

INTERIM BILL OF RIGHTS AND CUSTOMARY LAW

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Customary law must continue to be recognized in the new constitution. Apart from having profound symbolic and political values for the people of the country, this legal regime is already part of South African law, and it would be unthinkable to withdraw recognition now. At the same time, if only for ideological and educative purposes, the gender equality clause must also be included in the Bill of Rights. From my reading of the experts' opinions, I understand that they are all broadly of the view that neither customary law nor the Bill can be sacrificed. This means that a patent conflict will be built into the Bill of Rights.

Unfortunately, this conflict has been oversimplified for purposes of the current debate. There is a tendency to assume that because patriarchy infuses African culture, all aspects of customary law are equally objectionable and that all are liable to be struck down by the Bill of Rights. Such an over-generalization then tends to suggest that the conflict is overwhelming and irreconcilable, with no solution other than a ruling that either customary law or the Bill is paramount.

The traditionalist's understandable fear that customary law is in danger of being superseded by the common law must be allayed. Human rights are only a means to an end. According to the argument of cultural relativism (a principle that would be entrenched in the Bill following recognition of customary law), the social institutions peculiar to particular cultures may achieve the same goal as human rights: human dignity. And, if we are realistic about social and

economic conditions in Africa, existing social institutions may cater for the needs of individuals more effectively than a bill of rights.

In any event a bill of rights has a limited reach. It will be implemented only in formal, state institutions, to which the poor and powerless have restricted access. Reform of domestic law is notoriously difficult to achieve; and it must be appreciated that any authentic regime of customary law is one that will continue to exist beyond the reach of state institutions. Because a bill of rights can at best be applied only in courts and bureaucratic agencies that are closely supervised by the state, it is more than likely that a parallel, informal, customary system will continue to operate in the way that it always has. Informal dualism of this nature is widespread. States have simply ignored it, recognized aspects of it (such as informal tribunals), or included the informal regime as part of the state legal system (as in South Africa). The latter approach, of course, has the advantage of allowing the state to exercise more effective control.¹

When contemplating the reform of customary law, I would suggest that certain specific issues are more urgent and more sensitive than others, and that different issues can be resolved in different ways. I would support what I take to be a broad measure of agreement amongst the experts: the legislature must be put on terms, as it were, during

1 Indirect rule in a new guise. This may operate in a negative sense, by allowing appeals from informal courts and by reviewing the decisions of local authorities, and in a positive sense, by providing training and paying officials of the informal institutions.

the period of the interim constitution, to correct some of the more glaring anomalies and defects in customary law.²

- (a) Customary marriages must now be given full recognition on a par with civil/Christian unions.³
- (b) Section 11(3)(b) of the Black Administration Act (which condemns customary wives to the status of minors) must be deleted.⁴
- (c) Wives of customary marriages should have legally recognized parental rights to their children.⁵
- (d) Wives must be entitled to claim maintenance *stante matrimonio* and on divorce.⁶

Other uncontroversial issues could also be dealt with immediately by legislation: a minimum age for marriage should be fixed;⁷ a woman should be given the power to conclude a marriage despite the objection of her guardian;⁸ a final ruling should be made whether the Age of Majority Act⁹ applies to persons subject to customary law.

Further issues can be addressed in more particular contexts by using one of at least three different techniques: the repugnancy

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- 2 Certain of these have already been identified by the SA Law Commission's *Report on Marriages and Customary Unions of Black Persons* (1985) No 10. However, the Commission cannot be assumed to reflect a general opinion amongst the black population, since a comprehensive attitudinal survey was not conducted.
 - 3 (a) and (b) are anomalies created by the state; they have no authentic origin in community praxis, and so can be corrected without qualm.
 - 4 The term 'minor' in (d) is an unfortunate common-law rendering of the woman's actual position in customary law that has failed capture to nuances possible under that regime.
 - 5 This is admittedly a sensitive issue, and although change was recommended by the Law Commission, it should be reconsidered.
 - 6 There is evidence that chiefs' courts are less rigid in their adherence to 'traditional' customary law, and are prepared to allow women to sue for support. There is no reason why common-law institutions should not follow suit.
 - 7 At present customary law probably favours the age of puberty, a rule that might conflict with children's rights.
 - 8 Because, technically, the wife is not party to the marriage agreement in customary law, and because women are 'perpetual minors', their guardians may obstruct the formation of a customary union. Inclusion of a clause on marriage in the Bill of Rights would have the effect of improving the woman's position.
 - 9 57 of 1972.

proviso, horizontal application of the Bill (both direct and indirect) and a more imaginative approach to choice of law.

(1) *The repugnancy proviso*

The Bill of Rights can be implemented ad hoc, on a case by case basis, via the repugnancy proviso contained in s 1(1) of the Law of Evidence Amendment Act.¹⁰ It must be remembered that recognition of customary law has always been subject to this proviso, and that some practices, such as forced marriage and trafficking in children, have already been expunged through its application.¹¹ The courts' reading of the repugnancy proviso will now obviously be informed by the Bill of Rights. In this manner any new practices that happen to evolve may be tested against what are considered to be national standards of behaviour.

(2) *Horizontal application of the Bill*

(a) *Direct (unmittelbare Drittwirkung)*

A technique that allows the courts a measure of discretion in deciding whether the Bill should be applied, as particular cases occur, is *Drittwirkung* (or horizontal application). In Germany and the United States it has been held that state institutions cannot apply rules or practices that are in conflict with the fundamental norms of the constitution. Thus state courts and bureaucratic agencies can respond to specific issues as and when they arise. Certain problems in

10 45 of 1988. Courts may apply customary law, 'Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any courts to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles'.

11 The courts were, however, reluctant to adopt a interventionist role, with the result that the full potential of this proviso has never been realized.

customary law are amenable to *direct* horizontal application of the Bill of Rights. For instance, freedoms of movement and expression, when read with the gender equality clause, are not contentious and may completely override the few restrictions imposed by customary law.

But the ambit of the Bill of Rights is not limitless, even if horizontal application is assumed. For example, would it be correct to construe the gender equality clause as giving women *powers* that they lack in customary law? For purposes of this argument three examples may be considered. The first is relatively straightforward. Given the common-law rule that women may not be forced into marriages against their will,¹² there could be no objection to giving wives the power to sue for their own divorces (and for related matters such as maintenance and custody).¹³

The second example - women's proprietary capacity - is more complex. The term 'proprietary capacity' includes a person's *power* to acquire property, the *freedom* to use and dispose of it, and the *right* to vindicate it. Women already have firmly established rights and freedoms regarding property of a ritual nature in customary law; the question is whether they should be allowed to acquire and control wages/salaries and other more prosaic acquisitions. The gender and property clauses in the Bill could easily be read to allow women the same *right* to vindicate and protect their property as men have; but do these clauses mean that women now have the same *power* to acquire property that men have?

12 Applied in customary law via the repugnancy proviso.

13 That is, both the procedural power (*locus standi*) to argue the matter in court, and the substantive power to change status relationships.

This will depend on the way in which the Bill of Rights is drafted and interpreted. The traditional construction of bills of rights, the liberal western approach, is to regard them as a means of protecting existing rights. Albertyn, on the other hand, sees human rights as a means to 'grant people access to power and release them to participate meaningfully in the development of the new order'.¹⁴ Under her interpretation the Bill would empower women to acquire property; under the traditional interpretation specific legislation would have to be introduced to achieve this.

In the third case, even if Albertyn's interpretation is accepted, would the Bill *create rights* (not powers) that previously did not exist? For instance, would the Bill give a widow the right to inherit portion at least of her deceased husband's estate, a right that widows currently do not enjoy under customary law? I would suggest that rather than stretch the meaning of the gender and property clauses into a distortion, both proprietary capacity and inheritance should be dealt with by legislation.

Guardianship of minor children poses a problem similar to the widow's right to inherit; it seems more amenable to legislation than application of the Bill of Rights. An even further extension of the rule of gender equality might allow a woman to sue for damages for her own seduction,¹⁵ or to sue a co-respondent for damages for adultery

14 Paragraph 3. Her idea of empowering people to change the existing system of customary law, suggests that social and economic rights should be given priority in the Bill, because until people are materially 'empowered' they are in no position to act on such issues as equality.

15 And conclude their own marriages without payment of bridewealth. See in this regard the Zimbabwe case *Katekwe v Muchabaiwa* SC 87/1984.

committed by her husband. Again this would appear to be an over-extension. Neither delict was conceived to be in the interests of the woman. If she should want to sue for seduction or adultery, common-law remedies could be used.¹⁶

(b) *Indirect (mittelbare Drittwirkung)*

The German qualification - *mittelbare Drittwirkung* (indirect horizontal application) - could be relevant in deciding the circumstances in which horizontal application of the Bill of Rights should be allowed. According to this principle, norms of the constitution prevail over rules of private law only if the private-law rules are open-textured (abstract and general in their wording), ambiguous/vague, or contradictory. *Mittelbare Drittwirkung* could be used to great effect in modifying customary law, a system that is by nature vague and amorphous.

The following are examples where the Bill of Rights could indirectly influence a court's finding in a particular case:

- (a) the rule that payment of bridewealth determines guardianship of children. This is seldom applied strictly, and in any case is subject to whatever agreement the families concerned have reached. A court could in these circumstances make an order reflecting the child's best interests and the mother's right to her off-spring.
- (b) Under customary law, the natural father has a right to reclaim his child against payment of a paternity fee. This rule may be in conflict with the mother's husband's right to all children she bears. Given the contradiction here, the court could give effect of the mother's and child's interests.
- (c) Rules regarding a woman's proprietary capacity are still in the process of being formulated, and are therefore vague. If this issue is not resolved by legislation,¹⁷ the courts could intervene in favour of women.

16 Although it seems perverse to allow an action for adultery when the delict has all but disappeared from the common law.

17 As was recommended by the SA Law Commission *Report on Marriages and Customary Unions of Black Persons*.

(d) Where a discretion is involved, such as whether a husband chastised his wife *moderately* or whether he managed family assets *reasonably*, the court's finding would be determined by the Bill.

(3) *Choice of law*

While in principle every person should have the choice whether to remain bound by a system of personal law, it is facile to suggest that parties should be bound by customary law only if they have voluntarily opted for the system. Aside from the problem of those persons (such as children) who are in no position to exercise an informed decision, how is a court to respond to cases involving one party who has opted out of customary law and another who is still bound by it?¹⁸ Judicious application of choice of law rules may assist in specific contexts to ameliorate the position of individuals: if it is clear that a hardship will be involved in a particular case, the common law could be applied instead of customary law.¹⁹

18 There are very few decisions on this problem in South Africa (see Bennett *A Sourcebook of African Customary Law* 129), and they are not especially helpful. Presumably a litigant would not be permitted to upset acquired rights, in the sense that a defendant would be not entitled to renounce customary law on the eve of litigation so as to defeat the plaintiff's claim.

19 The present unhappy position of women is attributable in part to the earlier courts' refusal to apply common law as opposed to customary law. See Bennett *op cit* 116 and 120.