



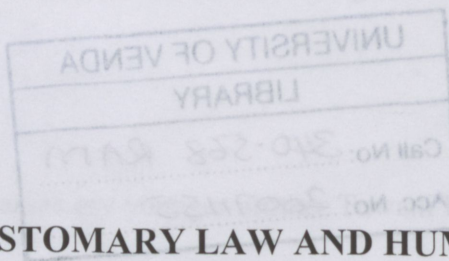
UNIVERSITY OF VENDA

MINI-DISSERTATION

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DEGREE: LLM (HUMAN RIGHTS LAW)



TOPIC: HARMONIZING CUSTOMARY LAW AND HUMAN RIGHTS LAW IN SOUTH AFRICA

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ACKNOWLEDGEMENTS

DECLARATION

I, Tsietsi Given Ramatsekisa, wish to thank my parents Mathias and Patironi Ramatsekisa for bringing me in this earth to enjoy its beauty. I also extend a special thanks to my cousins Mr and Mrs Mashamba and my aunt Mannoke Ramaite who kept on prodding me to be serious about my studies and to take care of myself. I also appreciate the encouragement from my fiancée Ndivhuwo Mulaudzi.

I will never forget the assistance from my Supervisor Prof O Mireku for the tireless contribution he made in this mini-dissertation and Mr N.R Nengome for proof-reading parts of the mini-dissertation.

With this mini-dissertation I also galvanize my younger brother Tuwani Ramatsekisa and younger sister Daphney Ramatsekisa to take their studies serious, as education is a powerful tool for transformation in our lives.

Kind regards

Ramatsekisa T.G



CHAPTER 1

INTRODUCTION

DECLARATION

pages

I declare that this mini dissertation is my own, unaided work. It is being submitted for the degree of **MASTER OF LAWS IN HUMAN RIGHTS LAW** in the **University of Venda**. It has not been submitted before for any degree or examination in any other University.

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PRE-CONSTITUTIONAL STATE OF CUSTOMARY LAW

T.G. Ramatsekisa

RAMATSEKISA T.G

17TH day of February 2006

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¹ AN Allot *The Limits of Law* (1996) p 15.
² The Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter referred to as the 1996 Constitution or Constitution).
³ S 30 of the 1996 Constitution.
⁴ S 21(3) 1996 Constitution.

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The protection of human rights in pre-colonial Africa is a bit controversial and obscure because of the absence of written accounts before the arrival of the whites to this part of the world. People depended on tradition. The notion that traditional societies did not possess a legal system may also be attributed to analytical positivism, which regards law as emanating from the State. Traditional societies were considered to be stateless, a view that was no doubt based on insufficient information and lack of appreciation of the true nature of pre-colonial African societies. It overlooked the fact that law did exist outside the framework of the state in the modern sense. A contrary view would imply that African societies operated in a legal vacuum, a contention that is untenable¹.

The South African Constitution² is based on liberal values. Cultural diversity,³ which includes the recognition of customary law, is protected by the Constitution⁴. The fundamental question is whether the bill of rights in particular, can coexist with customary law.

¹ AN Allot *The Limits of Law* (1980) p 15.

² The Constitution of the Republic of South Africa Act 108 of 1996 (Hereinafter referred to as the 1996 Constitution or Constitution).

³ S 30 of the 1996 Constitution.

⁴ S 211(3) 1996 Constitution.

Once application of customary law is considered a constitutional right, and not a precarious freedom, it is thrown into competition with the other fundamental rights in chapter 2 of the Constitution. The result is a series of conflicts, especially between the right to equal treatment and many rules of customary law that subordinate the interests of women and children to senior males.⁵ The primary question that arises is whether there is no irreconcilable clash or conflict between customary law and human rights. In South Africa, the Constitution is the supreme law of the country; law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled⁶. Because of the supremacy of the Constitution, the application of customary law is at stake.

Before colonialism, customary law was in existence and applied in Africa. It is a perspective that postulates the view that a proper synthesis of customary law values with western values can be mutually beneficial. This synthesis, however, must be preceded on a serious and in-depth analysis and proper understanding of both values.

Human rights were originally devised to protect the citizens from arbitrary and oppressive treatment by the State; citizens did not conceive them *per se*. It is also a perspective that we need to indigenise human rights or to demystify them. Ordinary black people should be made to understand that the issue of human rights is not a high-faluting one to be talked about in political speeches and with no practical relevance to their ordinary lives. People depended on tradition. One may identify two opposing views in this regard. The one seeks to create the impression that before the advent of

⁵ R.T Nlapho "The African Family and Women's Rights: Friends or Foes" 1991 *Acta Juridica* 135
⁶ S 2 1996 Constitution.

Europeans, Africa was a “dark continent”⁶ the other tends to romanticize the African past uncontaminated by European influences.



1.3 THE CUSTOMARY LAW VERSUS HUMAN RIGHTS DEBATE

Customary law is often criticised for being in conflict with human rights norms, mainly on the ground that it tends not to emphasize gender equality and discriminate against women. Although customary law has not been emphasized in the past, inequality between men and women existed, and it was not regarded as completely in conflict with human rights⁷. As already stated, one of the principles of human rights is equality between the sexes. According to Bennett, customary law has the same aim as human rights, which is the protection of human dignity⁸. The conflict may be largely caused by the fact that, ideologically, African customary law is communal or socialist in approach, whereas human rights are based on the premise that a person has rights by virtue of his or her being an individual human being. Today several traditional and cultural practices of the black communities are in contradiction with human rights norms; virginity testing of girls under the age of 16 without the consent of their parents or guardians or forced virginity testing and circumcision of boys under the age of 16 without the consent of their parents or guardians and forced circumcision are cited as examples of human rights violation.

Now that South Africa has a bill of rights and yet we still have customary law, the question has been and is still being posed whether customary law is not in conflict with universal human rights. The reason for this is that one of the values that underpin our

See J Van der Vyver “*Human Rights Aspects of the Dual System Applying to Blacks in South Africa*” 1982 CIL 06; T.W Bennett “*The Equality Clause and Customary Law*” 1994 SA JHR 115-131,123
See CRM Dlamini “*The Role of Customary Law in Meeting Social Needs*” 1991 Acta Juridica 73.

Constitution is equality.⁹ Customary law on the other hand does not insist on complete equality in every respect. In particular, section 9 of the 1996 Constitution provides for equality before the law and for equal protection and benefit of the law, which entails the full and equal enjoyment of all the rights and freedoms. It further proscribes unfair discrimination based on various grounds although it allows steps to promote or advance people or categories of persons who have been disadvantaged by unfair discrimination.

Admittedly, the position of women in the past was inferior than that of men because of patriarchy, but this position was offset by the fact that customary law did not provide a variety of institutions that tended to protect women as well. By its emphasis on social solidarity, it tended to prevent any abuse to which the individual woman might be exposed. The inferior position of women, however, should not be regarded as peculiar to African customary law only. This has been a situation in western law as well. Customary law also protects those individuals who, in an individualistic society, would be disadvantaged. It does not assume that all people are equal in all material and non-material aspects, but accepts that all people are not equally advantaged. For these reasons therefore, although certain aspects of customary law need to be amended or even repealed, customary law as such still has a role to play in a society that upholds human rights. African societies did not subscribe to many of the rights, which are now commonly demanded, such as universal suffrage, separation of powers or the rights of women and persons of different religious backgrounds to participate in political matters.¹⁰

⁹ *The and others v Magistrate's Chamber and others* 2005 (21) BCLR (CC); *Attorneys v Legal and Another* 2000 (3) SA 967 (SCA); *All SA 719 (A)*; *Moseneke v The Master of the High Court* 2001 (2) SA 18 (CC).
¹⁰ C E Welch Jr "Human Rights as a Problem of Contemporary Africa" in Welch and Malzer (eds)
¹¹ RB Seidman "Judicial Review and Fundamental Freedoms in Anglophone Independent Africa" 1974 *Ohio Law Journal* 25; *South African Law Journal* 1974 25; *South African Law Journal* 1974 25.

⁹ Section 7 of the 1996 Constitution

¹⁰ R Howard "Human Rights and Personal Law: Women in sub-Saharan Africa" 1982 Issue 45.

The Constitutional Court has had a few opportunities to interpret and apply the equality clause of our Constitution.¹¹ It accepted that classification or differentiation would always be part of life. Although the recognition and protection of human rights existed in the pre-colonial period, African definitions of human rights differed in important respects from those prevalent in the west.¹² The context of the family, clan and ethnic solidarity or the kinship network, provided the framework within which individuals exercise their economic, political and social liberties and duties under African customary law, and provided restraints to arbitrary official action that might otherwise have prevailed. When colonialists came to Africa, there was a clash of cultures, which was sometimes preceded or accompanied by clash of arms. The subjugation of the African people by the colonialists led to the white administrators assuming the task of administering the subjugated people and had to try to make sense of their social and legal system, which they could not understand or accept. They tried to regulate the African population in terms of the imposed legal system and by simply discounting African customary law. This approach was largely dysfunctional and African people continued to live according to their own cultural norms. This necessitated the recognition of customary law.

Colonial rule was authoritarian to the core.¹³ There were no representative institutions. The administration not only implemented policy, they made it as well.¹⁴ Even the policy of “indirect rule” which emphasized the powers and use of traditional rulers and the creation of special native courts to administer unwritten customary law, was

¹¹ *Bhe and others v Magistrate Khayelitsha and others* 2005 (21) BCLR (CC), *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA); All SA 219 (A), *Moseneke v The Master of the High Court* 2001 (2) SA 18 (CC).

¹² C E Welch Jr “*Human Rights as a Problem of Contemporary Africa*” in Welch and Meltzer (eds)

¹³ RB Seidman “*Judicial Review and Fundamental Freedoms in Anglophonic Independent Africa*” 1974 *Ohio State Law Journal* 815-839, 820; JS Read “*Bills of Rights in the Third World: Some Common Law Experiences*” 1973 *Verfassung Und Recht in Uebersee* 29.

¹⁴ R B Seidman “*Law and Stagnation in Africa*” 1973 *Zambia Law Journal* 39-62, 56.

conceived for the benefit of the white administrators and not necessarily for the benefit of Africans.¹⁵ Colonialism founded, as it was, on racism and naked exploitation not only denied and inhibited fundamental rights but also was essentially against the promotion and protection of human rights in Africa.

Although, customary law existed in the pre-colonial Africa, it ceased to be indigenously developed on the arrival of the colonialists. It no longer developed in response to African needs but to those of the new political overloads. African societies became subject to political, economic and social domination. The deculturalisation that ensued resulted in those in contact with the colonial administration being dissatisfied with their own traditional system of education and the values of African civilization. The conflict between customary law and human rights need to be examined very closely as the two systems appear to be contradictory.

The clash between human rights and customary law need to be harmonised. It must be clear which one must overlap the other. This will help to wipe out the confusion, and contradiction resulting from the use of the two ideologies and create certainty in legal fraternity.

1.4 SUMMARY

The purpose of this study is to harmonize the conflict between customary law and human rights by examining the conflict of customary law and human rights in terms of the Bill of Rights through the analysis of case law and academic opinions. To this end, the rest of the study is devoted to the examination of the pre-constitutional state of

¹⁵ T O Elias “ *The Nature of African Customary Law* (1956) 187 et seq; H.F Morris “*Framework of Indirect Rule in East Africa*” in HF Morris and JS Read (eds) *Indirect Rule and the Search for Justice* (1987); A.N Allot “*What is to be done with African customary law?*” 1984 *Journal of African law* 40-61, 58.

customary law, the impact of the bill of rights on certain aspects of private law and the perspectives of the ban on virginity testing.



2.1 INTRODUCTION

Democratisation is about creating a new kind of social order, one that includes an improvement in the status of women and the questioning of all things that smack of discrimination. With modern constitutions giving expression to democratic ideals such as gender justice and children's rights, old practices such as virginity testing and the values that they reflect are problematic. Some people now find such customs to be objectionable and demeaning. However others, most especially those whose power and privilege derived from the pre-democratic social order such as kings, chiefs, traditional leaders and virginity testers, may be expected to reject anything that threatens to erode the practices and values that helped to legitimise their power and authority. Precisely because patriarchal privilege has been foundational in so many societies for so many centuries, it is at the heart of much that is perceived today as clashes between tradition and modernity. The clash itself illuminates the need for new cultural practices and values that accord with the democratic project and the requirements of an enlightened citizenry.

2 THE STATE OF CUSTOMARY LAW BEFORE THE CONSTITUTION

Pre-colonial Africa practised a system of human rights, which was suited to the political and social situation of the time. African society possessed an integrated culture



PRE-CONSTITUTIONAL STATE OF CUSTOMARY LAW

2.1 INTRODUCTION

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2.2 OWNERSHIP OF PROPERTY

2.2 THE STATE OF CUSTOMARY LAW BEFORE THE CONSTITUTION

Pre-colonial Africa practised a system of human rights, which was suited to the political and social situation of the time. African society possessed an integrated culture

where the law occupied a central position. Everybody knew the law, and the state in which the community was handed down by the ancestors, had to be maintained¹⁶.

When the colonialists came to Africa, there was a clash of cultures, which was sometimes accompanied by a clash of arms. Where the colonialists ultimately subjugated African people, the white administrators had the task of administering those people and had to try to make sense of their social and legal norms, which they could not understand or accept. They tried to regulate the African population in terms of their imported legal system and by simply discounting African customary law. This approach was largely dysfunctional and African people continued to live according to their own cultural norms.

As Seidman points out, colonial rule was authoritarian to the core.¹⁷ There were no representative institutions. The administration not only implemented policy, they made it as well.¹⁸ Although customary law existed before the arrival of the colonialists in South Africa, political dispensations never bothered to develop it. They only suppressed it and concentrated on the reception of their legal system by Africans. The colonialists legal system started to be taught in legal institutions they created.

2.3 OWNERSHIP OF PROPERTY

Customary law does not have private law. It is communal by its nature. However, there are ways in which ownership of property and family matters are handled. Before the

¹⁶ L Marasinghe "Traditional Conceptions of Human Rights in Africa" in CE Welch JR and RJ Meltzer (eds) Human Rights and Development in Africa. (1984) 31; AN Allot "African Law" in JDM Derrett (ed) An Introduction to Legal System (1986) 135-136

¹⁷ RB Seidman "Judicial Review and Fundamental Freedoms in Anglophonic independent Africa" 1974 *Ohio State Law Journal* 820

¹⁸ RB Leidman "Law and Stagnation in Africa" 1973 *Zambian Law Journal* 56

interim Constitution of 1993 came into effect. Customary law discriminated against women and children on the grounds of sex and age.

Women were prohibited to own family property, only their husbands were allowed as heads of the families. As wives remained perpetual minors under the guardianship of their husbands. This meant they had no right to own property and this transgressed their right to own property. Section 25 of the 1996 Constitution gives the right to own property to everyone and forbids any arbitrary deprivation of property.

2.4 MARRIAGES

During the pre-constitutional era, the consent of a woman in a customary law marriage was not required. Issues of marriages were considered to be of the two families of the bride and the bridegroom and the consent of the woman for a marriage was irrelevant.

Women were forced to enter into marriages without their consent. In customary law there are practices, which do not have room for consent of a woman such as “*Ukuthwala*” (where a woman is forced into a marriage) such practices were completely against human rights norms and values and transgressed human dignity and bodily integrity of women. The Recognition of Customary Marriages Act¹⁹ was enacted to address the violation of women’s rights in terms of customary marriages. In terms of the Act the consent of a woman is an essential element for a validity of the marriage, a wife is no longer a perpetual minor; she has the capacity to enter into contracts. The husband is no longer the guardian of his wife. A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system

¹⁹ Act 120 of 1998

governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

The Recognition of Customary Marriages Act²⁰ seeks to harmonize the clash between customary law and human rights, which existed for a long time. The Bill of Rights in the 1996 Constitution entrenches the freedom and security of a person²¹, which include the right not to be deprived arbitrarily without cause²², right to bodily and psychological integrity, which includes the right to security over their body²³ and the right to privacy²⁴.

2.5 SUCCESSION

Customary law was characterised by unequal treatment between men and women. In terms of customary law of succession, women were discriminated against because of gender through the principle of primogeniture. For some time South African courts provided conflicting decisions on the constitutionality of the principle of primogeniture but finally the Constitutional Court has had occasion to resolve the conflict brought by this principle.²⁵

In customary law of succession there is a principle of primogeniture. The general rule of this principle is that only a male who is related to the deceased qualifies as an intestate heir. The problem with primogeniture is that it precludes widows from

²⁰ Act 120 of 1998

²¹ Section 12 of the final Constitution

²² Section 12(1)(a) Ibid n 19

²³ Section 12(2) Ibid n 20

²⁴ Section 14 of the final Constitution.

²⁵ *Bhe and others v Magistrate, Khayelitsha, and others*, 2004(2) SA 544(C); 2004 (1) BCLR 27 (C)

inheriting as the intestate heirs of their late husbands; daughters from inheriting from their parents; younger sons from inheriting from their parents and extra-marital children from inheriting from their fathers. Women do not participate in the intestate succession of the deceased estate. In a monogamous family, the eldest son of the family head is the heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male descendants related to him through the male line.²⁶ It was contended that these exclusions constitute unfair discrimination on the basis of gender and birth and are part of a scheme underpinned by male domination and that amounts to inequality for women.

In, *Bhe and others v The Magistrate Khayelitsha and others (Bhe case)*²⁷ the applicant brought an application in the following capacities:

- (a) On behalf of her two minor daughters²⁸
- (b) In the public interest and²⁹
- (c) In the interest of the female descendants, and descendants and extra-marital children³⁰ of people who die intestate.

²⁶N.J.J Olivier et al *Indigenous Law* (Butterworths, Durban 1995) 147 at para 142.

²⁷The case is reported as *Bhe and others v Magistrate, Khayelitsha, and others* 2004(2) SA 544(C); 2004 (1) BCLR 27 (C).

²⁸Section 38 of the constitution provides that:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are-

- (a) anyone acting in their own interest;
- (b) Anyone acting on behalf of another person who cannot act in their own name;
- (c) Anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) Anyone acting in the public interest”.

²⁹Section 38(d) of the constitution.

³⁰The expression “illegitimate children” has been used by lawyers in South Africa for many years, and was used by the Cape High Court in the *Bhe* case and by the lawyers in this case to describe children who are conceived or born at a time when their biological parents are not lawfully married

children, when he died, was not survived by a parent nor grand parent. His nearest male relatives were his two cousins the first and second respondent respectively. His intestate estate fell to be administered under the provisions of section 23 of the Act³⁴ as the deceased was an African. Because of the principle of primogeniture the court guided by the decision in *Mthembu v Letsela and another*³⁵ appointed his male cousin as representative of the deceased estate. The cousin misappropriated the estate funds and was withdrawn and the Magistrate appointed an attorney to administer the estate and to distribute them according to customary law. The amount of the estate was awarded to the second respondent as the only heir to the estate. In terms of the system flowing from the provisions of section 23 of the Act³⁶ and the regulations framed under it, in particular 2(e), the estate of the deceased fell to be distributed according to custom. The applicant was, in terms of that system, precluded from being the heir to the intestate estate of her deceased brother.

The applicant contested that section 23 of the act, alternatively subsections (1), (2) and (6) of section 23, should be declared unconstitutional and invalid because of their inconsistency with the constitution's equality provisions as contained in section 9³⁷, the right to human dignity as provided in (section 10)³⁸

The third case was an application for direct access to the court brought jointly by the South African Human Rights Commission and the Women's Legal Centre Trust respectively the first, and the second applicants who applied for relief, which included the constitutional invalidation of the whole of section 23 of the Act.

³⁴ Black Administration of Estate Act of 1927

³⁵ 1998 (2) SA 675 (T). The decision of the Supreme Court of South Africa of Appeal is Reported as *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA); All SA 219 (A)

³⁶ Supra n 34

³⁷ Of the 1996 Constitution

³⁸ See n. 11 above

There were two main issues in the cases before the court:

First the court had to decide on the constitutional validity of section 23 of the Act, which precludes extra-marital children from inheriting from the estate of their father, particularly the rights enshrined in the Bill of Rights (sections 9, 10 and 28).

Second the court had to determine the constitutional validity of the principle of primogeniture in the context of the customary law of succession. The principle was contested to be discriminatory because it does not allow women to inherit the estate of their deceased husbands and illegitimate children to inherit from their fathers.

The court held that section 23 of the Act and its regulations were manifestly discriminatory and in breach of section 9(3) of the 1996 Constitution and it must be struck down.

The court further held that the principle of primogeniture also violates the rights of women to equality and human dignity as guaranteed in sections 9(3) and 10 of the 1996 Constitution as, in one sense, it implies that women are not fit or competent to administer property. The court then concluded that section 23 was unconstitutional in so far as it infringes the rights entrenched in the constitution.

In the light of history and context of the Act section 23 of the Act and its regulations particularly regulation 2(e) are based on apartheid policies. The discrimination they perpetuate touches a raw nerve in most South Africans. It was relic of our racist and

painful past.³⁹ The question to be considered was whether the discrimination occasioned by section 23 and its regulations was capable of justification in terms of section 36 of our constitution. The court decided to engage in a balancing exercise and arrived at a global judgment on proportionality. As the court put it, there is a general rule that the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be.⁴⁰

Ultimately, the question was one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.⁴¹ The rights violated are important rights, particularly in the South African context. The rights to equality and dignity are the most valuable of rights in any open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that included race and gender.

It could be argued that despite its racist and sexist nature, section 23 gave recognition to customary law and acknowledged the pluralist nature of our society.⁴² This was however not its dominant purpose or effect. Section 23 was enacted as part of a racist programme intended to entrench divisions and subordination of the black race. Its effect has been to ossify customary law. In the light of its destructive purpose and effect, it could not be justified in any open and democratic society.

It was clear that the serious violation by the provisions of section 23 of the rights to equality and human dignity could not be justified in our constitutional order. In terms

³⁹ Section 23 of the Act.

⁴⁰ *S v Manamela and another* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC).

⁴¹ *Prince v President, Cape Law Society and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

⁴² See section 15(3)(a)(ii) of the constitution, Act 108 of 1996 which recognizes "systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. See also section 30 of Act 108 of 1996.

of section 172(1)(a) of the 1996 Constitution, section 23 must accordingly be struck down. It is important to examine the context in which the rules of customary law, particularly in relation to succession, operated and the kind of society served by them. The rules did not operate in isolation. The system had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities. In the position of the extra-marital children, they are not entitled to succeed to their father's estate in customary law.⁴³ They however qualify for succession in their mother's family, but subject to the principle of primogeniture. The eldest male extra-marital child qualifies for succession only after all male intra-marital children and other close members of the family.

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2.6 CRITIQUE OF PREVIOUS DECISIONS

Prior to the *Bhe* decision the existing law was stated in two conflicting decisions. First, the Supreme Court of Appeal in *Mthembu v Letsela*⁴⁴ had upheld the customary law of primogeniture and thereby disinherited a daughter.

Second, in *Zondi* the High Court had ruled that the primogeniture rule was inconsistent with the Constitution. Although in terms of the superior status of the *Mthembu* court that decision overrides the *Zondi* judgment, the conflict creates uncertainty in the state of the law. It may therefore be appropriate for the criticisms levelled at those decisions to be examined.

Bennett argues that various judgments in *Mthembu* case overlooked many factors that an analysis of unfair discrimination should have taken into account⁴⁵. According to the

⁴³ *Mthembu v Letsela* 1998 (2) SA 675 (T). The decision of the Supreme Court of Appeal is reported as *Mthembu v Letsela and another* 2000 (3) SA 867 (SCA); [2000] 3 All SA 219 (A)

⁴⁴ *Ibid.* 18

learned author, the court should have asked whether customary law differentiation on the basis of gender and legitimacy was compatible with human dignity, which is the principle underlying the right to equality. Indeed the failure of the *Mthembu* Court to inform that decision with the emerging gender equality jurisprudence in South Africa was regrettable.

In *Zondi v President of RSA & others*⁴⁶ the Court provided dubious authority for overriding reg. 2(e) of GN R200 of 1987. This case concerned the succession rights of two children born out of wedlock, and a declaratory order was sought to have the Regulation declared invalid. In a brief judgment, the court granted the order and held that reg. 2(e) offends the equality provision of the 1996 Constitution.

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2.7 SUMMARY

The official rules of customary law are sometimes contrasted with what is referred to as “living customary law”, which is an acknowledgement of the rules that are adapted to fit in with changed circumstances. The problem with the adaptation is that they are *ad hoc* and not uniform. Although African law and custom has always had a patriarchal bias, the era of colonialism saw it exaggerated and entrenched through a distortion of custom and practice which, in many cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young. Enthroning the male head of the household as the only true person in law and the sole holder of family property and civic status, rendered wives, children and unmarried sons and daughters invisible in a legal sense. The identification of the male head of the household as the

⁴⁵ TW Bennett (2004) *Customary Law in South Africa*, Juta 359

⁴⁶ 2000 (2) SA 49 (N) at 53.

only person with property-holding capacity. Without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. It is clear that the principle of primogeniture violates the rights of women to human dignity as guaranteed in section 10 of the Constitution.

The primogeniture rule prevents all female children and significantly curtails the rights of male extra-marital children from inheriting; it discriminates against them too. These are particularly vulnerable groups in our society that correctly places sympathy in the well-being and protection of children who are ordinarily not in a position to protect themselves.⁴⁷ The primogeniture rule of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. There is a need for developing the customary law to be in line with the current circumstances and the constitutional order.

Section 23 of the Act is inconsistent with the Constitution and invalid.⁴⁸ As a result, regulation 2(e) falls away. The unconstitutionality of section 23 of the Act can be hardly disputed. The Act is manifestly racist in its purpose and effect. It discriminates on the grounds of race and colour.⁴⁹

Our 1996 Constitution recognizes indigenous law as part of our law. Thus section 211(3) enjoins the courts to “apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”. The Constitution accords it the same status that other laws enjoy under it. In addition, courts

⁴⁷ *Fraser v Naude and Others* 1999 (1) SA 1(CC); *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC).

⁴⁸ *Moseneke v The Master of the High Court* 2001 (2) SA 18 (CC).

⁴⁹ C Rautenbach et al *Law of Succession and Inheritance* in JC Bekker et al (2002) *Introduction to Legal Pluralism in South Africa* p 116

are required to develop indigenous law so as to bring it in line with the rights in the Bill of Rights.

The Promotion of Equality and Prevention of Unfair Discrimination Act⁵⁰ preceded both the *Mthembu* and *Zondi* cases. Section 8 of the Act prohibits discrimination against women when it comes to inheritance and discourages male primogeniture. Furthermore in both cases, the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), which South Africa is a party to, were not applied.

During the time of the *Bhe* decision the Promotion of Equality Act and Prevention of Unfair Discrimination Act⁵¹, had passed but had not been promulgated. The court paid no attention to the best interest of the children in question. An interpretative principle should have been used to ensure that the children received the best level of protection.

The *Bhe* decision is a welcome decision because it has resolved the uncertainty created by the two decisions. Customary law in South Africa has long been recognised to discriminate against women and other family members, and to privilege certain groups and individuals at the expense of others. The codification of customary entitlements and obligations within a colonial and patriarchal context created rights for men that continue to exist at the expense of women.

The transition to democracy has created an enabling environment for the promotion of democratic objectives, including gender equality. This created an opportunity not only to eradicate the inequality between the two legal systems (customary and civil) in South Africa, but also to remove the inequality and discrimination within each system.

⁵⁰ Act 4 of 2000. The Act gives effect to section 9 of the 1996 Constitution by providing for, among others, the equal enjoyment of all rights and freedoms by every person; the promotion of equality; the values of non-racialism and non-sexism contained in section 1 of the 1996 Constitution; the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the final Constitution.

⁵¹ Act No 4 of 2000.

The new Constitution of South Africa entrenches human rights and democratic values at the same time as it recognises a dual legal system of customary and civil law. It recognises customary law but subjects it to the Constitution and the Bill of Rights, including the equality right. This broad political and legal context provides the setting for a series of law reform initiatives relating to customary law, including marriage, property, succession, inheritance, and administration of estates, conflict rules and customary courts.

The position of customary law in private law is clearly characterized by inequalities between men and women who were the most disadvantaged group as they were discriminated against in terms of gender.

Having said that it is important to point out that the law reform initiatives proposed above may be limited to the rules of customary law of succession within the realm of private law including family law. As a recent court decision, *Nwamitwa v Philia and others*⁵² suggests, gender equality as entrenched in the Bill of Rights may not be applicable when dealing with chieftaincy succession.

In *Nwamitwa* the court held that the first respondent was not disqualified to be chief because of her gender or the custom of primogeniture alone. Rather because there was no basis in custom of the royal family to re-establish the family line ex post facto by assuming they were right to elect the first respondent who was a female as a chief. The court further held that whatever might have been the motivation at that stage that would not be a proper preponderance of the various requirements of the Constitution. The

⁵² 2005 (3) SA 536 (T)

application of customary law in this case was held not to be in conflict with the Constitution in any way.



INTRODUCTION

South Africa is a democratic country with a supreme Constitution.⁵¹ The Bill of Rights is the cornerstone of democracy in South Africa; it protects the fundamental rights and freedoms of every person in the country.⁵²

The development of the law in customary marriage law must obviously comply with the Bill of Rights of the 1996 Constitution.⁵³ Of special relevance are the principles of equality and non-discrimination. Section 9(1) of the Constitution declares that "every person shall have the right to equality before the law and to equal protection of the law", and section 9(2) provides that no person shall be unfairly discriminated against, directly or indirectly on grounds, *inter alia*, of gender, sex or age. Many aspects of customary law, which generally endorse the patriarchal traditions of Africa, could now be in conflict with these provisions, which enroach the equality rights of women and men.

Although the Constitution contains no sections on marriage, there are various government policies and international conventions that regulate marriage in South Africa. The most important treaties are the 1981 Convention on Elimination and Discrimination against Women (CEDAW), the 1990 United Nations Convention on the Rights of the Child and the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. These conventions have been ratified by

⁵¹1996 Constitution.
⁵²Chapter 2 of the 1996 Constitution.
⁵³Chapter 2 of the Constitution of the Republic of South Africa 1996.

THE IMPACT OF THE BILL OF RIGHTS ON ASPECTS OF PRIVATE LAW

3.1 INTRODUCTION

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⁵⁵ Chapter 2 of the Constitution of the Republic of South Africa 1996.

South Africa, which in consequence has an international obligation to adjust its domestic law in accordance with their injunctions.

Customary law received little attention during the drafting of South Africa's interim and final Constitutions.⁵⁶ In the final Constitution, it was given express mention in s 211(3), which declares that the courts must apply customary law when that law is applicable, but subject to any legislation specifically dealing with it and also subject to the Constitution.⁵⁷

On a literal interpretation of s 211(3), any rule of customary law in conflict with the Bill of Rights must give way to the Bill of Rights. Testing the constitutional validity of rules of private law, however, involves a more flexible approach. Three inquiries are necessary: when is the Constitution applicable to private relationships; when do circumstances warrant limitation of fundamental rights; and how are the abstract and generalized terms of these rights to be construed in a South African context? In answering these questions, a measure of discretion is introduced into what would otherwise be an entirely mechanical process.

The first question is whether the Bill of Rights should apply horizontally (i.e. to relationships of citizens *inter se*) or whether it should be applicable only vertically (i.e. to relationships between citizens and the State). The drafters of the final Constitution seem to have opted for horizontal application by providing in s 8(2) that a provision in

⁵⁶ This oversight is apparent in s 8(3), which enjoins the courts to develop only *common* law to give effect to or to limit the fundamental rights.

⁵⁷ Formerly, s 1(1) of the Law of Evidence Amendment Act 45 of 1988 did no more than empower courts to take judicial notice of customary law. *Thibela v Minister van Wet en Orde* 1995 (3) SA 147 (T), however, interpreted this provision to be mandatory rather than permissive.

the Bill of Rights binds natural persons 'if, to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.⁵⁸

The word 'applicable' in this clause could be interpreted in such a way that the fundamental rights would be deemed to apply only when organs of state were involved. Such a reading would, however, defeat a clear intention. A sensible approach to a provision as ambiguous as this would be to follow jurisprudence abroad,⁵⁹ where constitutional norms have been extended from their traditional sphere of vertical operation, but only by way of exception. Courts have had to consider the nature of the right concerned and the offending rule, matters already provided for in s 8(2) together with the social context.⁶⁰

This more circumspect approach to horizontality requires both a policy decision on the extent to which the State should intervene in domestic relations (an issue considered below) and a legal assessment of how constitutional rights should relate to one another. The right to equal treatment, for instance, must be weighed against the right to culture.⁶¹ Implicit in this balancing of interests is the further inquiry of limitation: whether one right may limit application of another or whether a rule of private law may limit a constitutional right in compliance of the limitation clause of the Constitution⁶².

In this regard, the clauses allowing freedom to pursue a culture of choice, namely ss 30

⁵⁸ Section 8(1) provides that the Bill of Rights applies 'to all law, and binds the legislature, the executive, the judiciary and all organs of state'.

⁵⁹ In particular those in the United States, Canada and Germany, since the laws of these countries have exerted a considerable influence on the formation of our Constitution.

⁶⁰ The leading South African case, *Du Plessis & others v De Klerk & another* 1996 (5) BCLR 658 (CC), also rejected a uniform doctrine of horizontality, although in the context of the 1993 Interim Constitution. See too *Mthembu v Letsela & another* 1997 (2) SA 936 (T), which considered the extent to which customary law actually prejudices women and children.

⁶¹ Adv D Singh contended that, where two provisions of the Constitution conflict, the one which provides the greater positive benefit [presumably to the individual] should prevail. This argument is in line with *Kaganas & Murray* (1994) 21 J Law & Society 415-17 and 424-5, who looked to the general tenor of the Constitution, and concluded that it favoured an individual right to non-discrimination rather than a group right to culture.

⁶² Section 36 of the 1996 Constitution.

and 31 of the Constitution, contain express limitation provisos to the effect that they are subject to the Bill of Rights. Hence, an argument of culture alone may not limit application of the right to non-discrimination. If recognition of customary law is to be something more than empty gestures towards the African cultural tradition, however, application of the Bill of Rights must be construed in such a way that a set of western values does not become dominant.⁶³

There are forbidding precedent from the colonial era of customary law being all but eliminated in the cause of western standards. In the former Transvaal, for example, while the government was prepared to apply laws and customs of the African population,⁶⁴ it deemed polygyny and bridewealth “uncivilized”.⁶⁵ As a result, the courts bastardised almost the entire “native population ... deprived practically every Native father of guardianship or other rights to his children [and] ... destroyed any equitable claim in property”⁶⁶

No one in South Africa today would wish this fate on customary law. At the same time, the State cannot abdicate its responsibility to protect its citizens and to improve their lot in life. In deciding which aspects of customary law are to be deemed unconstitutional, obvious targets would be rules of the ‘official’ version that owe little to an authentic African tradition or to contemporary social practice. In so far as they fall foul of the Bill of Rights, they must be deemed invalid. Moreover, where no settled rule can be

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⁶³ An issue explored in more detail by Bennett *Human Rights and African Customary Law* chs 1 and 2, in the context of the 1993 Interim Constitution.

⁶⁴ Provided, according to s 2 of Law 4 of 1885, that they were compatible with ‘general principles of civilization’.

⁶⁵ *R v Mboko* 1910 TPD 445 at 447 and *Kaba v Ntela* 1910 TPD 964 at 969, respectively.

⁶⁶ *Stubbs P*, reported in (1929) 1 NAC (N&T) 1. See also *Meesadoosa v Links* 1915 TPD 357 at 361.

3.3 distilled from social praxis or where rules are vague and contradictory, constitutional norms must fill what is in essence a gap in the law.⁶⁷

Customary law incorporates its own concepts of the law of delict. In terms of

3.2 THE LAW OF CONTRACT

3.4 matters. As women lacked contractual capacity, they hardly appeared in traditional

The Bill of Rights is a fundamental guideline of democracy in South Africa.⁶⁸ It has brought major changes in the law of contract in terms of customary law. The history of South Africa clearly positioned women as the most historically disadvantaged group in the society. They were not afforded equal opportunities with men. In terms of customary law, women were considered perpetual minors and men were guardians of their wives. As women were regarded as perpetual minors, they lacked contractual capacity, while only men were contractually capacitated.

The Bill of Rights prompted the enactment of supporting legislation such as Recognition of Customary Marriages Act,⁶⁹ which brought equality between men and women. Women can now enter into contract on their own without men being their guardians.

The major change brought by the Bill of Rights is “equality” in terms of section 9 (equality clause) of the 1996 Constitution, which confirms the prohibition of discrimination on the grounds such as gender, sex, race, ethnic origin, disability and age.

⁶⁷ In German law this is known as the *Drittwirkung* of constitutional principles to private law. See Bennett (n 85) 38-40.

⁶⁸ Chapter 2 of the final Constitution.

⁶⁹ Act 120 of 1998.

3.3 THE LAW OF DELICT



Customary law incorporates its own concepts of the law of delict. In terms of customary law, the traditional authorities like the Chief's court handled delictual matters. As women lacked contractual capacity, they hardly appeared in traditional courts because they lacked *locus standi*. Men as heads of families handled matters of this nature. This did not mean women lacked delictual liabilities, they were delictually liable but their husbands as their guardians acted on their behalf in delictual cases and damages were paid by husbands. The Bill of Rights brought major changes in this regard, as everyone is now equal before the law, and woman can sue and be sued.

3.4 SUMMARY

In terms of the law of contract and delict, women were not treated equally to men. They were not contractually capacitated, only men were contractually capacitated, and this was unfair discrimination because of their sex. Despite women being delictually liable they were not allowed to sue, only their husbands could sue on their behalf as they enjoyed guardianship of their wives (perpetual minors). The Bill of Rights uprooted unfair treatment against women by the equality clause entrenched in chapter 2 of the final Constitution. Women can now sue in their own capacity and they can also be sued and they can stand in any court as the men do as all people are equal before the law⁷⁰ and they have right to access the courts⁷¹ for disputes to be resolved. The husband in terms our law is no longer a guardian of his wife.

⁷⁰ Section 9 of the final Constitution

⁷¹ Section 34 of the final Constitution.

THE BAN ON VIRGINITY TESTING

4.1 INTRODUCTION

Virginitv testing has become a relatively new trend in many countries, especially those that are highly concerned with women's honour and infectious diseases such as HIV/AIDS. Females of all ages (ranging from as young as 4 months to 50 years) essentially queue up and have their vaginas inspected to see if their hymens are intact; if they are, the women are found to be virgins. In South Africa, the practice has become more common in recent years. The motivation behind the revival in this testing comes from concern amongst traditional leaders about the increasing prevalence of HIV/AIDS. It is believed that this testing promotes abstinence and curtails the spread of HIV/AIDS among the youth.

Virginitv testing is also seen as a way of curbing women sexual activity before marriage and keeping them "pure" until then. There is much controversy and debate as to whether or not this infringes upon women's human rights, even if they participate willingly.

4.2 BRIEF COMPARATIVE SURVEY OF VIRGINITY TESTING

Virginitv testing is done in different ways, depending upon the country. Primarily, the vagina is examined to see whether or not the girl's hymen is intact. The hymen is defined as "the thin membrane of skin that may stretch across part of the vaginal

opening".⁷² An opening in the hymen allows the menstrual flow to pass out of the body.

Most girls are born with a hymen, although some are born without it. Many doctors say that the hymen is not a good indicator of sexual virginity for several reasons:

- (a) A girl may have been born without a hymen;
- (b) The hymen can easily be ruptured during normal physical activities and sport; or,
- (c) The hymen can be stretched open by the use of tampons.

Often the bed sheets from a couple's wedding night are examined to see if any blood is present on them because a virgin is supposed to bleed during her first sexual encounter.

However, a woman may be a virgin and still not bleed during her first intercourse⁷³.

During the Middle Ages, there were many alternate methods to testing one's virginity.

One could conduct a urine test (a virgin's urine is clear and sparkling), or look at which way a woman's breasts point (a virgin's breasts point up). In Middle Ages romances

(where a urine test would not be at all romantic), there are many stories of magical objects used to test virginity or marital fidelity. A common object is the magic drinking

horn. Women who attempted to drink from it and were not faithful to their husbands would spill the wine inside of the magic horn. During the Middle Ages people were

much more interested in the question of a woman's virginity than that of a man⁷⁴.

Amnesty International's formal statement and position in regards to virginity testing is

that "forcibly subjecting [women] to so-called 'virginity tests' is an egregious form of gender-based violence constituting torture or cruel, inhuman or degrading treatment".⁷⁵

⁷² <McIntosh, <http://www.saartjie.co.za/feb2000/hymen23.html>>

⁷³ Ibid n 68

⁷⁴ <<http://lynx.dac.neu.edu/k/kakelly/virgins/virgins.html>>

⁷⁵ <http://www.amnesty.org/ailib/intcam/women/2000/apel_turkey.html>

4.3 VIRGINITY TESTING IN INDIA

In India there is a centuries-old custom of *Kukari ki Rasam* (thread ritual), where a skein of thread is used to detect the presence of an intact hymen. It isn't just used to torture women, but is often used so that the bride's family can make money "Impure" brides are beaten to reveal the names of their "lovers" and then these lovers are forced to pay large amounts of money to the bride's family. Under the pain of torture, *Sansi* women suspected of fornication often name any man that they know just to stop the torture that they are undergoing. A local school teacher says that it is irrelevant that they are forced to name the men. He says, "Here the brides are beaten to make them admit to affairs".⁷⁶ The police claim that they are unable to do anything because this is not illegal, rather just immoral. Virginitv tests are not covered under the Indian Penal Code and therefore cannot be considered a crime so a case cannot be filed against these practices.

In India, women's organizations are active, but the movement to end virginitv testing is not strong as of yet. Other tests used in India are the *Paani ki Dheej* (purity by water) or *Agnipariksha* (trial by fire). In the purity by water test, the woman has to hold her breath under water while another person takes one hundred steps. If she is unable to do this, she is not considered a virgin. In the trial by fire test, the brides have to walk with red-hot iron in their hands with just a plate made out of leaves and dough to shield her hands from the heat. If her hands are burnt, she is considered to be impure. *Sansi* women are often not willing to draw attention to this problem, so the government is unable to do very much. Many *Sansi* people feel that whatever happens within the

⁷⁶ Ibid n 71

home between husband and wife is private, so education is probably the best route to invoke any change in the cultural practice.⁷⁷

4.4 VIRGINITY TESTING IN TURKEY

In Turkey, the government has stepped in to try to curb the controversy of virginity testing after five girls, aged 12-16, tried to commit suicide after being ordered to have the tests performed because they came home late to their dormitories one night. Women and Family Affairs Minister Isilay Saygin tried to say that the situation was of little importance. He said,

Girls of 12 and 13 are falling pregnant. If girls commit suicide because of the virginity tests, they would have committed suicide anyway. It is not that important. We need to lay down certain conditions as a deterrent⁷⁸.

Virginity is seen as highly important in Muslim culture, but the tests seem to mainly occur in Turkey, where Turkish law states that the husbands are the head of the family. For a new bride, virginity is of extreme importance, symbolized by the red ribbon belt that she wears on her wedding day⁷⁹. In Turkey, a cross-sectional study in the form of a self-administered survey was given to forensic physicians in Turkey. About 118 physicians completed the survey and the results are quite interesting. 68% believed that virginity examinations are inappropriate if there is no allegation of sexual assault, however, 45% had conducted examinations for social reasons. Most respondents (93%)

⁷⁷ Sharma, <<http://uk.news.yahoo.com/001214/80/as7x9.html>>

⁷⁸ Associated Press, <<http://hr-action.org/thr/Apress-vt.html>>

⁷⁹ Associated Press, <<http://generation-y.com/stories/011698/turkish.html>>

believed that these examinations are psychologically traumatic for the patients and 58% reported that at least half of the patients undergo these examinations against their will⁸⁰. Some of the social reasons for performing these examinations are the following: consensual sexual intercourse between minors, certification that intercourse had not taken place prior to divorce, suspicions of consensual sexual intercourse between adults or immoral behaviour, forced marriage because of a failed virginity examination, no vaginal bleeding after first marital intercourse, and certification of virginity before marriage⁸¹.

It is interesting to note that virginity examinations violate guarantees of freedom from discrimination found in the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women, all of which are international human rights standards that Turkey has ratified⁸².

4.5 VIRGINITY TESTING IN SOUTH AFRICA

About 120,000 South Africans in 2005 were estimated to have died of HIV/AIDS-related illnesses and more than 100,000 HIV/AIDS orphans have been created. This has made community leaders extremely interested in reviving the old cultural tradition of virginity testing as a way to safeguard against HIV/AIDS. They believe that by testing for virginity, they are protecting themselves by telling people to abstain from sex.

⁸⁰ Women's Health Information Centre.

<http://www.amaassn.org/special/womh/library/readroom/vol_282a/jlf90016.html>

⁸¹ Women's Health Information Centre,

<http://www.amaassn.org/special/womh/library/readroom/vol_282a/jlf90016.html>

⁸² Ibid n 7

These examinations have become extremely popular and hundreds of girls wait in line for up to three hours to be tested. Government officials in KwaZulu-Natal province estimate that tens of thousands are being examined each month. Many Western critics claim that this method is just "putting raging teen hormones in temporary check by creating a culture of fear".⁸³ These critics believe that both boys and girls need to be educated about sex, condoms, HIV/AIDS, and STD's instead. Leaders, however, refuse to educate about condoms because they believe that this may spark curiosity and that the boys and girls may try it. There are increasing reports of parents beating their children for failure to pass virginity examinations. The Ministry of Health has many concerns about the testing, but will not do anything because of the sheer size of the HIV/AIDS epidemic and does not want to curb efforts to halt the spread of the disease⁸⁴.

In South Africa, particularly in KwaZulu-Natal, infants as young as 4 months are being tested to protect them against child abuse. Even women as old as 50 undergo these examinations to show that they are becoming socially prestigious. One girl says⁸⁵,

This is not the time to be sleeping with boys. We have isolated ourselves from those girls who sleep with boys. They are not our friends.

This is the type of attitude that is prominent within these communities. Newly branded virgins often wear colourful dots on their foreheads to show their purity to the world. This is not always a good idea, though. Because of the existing myth that having sexual

⁸³ <<http://www.csmonitor.com/durable/2000/06/02/pls4.html>>

⁸⁴ Singer, <<http://www.csmonitor.com/durable/2000/06/02/pls4.html>>

⁸⁵ Ibid n 81



intercourse with a virgin may cure a person with HIV/AIDS, many women are raped after undergoing examinations that show that they are virgins⁸⁶. At one particular school in KwaZulu-Natal, about half of the 1,500 students have undergone a virginity test. Fewer than 30 have failed. At times, the testing can be cause for major celebration of Zulu culture, where they slaughter cows and have large celebrations. The boys are also often tested. The penises are checked. A hard foreskin is a sign of purity. A wire is placed between two trees about three feet off of the ground. The boys are instructed to urinate about the wire, without using their hands. If they urinate in a straight line, they are virgins. If it is a shower, they are impure. They are also told to urinate in the sand. The urine of a virgin makes a straight hole, they claim.

The South African Commission on Gender Equality held a special meeting on virginity testing and determined that it is a bad thing on the whole, but recognizes that individuals have the right to practice their cultural traditions. One of the problems is that there are no babysitters in South Africa. Parents return from work in the evening and do not know what their children have been up to during the day.

Many parents believe that these tests will be a cure for AIDS because virgins will congregate with virgins and the impure will be shunned. Tests are also performed in five other schools in KwaZulu-Natal on children as young as six so that they can get used to it. Sex education does not sound like it is plausible in the near future.

⁸⁶ Murphy, <<http://www.aegis.com/news/lt/1999/LT990702.html>>

A local school teacher says,

We are against the use of condoms. We think condoms promote lust for sex. If a person has condoms he can go to another man's wife knowing he will not get her pregnant. I don't think we should teach children about such things⁸⁷.

Many questions are raised about the inspections such as:

- (a) How much anatomical knowledge does those doing the testing have?
- (b) How do they know that a broken hymen is not the result of sport or even child abuse?
- (c) How hygienic are the inspections?

If the first girl inspected has HIV, and the same pair of gloves is used on the rest of the girls in the row, they can all become infected with the virus⁸⁸.

4.6 PLACING A PREMIUM ON VIRGINITY

Many cultures in the past placed a premium on the virginity of girls and young women before marriage. Several still do, and in some places where the practice has declined, there has been a return to so-called virginity testing to determine whether a girl has ever had sexual intercourse. In South Africa's KwaZulu-Natal province, and in the neighbouring kingdom of Swaziland, girls are routinely inspected to check if they are virgins. The reason for the practice, it is said, is to preserve beauty, pride and a valuable

⁸⁷ McGreal, <http://www.mg.co.za/mg/news/99sep2/29sep-aids_virgin.html>

⁸⁸ Strachan, <<http://www.hst.org/za/update/44/policy4.html>>

asset of the nation. Women are regarded as flowers of any nation and each nation has its specific features and perceptions of what value is⁸⁹.



4.7 LINKING VIRGINITY TO HIV/AIDS PREVENTION

Virginity testing is now being touted as one method to check the onslaught of the HIV/AIDS pandemic, presumably to encourage abstinence, which is one of the ABCs of preventing the spread of the virus. One of the advocates of virginity tests is South Africa's immediate former Deputy President Jacob Zuma who, while still in office, was reported as having encouraged girls to take the tests as a way of curbing the spread of HIV/AIDS and reducing the prevalence of early pregnancies. Mr. Zuma referred to virginity as a girl's "family's treasure", saying that traditionally girls would only have sex when permitted to do so by their families after marriage.⁹⁰ In Uganda, one Member of Parliament organizes bursaries to enable needy girls to go to university, provided that they pass a virginity test. He links virginity tests to the prevention of exposure to AIDS⁹¹.

The South African Parliament in June 2002 passed the Children's Bill to prohibit virginity testing. This drew fierce opposition from proponents of the custom. Zulu king Goodwill Zwelithini protested that the government did not consult him before the law was enacted, and his supporters are reported to have vowed to defy the ban on this age-

⁸⁹ Report on Consultative Conference on Virginity Testing held in South Africa on June 12, 2000 by South Africa Commission for Gender Equality and the South Africa Human Rights Commission

⁹⁰ See <<http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/3683210.stm>>

⁹¹ See <<http://news.bbc.co.uk/1/hi/world/africa/4700171.stm>>

old tradition⁹². Many of the girls who undergo the inspection say that they are doing so of their own volition and in exercise of their right to practise their culture and traditions. On the other hand, human rights advocates say the tests are discriminatory, invasive of privacy, unfair, impinging on the dignity of young girls and unconstitutional. The debate brings into focus the sharp clash between the right to practise culture and other human rights of bodily integrity and equality as well as sexuality rights.

4.8 ARE VIRGINITY TESTS AN EFFECTIVE WEAPON IN THE WAR AGAINST AIDS?

Virginity tests are unlikely to prove a realistic or useful HIV/AIDS prevention method, and may even be an obstacle for several reasons.

Linking virginity and by extension 'purity' moralizes the HIV/AIDS status of people and this is not effective in tackling the disease. It merely leads to discrimination against people living with HIV and AIDS. Virginity tests rely on shame and the fear of stigmatization, rather than free choice to encourage girls to abstain from sex before marriage. In some communities, girls who pass the test wear a colourful dot on their foreheads to show that they are 'pure'.⁹³ Those who fail the test are shunned, and this is likely to cause immense psychological and emotional trauma to them and stunt their social development. Further, it is likely to lead to people failing to disclose that they are HIV positive and consequently missing out on the benefits of living positively with the virus and drawing on a support system, which has been shown to delay the onset of full blown AIDS and to improve the quality of life of those with AIDS. Countries such as

⁹² See <<http://www.plusnews.org/AIDSreport.asp?ReportID=5052>>

⁹³ See <<http://www.aegis.com/news/lt/1999/LT990702.html>>



Uganda have been successful in bringing HIV infection rates largely due to their policy of removing the stigma surrounding the HIV/AIDS disease in their country.

Moreover, virginity testing fails to take into account involuntary sexual encounters such as rape. Many girls and women, out of shame, do not report that they have been raped. In a country such as South Africa, which has a notoriously high incidence of rape, a girl who has been raped would undergo trauma on several levels if she had to undergo a virginity test.

In some parts of Southern and Eastern Africa a myth has arisen that having sex with a virgin can cure an HIV positive man. This has seen the rape of many girls, from infants to young women, leading to their infection with the virus. Virginity testing would be a dangerous companion to the myth, serving to confirm which girls are virgins and exposing them to the great risk of being raped and contracting HIV.

Virginity testing places the responsibility of preventing HIV/AIDS on girls and women and this is not an effective way to combat the scourge as global statistics indicate that HIV/AIDS is mainly spread through heterosexual sex. Both men and women have the responsibility to prevent HIV transmission. Although there have been calls for boys to undergo virginity testing as well, these have been few and far between. It is mostly girls who are tested, as they are the ones who are expected to remain 'pure' before marriage. Most cultures that venerate the girls' virginity do not similarly venerate boys' virginity. HIV/AIDS is also spread within marriage and a girl or young woman who has avoided contracting the virus before marriage may contract it afterwards from her husband. She may even contract it from another partner if the main driving force for her abstinence

from sex prior to marriage was to avoid the stigma of failing a virginity test.

The tests may therefore just temporarily suspend the risk of getting the disease.

HARMFUL EFFECTS

Virginity testing may merely result in young people avoiding vaginal intercourse and having other forms of sexual intercourse such as anal or oral intercourse, through which HIV can still be spread.

In any case, virginity tests are often inaccurate. The most common test is checking whether a girl's hymen is intact, but many girls are born without the membrane, or it is ruptured in other ways such as during sport. Around the world, there are numerous other traditional ways to test whether a girl is a virgin, and these are based on myth, such as the test to determine whether a girl's urine is 'clear and sparkling' as a virgin's should be⁹⁴. Moreover, the presence of a hymen is not necessarily an indication that a girl or woman has never had sexual intercourse. In Egypt, China, amongst some ethnic groups in the United States, and in many other countries it is becoming increasingly common for women to have surgery to restore their hymens. The presence of a hymen is not therefore any indication of a woman's HIV status, as the testers believe. South Africa has one of the highest HIV infection rates in the world, and its leaders have been criticised for burying their heads in the sand about the HIV/AIDS pandemic, and for suggesting doubtful ways of tackling the virus, instead of tried and proven methods of preventing transmission. The South African government's official stance is against virginity testing, but it remains to be seen whether the ban will really be effective in preventing the practice given that the tests have received strong support from some of the country's leaders and are gaining popularity.

See <<http://www.aegis.com/news/lt/1999/LT990702.html>>

9 HARMFUL EFFECTS

The practice can be dangerous to all the girls involved because testers do not wear gloves or wash their hands, if gloves are worn; it is often the case that same gloves are used on every girl. As a result, diseases may be passed along to previously uninfected girls. Virginitv testing is a temporary solution to the problem of HIV/AIDS and teen pregnancies, as most of leaders who promote virginitv testing often do not provide youth with proper knowledge about condom use, HIV/AIDS and other sexually transmitted diseases. They believe that educating youth about sex will only spark curiosity and the AIDS pandemic will grow. There is a widespread myth that sex with a virgin may curb HIV/AIDS; it is likely that this “virgin myth” is linked to increased sexual assaults on children. The testing, which often publicly identifies those who are virgins may increase a girl’s chances of being raped.

4.10 HUMAN RIGHTS ABUSE

Virginitv testing infringes human rights on a child’s right to privacy and body integrity and it is gender discrimination. The South African Commission on Gender Equality states that the testing undermines principles of equality freedom, and human dignity⁹⁵. The tests give the impression to the participant that their bodies do not really belong to them. The National Council of Provinces approved the Children’s Bill to ban virginitv testing on children under the age of 16 without the consent of their parents or guardian and forced virginitv testing. The Bill

⁹⁵ Sections 9,10, 12 and 14 of the Bill of Rights 1996 Constitution of South Africa.

stipulate further that, Female genital mutilation and virginity testing have been banned, and a male child now has the right to refuse to be circumcised. Anyone who violates these provisions, or who fails to protect the child from such an abuse, is guilty of an offence⁹⁶.

1.11 SUMMARY

The custom or tradition of virginity testing violates human rights. This is clear particularly where children under the age of 16 are taken for the test. In South Africa children below the age of 16 cannot give valid consent. Virginity testing infringes the right of privacy, human dignity and bodily integrity of children. The testers also expose children to high risk of infection because of the lack of training.

The clash of this custom with human rights can be easily harmonised particularly by the Children's Bill, which takes into account the best interest of the children who are under age by banning virginity testing on them. In my view this clash has been harmonised because only people with valid consent can participate without being forced to undergo the test.

But this does not end with participants being tested at their own free will or having reached the age of majority. The government must train the testers on precautions on the high risk of infections during the testing, because when infections occur and increase the government will be failing to safeguard human rights particularly health.

⁹⁶ <<http://www.cyc-net.org/cyc-online/cyc01-0805-jamieson.html>>

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

Criticisms have been levelled against customary law for being in conflict with human rights norms, mainly on the ground that it tends not to emphasize gender equality and patriarchy, but this position was offset by the fact that customary law did not provide a variety of institutions that tended to protect women as well. By its emphasis on solidarity, it tended to prevent any abuse to which the individual women might be exposed. The inferior position of women, however, should not be regarded as peculiar to African customary law. This has been a situation in western law as well. Customary law also protects those individuals who, in an individualistic society, would be disadvantaged. It does not assume that all people are equal in all material and non-material aspects, but accepts that all people are not equally advantaged. Customary law also protects those individuals who, in an individualistic society, would be disadvantaged. It does not assume that all people are equal in all material and non-material aspects, but accepts that all people are not equally advantaged. Customary law also protects those individuals who, in an individualistic society, would be disadvantaged. It does not assume that all people are equal in all material and non-material aspects, but accepts that all people are not equally advantaged.

human rights are based on the premise that a person has rights by virtue of his or her being an individual human being.

Now that South Africa has a Bill of Rights and yet still has customary law, the question has been posed whether customary law is not in conflict with universal human rights. The reason for this is that one of the values that underpin our Constitution is equality.⁹⁷ Customary law on the other hand does not insist on complete equality in every respect. In particular, section 9 of the 1996 Constitution provides for equality before the law and for equal protection and benefit of the law, which entails the full and equal enjoyment of all the rights and freedoms. It further proscribes unfair discrimination

⁹⁷ J van der Vyver "Human Rights Aspects of the Dual System Applying to Blacks in South Africa 1982 CILA 306; T.W Bennett The Equality Clause and Customary Law" 1994 SA JHR 115-131,123.

⁹⁸ Bennett 123; CRM Dlamini "The Role of Customary Law in Meeting Social Needs" 1991 Acta Juridica 73.

⁹⁹ S 7 of the 1996 Constitution.

based on various grounds although it allows steps to promote or advance people or categories of persons who have been disadvantaged by unfair discrimination.

5.2 CONCLUSIONS

Admittedly, the position of women in the past was lower than that of men because of patriarchy, but this position was offset by the fact that customary law did not provide a variety of institutions that tended to protect women as well. By its emphasis on social solidarity, it tended to prevent any abuse to which the individual woman might be exposed. The inferior position of women, however, should not be regarded as peculiar to African customary law. This has been a situation in western law as well. Customary law also protects those individuals who, in an individualistic society, would be disadvantaged. It does not assume that all people are equal in all material and non-material aspects, but accepts that all people are not equally advantaged.

For these reasons therefore, although certain aspects of customary law need to be amended or even repealed, customary law as such still has a role to play even in a society that upholds human rights. African societies did not subscribe to many of the rights, which are now commonly demanded, such as universal suffrage, the rights of women and persons of different religious backgrounds to participate in political matters¹⁰⁰. On the other hand, the Constitutional Court has had a few opportunities to interpret and apply the equality clause of our Constitution. It accepted that classification or differentiation would always be part of life¹⁰¹. Although the

¹⁰⁰ R Howard "Human Rights and Personal Law: Women in sub-Saharan Africa" 1982 Issue 45.

¹⁰¹ *Bhe and others v The Magistrate Khayelitsha and others* 2004(2) SA 544(C); 2004 (1) BCLR 27 (C).

recognition and protection of human rights existed in the pre-colonial period, African definitions of human rights differed in important respects from those prevalent in the west¹⁰². The context of the family, clan and ethnic solidarity or the kinship network, provided the framework within which individuals exercise their economic, political and social liberties and duties under African customary law, and provided restraints to arbitrary official action that might otherwise have prevailed. Customary law and human rights contradict in several aspects but legislation has been enacted to heal the injustices brought by customary law. On the other hand, customary law was suppressed and not considered by the colonialists in order to push their agenda of segregation even in circumstances and aspects, which were consistent with human rights.

The 1996 Constitution brought major changes because of its values of “equality and human dignity” and legislation developing customary law has been put into place (e.g. Recognition of Customary Marriages Act No 120 of 1998 etc.). The consequences of the Constitution and legislation reforming customary law were to do away with aspects of customary law which are completely unfair, like the principle of primogeniture in customary law of succession and where a husband in a marriage was regarded as a guardian of the wife, and the wife regarded as a perpetual minor. The courts in South Africa are also busy developing customary through case law and this was a major step of developing customary law. Aspects of customary law that weaken the values of our Constitution just need to be done away with, and that will amount to harmonization of customary law and human rights.

The compatibility of African customary law and human rights has been widely debated.

The issue has also been the subject of several court decisions in post-1994 South

¹⁰² C E Welch Jr “Human Rights as a Problem of Contemporary Africa” in Welch and Meltzer (eds)

Africa. These judgments have been confirmed in the light of the constitutional obligations of the courts. While the courts have generally taken seriously their role of promoting human rights by showing an increased sensitivity to the rights of marginalised groups such as women and children, the judiciary still has a limited understanding of customary law concept and refers mainly to a distorted official customary law rather than living customary law. With some institutional improvements, courts will be in a good position to reconcile customary law with human rights. Important tools for the courts to resolve conflicts between customary law and human rights under the Constitution are applying living customary law in addition to actively developing new customary law rules in line with the values of both customary law and the Constitution.

The values of the 1996 Constitution of South Africa (i.e. equality and human dignity) cannot be weakened by the right to culture. Section 2¹⁰³ of the 1996 Constitution, which declares the supremacy of the Constitution, remains a point of departure in all cases where practices and laws are inconsistent with the Constitution.

5.3 RECOMMENDATIONS

The South African courts have a major task of developing customary law. The main problem is the limited powers they have in making laws. Because of the separation of powers¹⁰⁴ the courts interpret the law; they do not create law (*ius dicere non facere*)¹⁰⁵.

Case law is developing customary law at a lower pace because of limited powers in law

¹⁰³ In terms of Section 2 of the Constitution any practice or law inconsistent with the Constitution is invalid.

¹⁰⁴ Prof GE Devenish *A commentary on the South African Constitution*, 1998. P 12.

¹⁰⁵ S v Werner 1981 1 SA 187 (A).

making. The powers of the courts in developing customary law should be extended especially in customary law, but even with limited powers the contribution of the law is still important.

In terms of section 43 of the 1996 Constitution the legislative authority is vested in parliament. This means that parliament is the highest law making body in the country. Because of the powers vested in it by the Constitution it has a lot of work in enacting legislation, which reform customary law. For now the parliament is paying little attention in developing customary law to match human rights.

Parliament can develop customary in a quick pace to match the needs of the modern communities by engaging the academics, who seems to be the ones trying to examine the clash between customary law and human rights through researches and also putting forward their opinions on how the clash can be resolved.

The South African Law Reform Commission must also be involved by the legislature to research deeper areas of customary law, which are still in conflict with human rights and come up with ways of harmonising the two areas of law in consultation with stakeholders such as chiefs, academics and lawyers.

The legislature must establish awareness campaigns. Members of the public need to be informed and taught the developments of customary law especially rural communities, which are still living according to customary law.

The legislature must also conduct workshops for headmen on the developments of customary law. The civic organisations in villages and other structures also need the workshops. In terms of customary law, the heads of families are the integral part of

families and they also need workshops on transformation of customary law. The legislature may also educate people about changes through publications. It does not serve the purpose if the legislature continues enacting legislations for members of the public to abide by, while these enactment or changes are not reaching them.

Creating institutions such as research centres to harmonise the conflict between human rights and customary law may also assist the legislature on reform of customary law.

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These examinations have become extremely popular and hundreds of girls wait in line for up to three hours to be tested. Government officials in KwaZulu-Natal province estimate that tens of thousands are being examined each month. Many Western critics claim that this method is just "putting raging teen hormones in temporary check by creating a culture of fear".⁸³ These critics believe that both boys and girls need to be educated about sex, condoms, HIV/AIDS, and STD's instead. Leaders, however, refuse to educate about condoms because they believe that this may spark curiosity and that the boys and girls may try it. There are increasing reports of parents beating their children for failure to pass virginity examinations. The Ministry of Health has many concerns about the testing, but will not do anything because of the sheer size of the HIV/AIDS epidemic and does not want to curb efforts to halt the spread of the disease⁸⁴.

In South Africa, particularly in KwaZulu-Natal, infants as young as 4 months are being tested to protect them against child abuse. Even women as old as 50 undergo these examinations to show that they are becoming socially prestigious. One girl says⁸⁵,

This is not the time to be sleeping with boys. We have isolated ourselves from those girls who sleep with boys. They are not our friends.

This is the type of attitude that is prominent within these communities. Newly branded virgins often wear colourful dots on their foreheads to show their purity to the world.

This is not always a good idea, though. Because of the existing myth that having sexual

⁸³ <<http://www.csmonitor.com/durable/2000/06/02/pls4.html>>

⁸⁴ Singer, <<http://www.csmonitor.com/durable/2000/06/02/pls4.html>>

⁸⁵ Ibid n 81