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REPORT

"THE POSITION OF INDIGENOUS CUSTOMARY LAW IN SOUTH AFRICA'S NEW CONSTITUTIONAL ORDER"

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1. Historical background

In order to understand the present position of customary law in SA's legal system, it is necessary to have some background of the history of this institution. Since the early days of colonial penetration in Southern Africa, indigenous laws have been given formal state recognition, together with the traditional courts applying them. The colonial authorities did so, however, only because they realised that it would be impossible to enforce alien laws on an uncomprehending population. In this way, a de facto system of indirect rule came about, although it was later, in the 1920s, elevated to an official policy in all parts of Anglophone Africa.

Recognition was limited, however, in accordance with the overall justifications for colonial rule: assimilation of native subjects to European notions of Christianity and British civilisation. As a result, certain practices, such as initiation dances and 'witchcraft' were banned, and customary law was subject to a repugnancy proviso, ie, it had to conform to 'the general principles of humanity observed throughout the civilized world'.[1]

In the 1920s, government policy changed. The idea of assimilation was abandoned in favour of racial segregation. Accordingly, the Native Administration Act[2] made customary law applicable only in a special system of courts constituted by traditional leaders and native commissioners. This regime was given its decidedly racist stamp by a rule that these courts were reserved for blacks only. Hence, when apartheid appeared in 1948, the foundations for segregation had already been laid, and the new government had only to tighten up the laws and policies of previous governments.

The promulgation of a new, democratic Constitution in 1993 was a turning point in South Africa's legal history. Until then, customary law had been widely recognised, and, in practice, the terms of its application had been fairly generous. Nevertheless, it was still regarded as a minor component of the legal system, subordinate always to the common law.[3]

2. The new Constitution

The new democratic Constitution provided an occasion for completely revising the legal order, and, at first, there was even talk of 'africanising' the law. This idea was soon forgotten, however, and the common law has maintained its dominant position.

The 1993 Interim Constitution required the drafters of the final instrument to protect cultural diversity and to encourage conditions for its promotion.[4] This requirement was translated into the following two sections of the Final, 1996 Constitution.

> 30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.
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> 31.
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> (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

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1 Section 23 of Proclamations 110 and 112 of 1879 (Cape).

2 38 of 1927.

3 In South Africa, when this term is used in contrast with customary law, it means the combination of English and Roman-Dutch law, as developed by judicial precedents and legislation.

4 Constitutional Principle XI in Schedule 4 of Act 200 of 1993.

(*a)* to enjoy their culture, practise their religion and use their language; and
(*b*) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

In addition to these two sections, and as a concession to the demands of traditional rulers, a further clause provided that:

> 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'[5]

As a result of these provisions, customary law enjoys a special status in the legal system, primarily because it is now based on a guaranteed right to culture. When read in conjunction with other provisions in the Constitution,[6] it can no longer be assumed that English and Roman-Dutch law constitute the 'common law' of the land. Customary law, as the personal law of the great majority of the population, has become its equal.[7]

Nevertheless, the application of customary law is subject to three conditions. It must, first of all, be 'applicable', which implies a determination by the courts, in accordance with statutory and judge-made choice of law rules governing conflicts of personal law, that it is appropriate in the circumstances of the case.[8] In the second place, it is deemed to be repealed to the extent that it is inconsistent with legislation. Although this provision would seem obvious, it clarifies a long-standing uncertainty: customary law was sometimes treated as tacitly exempt from legislation aimed at reforming various branches of common law, notably those concerning family relationships and land tenure.[9] In the third place, customary law (together, of course, with the common law) must give way to the Bill of Rights.

While the Constitution brought about a dramatic change to the status of customary law, it had no immediate effect on the system of courts applying that law. Magistrates' courts and the High Court continue to operate primarily in terms of the common law. Only one concession is allowed for the cultural orientation of African litigants: the courts may take judicial notice of customary law, provided that it is sufficiently certain and readily ascertainable.[10] If not, it must be proved by calling expert testimony.

Otherwise, those wanting to litigate in accordance with a familiar language, law and procedure can approach one of the courts of the traditional leaders. These are the hardy survivors of the colonial and apartheid eras, and they were expressly retained in the new Constitution.[11] Hence, the approximately 1 500 traditional rulers continue to bring affordable justice to the rural population.[12] While most litigants in these courts are probably in favour of keeping them,[13] the

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5 Section 211(3).

6 Notably, s 39(2).

7 See *S v Makwanyane & another* 1995 (3) SA 391 (CC) paras 365ff.

8 See T W Bennett, *Customary Law in South Africa* (2004) Juta & Co 49-68. The Law Reform Commission is still engaged with a project to simplify the application and ascertainment of customary law, an area that is currently governed by a few cryptic clauses in the Law of Evidence Amendment Act 45 of 1988 and a mass of precedents. See the South African Law Reform Commission, *Report on Conflicts of Law*, Project 90, Pretoria, Government Printer, 1999.

9 For instance, certain statutes, such as the Divorce Act 1979 and the Matrimonial Property Act 1984, were presumed to amend only Roman-Dutch law, because customary marriages were not fully recognized.

10 Section 1(1) of Act 45 of 1988.

11 Section 16(1) of Schedule 6 of Act 108 of 1996.

12 South African Law Reform Commission, *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, Project 90, Pretoria, Government Printer, 2003, paras 2.1.1-5.

13 *Discussion Paper on Traditional Courts and the Judicial Function of Traditional Leaders*, Project 90, Pretoria, Government Printer, 1999, para 3.4.1.

customary courts have been widely criticised for failure to maintain the judicial standards prescribed by the Constitution.[14]

In 2008, the government tabled a long-awaited Traditional Courts Bill which was supposed to deal with these problems.[15] In essence, however, the bill did little more than confirm, in modified terms, the courts' existing civil and criminal jurisdiction. Strongly voiced protests immediately appeared in the liberal press. All objected to the wide powers given to traditional rulers to enforce customary law within areas of jurisdiction that correspond to the bantustans of the apartheid era.[16] Rural South Africans would thereby have been restricted to litigating in their former 'tribal' homelands, even if they had lost all connection with these areas. No provision was made for opting out of the system on the grounds that cultural orientation or the type of case was more suited to a magistrate's court. A person summoned to appear before a traditional court could be fined for failing to do so.[17]

3. The Bill of Rights and statutory reforms

A highlight of the new constitutional order in South Africa is a fully justiciable bill rights contained in Chapter 3 of the 1996 Constitution. The drafters of this document were clear that, as a clear break with the apartheid order, everyone in the country would now be subject to a uniform code of fundamental human rights. In particular, any unfair discrimination on grounds *inter alia* of race, age, sex or gender would no longer be allowed.[18]

When negotiations for the new constitution started, however, the public assumed that fundamental rights would be applicable only vertically (ie, to relations between citizen and state). The Interim Constitution permitted horizontal application (ie between individuals), but only in certain circumstances - which prompted a burst of speculative litigation.[19] The Final Constitution cleared up these ambiguities, and carried horizontality even further: the Bill of Rights was made binding on natural persons 'if, and to the extent that [a right] is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.[20] In this regard, equal treatment was given specific mention: s 9(4) provided that no *person* may unfairly discriminate against another *person* on any of the proscribed grounds.[21]

These provisions set the stage for an immediate confrontation with customary law, since traditional African cultures have long been associated with gender discrimination and chiefly rule. The issue was complicated by two factors. First, customary law and African culture were themselves given special status as a constitutional right, and were now being regarded as a source of positive values. Secondly, the version of customary law used by the courts and administrative officials was long out of date. It reflected an idealised notion of traditional African culture that lagged far behind contemporary social practice. Thus, any constitutional challenge

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14 See *Bangindawo & others v Head of the Nyanda Regional Authority & another* 1998 (3) SA 262 (Tk) and *Mhlekwa & Feni v Head of the Western Tembuland Regional Authority & another* 2001 (1) SA 574 (Tk).

15 B15-2008.

16 Moreover, under Clause 20(c), anyone who, when duly summoned, failed to appear before a traditional court would have committed an offence.

17 The Editorial in *Business Day* 2 June 2008 went on to point out that the Bill would trap almost half of the country's population - those living in rural areas – under the authority of unelected traditional leaders whose judgments would carry the same weight as those issued by magistrates' courts.

18 Section 9 of the 1996 Constitution.

19 Hence, as soon as the Interim Constitution came into force, litigation was instituted to question such issues as a husband's position as head of the household, the standards of justice in traditional courts, a woman's right to inherit from a man and the validity of polygynous marriages.

20 Section 8(2).

21 Notably age, sex or gender. Constitutional provisions will be given added weight when all sections of the Promotion of Equality Act 4 of 2000 come into force.

could be met by saying that the the 'living' law that was actually being observed by the people might be in accord with the Bill of Rights.[22]

Soon after the Interim Constitution came into operation, the legislature set about attempting to resolve these problems. The Department of Justice reconstituted a Special Project Committee of the Law Reform Commission, which had been working on the reform of customary law since 1984. This Committee adopted a new working method in line with a constitutional requirement that the public was to be fully involved in the legislative process.[23]

As a result, the start of each project is announced with publication of a brief Issue Paper, in which the Committee sets out its view of a problem, together with possible solutions. After receiving comment on the scope and overall approach of the project, the Committee publishes a comprehensive Discussion Paper, and invites members of the public to explore the details more fully. Based on the response to this document, the Committee then prepares a report and draft bill for submission to Parliament.[24]

Through this process, the Department of Justice launched a reform programme aimed at the customary law of marriage and divorce, succession and administration of estates, application and ascertainment of customary law, the status of children and the composition and procedure of traditional courts. The Departments of Constitutional and Land Affairs, respectively, were responsible for separate projects on the powers of traditional leaders and customary land tenure.

Measuring the success of law reform is an imponderable question. Nevertheless, even from a superficial standpoint, few of these projects can be considered entirely successful. Notable failures have been the Communal Land Rights Act (11 of 2004) and the Traditional Courts Bill (B15-2008). The former was declared invalid by the Constitutional Court (for failure to follow the proper consultation procedures),[25] and the latter provoked such determined public opposition that it was withdrawn from Parliament. A new version is to be presented later this year.
The Law Commission's proposals on application and ascertainment of customary law were simply shelved. The Traditional Leadership and Governance Framework Act (41 of 2003), although adopted, has attracted widespread criticism, both from traditional rulers, who claim not to have received sufficient authority, and those opposed to the system of hereditary authority, who claim that they were given too much.

After a lengthy period of consultation and preparation, Parliament passed a Children's Act (38 of 2005) and Child Justice Act (71 of 2008). Both introduced ambitious reforms, aimed bringing both the common and customary law into line with international norms on the status of children and their proper care and protection. In addition, the Child Justice Act introduced African ideas of restorative justice to trial and sentencing procedures. It will take some years to determine how effectively the state is able to implement these various provisions.

In the case of succession and administration of estates, the Law Commission's investigation was so slow that it was overtaken by a suit in the Constitutional Court.

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22 See C Himonga & C Bosch 'The application of African customary law under the Constitution of South Africa: problem solved or just beginning?' (2000) 117 *South African LJ* 306.

23 Section 59 of the 1996 Constitution. See *Doctors for Life International (DFL) v The Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

24 It should be noted that s 18(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 obliges Parliament to refer bills concerning 'customary law or customs of traditional communities' to the National House before they are passed. The House must comment, if it so wishes, within 30 days.

25 *Tongoane & Others v Minister of Agriculture & Land Affairs* 2010 (6) SA 214 (CC).

Statutory rules were struck down,[26] and, until Parliament took action, interim measures drawn from the common law filled the resulting lacuna. Four years later, the Reform of Customary Law of Succession and Regulation of Related Matters Act (11 of 2009) was promulgated. In effect, this Act imposes a common-law regime. Some consideration is given to cultural sensibilities through elaborate modifications of the common law to accommodate polygynous unions,[27] even the rare cases of seed raiser unions and women-to-women marriages.[28]

If 'success' can be ascribed to any of the recent reform legislation in South Africa, then the customary law of marriage and divorce must be considered the most successful. The Law Commission placed this project first on its reform agenda, because customary marriages had never enjoyed full recognition in South Africa, due not only to an abiding colonial prejudice against polygyny, but also to the fact that the courts' version of customary law no longer represented the views and practices of those who lived it. The Special Project Committee was instructed to draft a bill that would ensure: respect for African cultural traditions, a thorough-going reform of marital relations and an alignment of the law with the Bill of Rights. Two years later, the Recognition of Customary Marriages Act (120 of 1998) appeared.

This Act best represents the attempt to reconcile culture and the Bill of Rights. The Committee took as its point of departure, first, the need to confront the patriarchal tradition of customary law, and secondly, that all people engaged in marital and other domestic relations, whatever their cultural orientation, were placed in a similar predicament. They had to resolve disputes *inter alia* over children, sexual and financial relations, and they had the same struggle as people everywhere to secure their material welfare. These problems were felt most acutely by women and children.

Three examples in the Customary Marriages Act can show how these aims were achieved. Under customary law, a marriage is gradually strengthened and confirmed over time. If, during this process, the spouses' relationship is called into question it can be proved only by reference to the performance of wedding rituals, payment of bridewealth and evidence given by members of the community. In order to simplify proof, the Committee proposed that couples could, if they wished, have their unions registered. After consulting the public, however, it appeared that most people - women in particular - wanted registration to be mandatory, in the belief that it would make customary unions as binding as their civil or Christian counterparts.
Largely in response to this request, the Act makes registration of marriage compulsory. Unfortunately, past experience had shown that people seldom comply with such state-imposed formalities - not least because they have little or no access to the necessary officials - and there are no appropriate sanctions to induce compliance. As a result, the Act contains an anomalous provision that failure to register has no effect on the validity of marriage.

An even more contentious issue was the husband's right to take as many wives as he wishes. Long condemned by mainstream churches and colonial administrations, polygyny was now under attack for discriminating against women. This was the predominant view of the public, and, although the Project Committee sympathised, it felt that polygyny on its own was not the cause of women's oppression. Rather, it was only one factor contributing to the patriarchal nature of gender relations.

For this and other reasons - the impossibility of enforcing an outright ban on polygyny and the gradual obsolescence of the practice - the Committee recommended that husbands in customary marriages be permitted to take more than one wife. The Act followed this

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[26] *Moseneke and others v The Master and another* 2001 (2) SA 18 (CC) (administration of deceased estates) and *Bhe and others v Magistrate Khayelitsha and others* 2005 (1) SA 580 (CC) (intestate succession).
[27] Sections 2(2) and 3(1).
[28] Sections 2(1)(b) and (c).

recommendation, but with a significant qualification in deference to the Parliamentary gender lobby. A husband wishing to take a second or subsequent wife must apply for a court order to approve a written contract regulating the future matrimonial property system. In this way, it was hoped that an equitable distribution of property could be guaranteed.

It appears, however, that, in the ten year period since the Act came into force, the courts have endorsed only three such contracts. Non-observance of this provision – and, even more important, those requiring divorce actions to be processed by the family courts - will defeat one of the principal aims of the Act: to allow the state to protect vulnerable parties in family relationships.

Whether there will be compliance with these provisions is, of course, unlikely. Even so, somewhat over-ambitious reform is perhaps justifiable where the aim is to assist women and children. Indeed, the Law Commission was well aware that, because of financial, educational and other social disadvantages, few women (and even fewer children) would be able to act on proposed reforms. It nevertheless felt that options should be made available for a time when people would be better placed to realise their rights.

It is much more difficult, however, to justify laws that are being frustrated by the inadequacies of state infrastructure. The bodies responsible for making right operational, ie, the Master's offices, family advocates and family courts, are still concentrated in urban centres, to the obvious disadvantage of the rural population. Even more serious is the fact that these facilities are grossly understaffed and quite unprepared to assume responsibility for implementing new legislation.

4. The new vision of customary law

This somewhat disappointing catalogue of statutory reforms is offset by a dramatically different approach to customary law in the courts. Even before the arrival of a new Constitution, thinking about customary law in South Africa had begun to change. Both legal pluralism, a specialist outgrowth of anthropology, and, for want of a better term, deconstructionism had set out to debunk the predominant theory of legal positivism.[29]
During the apartheid years, the low status of customary law was due largely to positivism. Because it deemed only state law as true law, customary normative orders failed to qualify.[30] Anthropologists, of course, could be relied on to contest such thinking, and they produced abundant evidence showing that positivist theory was not realized in reality. People did not accept formal legal systems as the primary sources of regulation in their lives. Instead, they observed customary and other, unofficial, normative orders. Legal pluralism therefore rejected the idea that law was and ought to be the law of the state, 'uniform for all persons, exclusive of all other law, and administered by a single set of state institutions'. The positivist notion of law was denounced as ideology, 'a myth, an ideal … an illusion.'[31]

Deconstructionists made free use of pluralist research, and their broad aims generally co-incided with those of the pluralists. Nevertheless, this school of thought was more concerned

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[29] Peter Fitzpatrick, for instance, said that colonialism had taken existing social relations, reconstituted them in terms of its demands, 'and then, as it were, [gave them] back to the people as their own. In this process, history was denied and tradition created instead.' See Peter Fitzpatrick 'Is it simple to be a Marxist in legal anthropology?' (1985) 48 *Modern LR* 472 at 479. See, too, Sandra B. Burman 'Use and abuse of the "modern" versus "traditional" law dichotomy in South Africa' (1979) 12 *Verfassung und Recht in Übersee* 129ff and Robert Gordon 'The white man's burden: ersatz customary law and internal pacification in South Africa' (1989) 2 *J Historical Sociology* 46ff.

[30] Customary law was then relegated 'to a nether world of qualifying adjectives and unnatural synonyms: indigenous, imbricated, or informal law, systems of social control, reglementation, normative systems, or folkways'. H W Arthurs *Without the Law – Administrative Justice and Legal Pluralism in Nineteenth-century England* (1985) University of Toronto 3.

[31] John Griffiths 'What is legal pluralism?' (1986) 24 *J of Legal Pluralism & Unofficial Law* 1 at 12.

with ideology than with the day-to-day life of the legal subject. It appeared that much customary law in South Africa was an 'invented' tradition. All systems of custom are based on social practices which the communities in question accept as binding. Hence, the key test for the validity and legitimacy of customary law is how widely and deeply it is rooted in community behaviour. If the rules being applied by the state are not fully accepted by the people, they are not only invalid, but any claim to legitimacy through democratic origins in a community tradition is a sham.

The law most commonly used by the legal profession – the 'official code' - bore the brunt of this attack. Opposed to this version were ethnographic texts, which more accurately describe the cultures of selected African peoples, and, in so doing, come closer to revealing a true customary law. Finally, there was the 'living' law, the system actually accepted and lived by the people.[32]

For the first time in Africa, law-making agencies began to acknowledge the differences between official and living laws. The courts declared that only the latter deserved constitutional protection,[33] and the Law Reform Commission used it as the basis for statutory reform. The living law had the merit of a more democratic base, while official law was condemned by '[t]raditionalists seeking to redeem the past, and modernizers attempting to discredit it'. For both, 'customary law as it stands is corrupted, inauthentic and lacking authority. It is a foreign imposition, a stranger in Africa.'[34]

Another significant development in South Africa has been the emergence of an indigenous jurisprudence. Since the colonial conquest, customary laws have been considered inferior, and, as a consequence, the traffic of concepts and ideas was always from the received Roman-Dutch law to customary law. With the reception of *ubuntu* - a complex concept denoting compassion, humanity and right-minded behaviour - into the common law, this process was reversed.

Ubuntu entered the law in a small but telling 'postamble' to the Interim Constitution. The deeply divided society that emerged from apartheid bore a 'legacy of hatred, fear, guilt and revenge'. These divisions were now to 'be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation'. With no solid legal foundation, apart from this aspirational clause, *ubuntu* was then absorbed into mainstream legal discourse by a series of judgments in the Constitutional and High Courts.[35]

By this means, *ubuntu* was given the function of a metanorm, one that could be used in particular factual situations where strict application of the usual rule would work a substantial injustice. Its other function has been to introduce a distinctively African source of values to the legal system. Although the values in the Bill of Rights are supposed to be universal, they have very little 'that is ostensibly "African"'. *Ubuntu*, however, is forming 'a cohesive, plural, South African legal culture',[36] one characterised by the ideals of reconciliation, sharing, responsibility, trust and harmony.

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[32] Anton J. G. M. Sanders 'How customary is African customary law?' (1987) 20 *Comp & Int Law of Southern Africa* 405.

[33] See, too, *Alexkor Ltd & another v Richtersveld Community & others* 2003 (12) Butterworths Constitutional Law Rep 1301 (CC) and *Bhe & others v Magistrate Khayelitsha & others* 2005 (1) SA 580 (CC).

[34] Anthony Costa 'The myth of customary law' (1998) 14 *SAJHR* 525 at 534.

[35] For example in the following cases: *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC), *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC).

[36] H Keep & R Midgley 'The emerging role of *ubuntu-botho* in developing a consensual South African legal culture' in Fred Bruinsma & D Nelken (eds) *Recht der Werkelijkheid* (2007) Reed Business Gravenhage 29 at 30.

5. Conclusion

The lessons to be learned from South Africa are common to all legal systems confronted by a significant gap between classes of society, especially when those classes are marked by cultural and differences and a history of colonial rule. Law becomes a marker of cultural resistance to central state interference in local matters. In addition, disadvantages of education, finance and social mobility make the lower classes less likely to accept and act on laws promulgated by the central state.

Hence, for law reform to succeed, even when inspired by international human rights norms, the state must be prepared to invest considerable resources in consultation and education with the general population. It must, furthermore, be prepared to develop the bureaucratic agencies responsible for enforcing the new rules, because most modern law reform requires at minimum supervision of traditional court systems and advice/aid agencies for vulernable groups (such as women and children).

It is perhaps permissible to legislate reforms with a view to providing goals to be realised at a later date – so-called programmatic reform – but, if significant progress is not made to achieving those goals, they soon become worthless.