oppression or discrimination of one particular group (for example, women). Particularly important here is that culture, custom and religion should not be used to deny the rights and

equality of women[1]. Indeed, articles 2 (e) and (f) of CEDAW require states

> "to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; and
>
> to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women".

The importance of equality as a principle of democracy has been recognised in the first constitutional principle to be included in the interim constitution:

> The Constitution of South Africa shall provide for the establishment of a single sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races[2].

3 Human rights, equality and democracy

The history of South Africa has been one of authoritarian power and unequal access to rights, resources and power. This history of inequality has meant that there are enormous political, legal, economic and social disparities between and within groups and institutions. In the transition to a democratic society, a political and legal framework is being developed which seeks to create

3.1 an accountable system of government; and

3.2 mechanisms for the equalisation of power, rights, resources and claims within civil society.

In other words, this framework should not only grant people access to power and release them to participate meaningfully in the development of the new order, but should also

---

[1] It should be noted that many countries which have a strong cultural base to their society have prioritised eqaulity over culture in their bill of rights, for example, Uganad and Canada.

[2]. Clause 2.1 in the 8th Report of the Committee on Constitutional Principles.

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grant people access to justice and allow them equal access to personal freedoms and to make equal claims to the resources and benefits of this order.

The constitutional framework which seeks to meet these demands is one which prioritises the principles of equality and democracy, as well as human rights, and which establishes a justiciable bill of rights. This inevitably involves a transformation of all our existing political and legal institutions.

4 Transforming the legal and political institutions of customary law to grant access to power and justice

The process of transforming legal and political institutions to grant people equal access to power and justice must include the institutions of custom, customary law and traditional rule. In an ideal sense, customary law is a method by which a community can organise its members' access to social, political and economic resources in a manner which is inclusive of all members of that community. However, customary law, as it is currently conceptualised, is far removed from the ideal. Colonialism, apartheid and economic development have meant that customary law in both its public and private aspects has prioritised the claims and status of some members of the communities over others[3]. For example:

4.1 Law of succession and inheritance: The caretaker rights of an heir or head of a family in respect of family property have been individualised with the effect of extinguishing the countervailing claims of non-heirs.

4.2 Women married according to customary law are perpetual legal minors subject to the guardianship of their husbands.

4.3 The chief's competency in respect of land allocation has been invidualised with the effect of excluding women, both in terms of the power to allocate and the

[3] We will provide a more detailed account of this in our second submission and raise the following points by way of example only.

ability to receive.

4.4 The authority of chiefs: The influence of colonialism, apartheid and economic development has meant that the institution of chieftainship has become removed from its location in the community and has developed its own base of political and economic power outside of the community. This has led to authoritarian and corrupt rule. It has also removed decision-making power from the people and especially from women.

In human rights terms, the current construction of customary law infringes a wide range of human rights of members of the community, especially women. These include rights to equality and dignity, as well as rights connected to political participation, economic freedom, social mobility and justice. A constitutional framework which prioritises equality and human rights is fundamental in redressing this imbalance. Within this constitutional framework, a bill of rights provides both a political context for government action and a legal framework within which to address inequality. Both the political and the legal context are important in restoring the balance within the community, bringing people back into the process, especially women, and granting freedoms and justice to all.

5 **The exclusion of customary law from the bill of rights will deny a substantial portion of the population, especially women, access to their rights as citizens of South Africa.**

The exclusion of custom, customary law and traditional power from the bill of rights will effectively exclude a substantial portion of the population of South Africa from access to power and justice. Indeed, it will effectively set up two states in South Africa:

5.1 A modern democratic state with a constitution which includes a bill of rights and democratic principles and which allows its citizens to use human rights both legally and politically to shape their lives. Their ability to appeal to the entire

institutionalisation of customary law in the statute book, the courts and traditional rule has tended to stifle the potential dynamism of African culture and frozen its development.

It is important to support and retain the positive and valuable aspects of culture, and hence of customary law, and in doing so to facilitate the involvement of all in that culture. This can be achieved through the reconciliation of the principles of democracy and equality with culture. It is only through this that the people and communities who are subject to the institution of customary law will have access to power and justice. It is suggested that, in the context of the new South African constitution, this involves the following:

5.3 The democratisation of the institution of traditional rule. This involves creating a framework which

5.3.1 allows people to challenge power (traditional rule) where it is unjust; and/or

5.3.2 allows people to decide

5.3.2.1 how they want that institution to be structured; and/or

5.3.2.2 whether they want to be subject to the institution at all;

This clearly has implications for the position on traditional leaders in the constitution and we address this point in the second submission.

5.4 A political and legal framework of rights enshrined in the constitution is the best mechanism to empower people to

5.4.1 create institutions that serve them and that they are able to change;

5.4.2 challenge and change existing public hierarchical relationships and discriminatory practices as well as the unequal distribution of rights, responsibilities and resources.

5.4.3 Within private aspects of customary law, such as laws, customs and

constitution (including a justiciable bill of rights) will more effectively allow them to challenge abuse of power and to enforce their political, social and economic rights.

5.2 An invisible "traditional" state whose subjects are restricted to an institutional framework of custom and culture with limited freedoms and no right or ability to appeal to socially sanctioned values, especially equality, to overcome disadvantage and empower themselves socially and economically. Furthermore, there exist no principles, rules or mechanisms within the system of traditional rule and customary law which allow communities the ability to challenge or change the current system. The existing hierarchy of power and exclusion of the community, especially women, will be perpetuated.

6 The value of culture and customary law

Although the current construction of customary law can be criticised, it is important to realise that culture and customs are valuable and important parts of people's lives. It can be argued that the positive aspects of culture can be measured in the extent to which they involve and empower people and are not experienced as oppressive. To achieve this, people should be continuously involved in creating and recreating those norms and values that regulate their lives. All cultures in South Africa are hierarchically ordered and gendered, excluding selected groups from defining the norms and values of that culture, and serving to benefit some at the expense of others. African cultures, as they are expressed in custom, customary law and the institution of chieftainship are no exception to this rule. Thus the current system of culture and customary law has excluded significant groups of people, especially women, from the benefits of, and involvement in the creation of the norms and values of, that culture.

Furthermore, although it must be recognised that cultures are dynamic and constantly changing through challenges from within and outside of those cultures; the