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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 foregoing 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

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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.

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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

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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.

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