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Legal Pluralism, Customary Law and Women's Rights

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ABSTRACT

This article examines the challenges legal pluralism poses in legal systems, especially in relation to conflicts between customary norms and the Bill of Rights and the need to contextualise customary law in order to resolve the need to adapt it to changing societal needs and values. The article focuses on African customary law, African legal systems and women's rights because it is a burning issue in Africa and was the subject-matter in several of the cases that came before the South African Constitutional Court during the time Justice Ngcobo was on the Court. Cases involving conflicts between customary law and gender rights are not unique to South Africa. These are issues that have engaged African courts and those elsewhere in the world. In Africa, the coexistence of customary law and received law is as old as colonial rule. Like all other systems of law, customary law has been influenced by various other forces in an ever-changing world. Justice Ngcobo's approach to resolving conflicts between customary law and the Bill of Rights in constitutions is instructive and makes a significant contribution to the jurisprudence in this area of the law. In his opinions on customary law, especially in the *Bhe* case, he implores us to look at the social context in which customary rules originated and, before discarding them, to examine the possibility of developing them to meet the changing needs and circumstances of society.

Keywords: legal pluralism; customary law; African legal systems; Bill of Rights; gender rights

Introduction

It is fitting to pay tribute to Justice Sandile Ngcobo's immense contribution to constitutional jurisprudence in South Africa and the world by publishing a Special Issue in his honour. I feel privileged to have been given the opportunity to participate in this project. My article focuses on customary law and women's rights. Justice Ngcobo's approach to resolving conflicts between customary law and the Bill of Rights in constitutions is instructive and makes a significant contribution to the jurisprudence in this area of the law. In his opinions on customary law, especially in the *Bhe & Others v*

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Magistrate of Khayelitsha & Others case,[1] he implores us to look at the social context in which customary rules originated and, before discarding them, to examine the possibility of developing them to meet the changing needs and circumstances of society. He argues that customary law in its diversity and the legal pluralism that it imports can be greatly strengthened to advance justice in the communities practising customary law. This, he states, is possible if customary law is afforded the opportunity to deal with issues according to the customary laws of the particular domain, that are fashioned to address those issues in context and in their specificity and particularity.

Against this background, this article examines the challenges legal pluralism poses in legal systems, especially in relation to conflicts between customary norms and the Bill of Rights. It also considers the need to contextualise customary law in order to fulfil the need to adapt it to changing societal needs and values. We realise that there are several other plural jurisdictions in the world—India, Malaysia to name but two. But the article focuses on African customary law, African legal systems and women's rights because it is a burning issue in Africa and was the subject-matter in several of the cases that came before the South African Constitutional Court during the time Justice Ngcobo was on the Court.

Cases involving conflicts between customary law and gender rights are not unique to South Africa. These are issues that have engaged African courts and those elsewhere in the world.[2] In Africa, the coexistence of customary law and received law is as old as colonial rule. Like all other systems of law, customary law has been influenced by a variety of forces in an ever-changing world. The mutilation of customary law by the forces of religion, colonialism, neocolonialism, and now globalisation, has meant that different narratives of customary law exist.

Legal pluralism is a condition in which a population observes more than one body of law. It has also been described as 'the presence in the social field of more than one legal order'.[3] It is of the essence that even if it is plural, the various elements are all

1 2005 (1) SA 580 (CC) ('*Bhe*').

2 Raymond Atuguba, 'Customary Law: Some Critical Perspectives in Aid of the Constitutional Making Process in Zimbabwe' in Norbet Kersting (ed), *Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe* (Fredrich Ebert Stiftung 2009) 291 <http://library.fes.de/pdf-files/bueros/simbabwe/07322.pdf> accessed 13 November 2017.

3 John Griffiths, 'What is Legal Pluralism?' <http://commission-on-legal-pluralism.com/volumes/24/griffiths-art.pdf> accessed 13 November 2017. Griffiths argues that legal pluralism 'refers to the idea that in one geographical space defined by the conventional boundaries of a nation state, there is more than one law or legal system.' He contrasts this with what he called 'Legal Centralism', which sees law as an exclusive systematic and unified hierarchical ordering of normative propositions, which can be looked at either from the top downwards as depending from a sovereign command (Bodin, 1576; Hobbes, 1651; Austin, 1832) or from the bottom upwards as deriving their validity from ever more general layers of norms until one reaches some ultimate norm(s) (Kelsen, 1949; Hart, 1961). In either case, while the various subordinate norms which constitute law carry moral authority because of their position in the hierarchy, the apex itself—the sovereign or the 'Grundnorm' or the rule of recognition—is essentially a given. It is the factual power of the state which is the keystone

subject to the overriding law-making process of the State. Legal pluralism poses real challenges for states in Africa. In almost all African jurisdictions, the law of the country is composed of customary law, the common law or civil law, religious law and legislation enacted by both the colonial and the post-colonial parliaments.[4] During the colonial period, customary law was administered by traditional or local courts; their jurisdiction was limited to situations where both litigants were Africans[5]. These courts were also limited in terms of the law they could apply by the repugnancy clause and the fact that customary law could not conflict with legislation[6]. Along with this formalistic dualism between the common-law and customary-law systems, there were vast functional and procedural disparities between the two systems of law. For example, the customary courts followed a more informal procedure—no lawyers were available in customary courts, nor were technical rules of procedure followed. They emphasised 'substantive justice' instead of 'technical justice'.[7] The customary courts' decisions were recorded in summary form and almost no precedential value was attached to decisions.

At independence, many African states maintained a *dualist system* of customary law, and the common or civil law inherited from the colonial period, but integrated their court systems. The former traditional or local courts were placed at the lowest stratum of the court system[8]. The integration of the court system maintained the differentiation in substantive law administered by the different courts. No African country reverted solely to a customary system of law that rejected the common or civil law. Instead, they all embraced the dualism of law that was the legacy of colonial rule. The received law

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of an otherwise normative system which affords the empirical condition for the actual existence of the 'Law'. Hence, the necessary connection between the conception of law as a single unified and exclusive hierarchical normative ordering and the conception of the state as the fundamental unit of political organisation.

4 In the former British colonies, the common law was introduced by the English Law (Extent of Application) Act. For instance, there is the English Law (Extent of Application) Act, Ch 11, 2 *Laws of the Republic of Zambia* (2002) s 2. See also WL Church, 'The Common Law and Zambia' (1974) 6 Zambia LJ 1; Anthony Allot, *New Essays in African Law* (Butterworths 1970) 21–27.

5 Francis O Spalding, Earl L Hoover and John C Piper, '"One Nation, One Judiciary": The Lower Courts of Zambia' (1970) 2 Zambia LJ 12.

6 Allot (n 4); A Akpamgbo, 'A "Woman to Woman" Marriage and the Repugnancy of Customary Law' (1977) 14 African Law Studies 87–92; TWE Bennett, 'Conflict of Laws: The Application of Customary Law and the Common Law in Zimbabwe' (1981) 30 International and Comparative Law Quarterly 59–103.

7 Max Gluckman, *The Ideas in Barotse Jurisprudence* (Yale University Press 1965).

8 In Tanzania, the Primary Courts established under Magistrates Court Act, subsec 2. The Act states: 'Generally a Primary Court has jurisdiction on civil and criminal matters, the primary court has jurisdiction to all civil matters where a law applicable is customary law or Islamic law as provided under 18(*a*)(1) of the Magistrates Court Act, Chapter 11 of the Laws of Tanzania, (2002).' See also *Jacob Mwangoka v Gurd Amon* 1987 TLR 165; and Robert Seidman, 'Rules of Recognition in the Primary Courts of Zimbabwe: on Lawyers' Reasonings and Customary Law' (1983) 1–2 Zimbabwe LR 43.

had become deeply embedded in the legal system of the new state. It was, therefore, a pragmatic approach to retain it as part of the national legal system.

Legal Pluralism and African Legal Systems

In a typical African country, the great majority of the people conduct their personal activities in accordance with and subject to customary law.[9] Customary law is largely ethnic in origin, and usually operates only within the area occupied by the ethnic group or in disputes where at least one of the parties to the dispute is a member of the ethnic group. It is often thought of as indigenous to the people, based on 'immutable tradition'. However, this is misleading. In their book, Mann and Roberts provided a more nuanced explanation of customary law when they stated:

> [W]hen Europeans conquered Africa they encountered populations with well-established indigenous and Islamic systems of law. Conquest did not destroy these systems, although it often subordinated them to metropolitan legal traditions ... customary law and Sharia law persisted alongside European civil, criminal, military and administrative law. In addition, the colonial period gave birth to 'official customary' law, regarded by Europeans as indigenous law, but in fact invented by Africans and Europeans under colonialism.[10]

Customary law is not a single, static legal regime based on unchanging tradition, but was and still is 'living law' based on an ever-evolving legal system which was changing as social and economic conditions changed.[11] As observed elsewhere, pre-colonial African society in which the rules developed was based on an agricultural subsistence economy characterised by self-sufficient joint family organisation.[12] African traditions and customary law served the needs of the traditional communities from which they developed and together the traditional practices and customary rules ensured that all members of the community has access to food, clothing and shelter. African customary law had its sources in the intergenerational traditions and customs of the people. Customary law continues to have a significant impact in the areas of land holding and

9 In the case of Zambia, an Afronet study concluded that 'of the five rugs of the judicial power in Zambia, comprising the Supreme Court, the High Court, the Industrial Relations Court, the Subordinate Courts and the Local Courts, it is the latter which play an important part in the settlement of disputes of the majority of the population': Afronet, *The Dilemma of Local Courts in Zambia* 1 (1998) <http://www.vanuatu.usp.ac.fj/library/online/USP%20Only/Customary%20Law/Dilemna.htm> accessed 13 November 2017.

10 Kristin Mann and Richard Roberts, *Law in Colonial Africa* (Heinemann Educational Books 1991) 2–3.

11 Muna Ndulo, 'The Changing Nature of Customary Marriage' in Muna Ndulo (ed), *Law in Zambia* (East African Publishing House 1984) 143.

12 Muna Ndulo, 'Widows under Zambian Customary Law and the Response of the Courts' (1985) XVIII CILSA 92.

personal law, so far as matters such as marriage, rights within the family, inheritance and traditional authority are concerned.[13]

African land-tenure systems have been an object of policy interventions from colonial times to the present. Colonialism has left very unequal patterns of land ownership in much of Africa and imposed statutory land laws that have little to do with customary law in practice. In recent times, the challenges pluralism poses in the area of land rights—such as ownership, access to land and its resources, and the agency of traditional authorities in land management and allocation have been exacerbated by the increased demand for oil, bio fuels, mineral resources and food and has led to the phenomenon of land-grabbing. It is estimated that as at 2012, corporations worldwide had invested an estimated fourteen billion dollars of private capital in farmland and agriculture infrastructure.[14] These investments reflect land deals that cover an area of nearly 1 148 million acres.[15] Of this land, approximately two-thirds was acquired in Africa. Countries such as Sierra Leone and South Sudan have sold off thirty-two per cent and ten per cent of their landmass respectively.[16]

It is widely acknowledged that in its present form customary law is distorted and has been influenced by its recent encounter with colonial rule.[17] Furthermore, various systems of customary law have been affected by their interaction with the common law and urbanisation. In *Alexkor Limited v Richtersveld Community*[18] the South African Constitutional Court observed that

> although a number of textbooks exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied.[19]

Customary law is unwritten, customary decisions certainly are too, whereas the basis of the common law is a series of written, previous judgments with precedential value. As noted earlier, the common law is structured around lawyer-governed adversarial proceedings in each case, whereas customary proceedings lack lawyers entirely and are often focused on reconciliation or social redress rather than on individual claims.[20]

13 Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18(1) Indiana J of Global Legal Studies 94.

14 Smita Narula, 'The Global Land Rush: Markets, Rights, and the Politics of Food' (Winter 2013) 49 Stanford Journal of International Law 111.

15 ibid.

16 See, for example, Land Matrix, West Africa <http://www.landmatrix.org/en/get-the-detail/by-target-country/sierra-leone/?order_by=target_country> accessed 13 November 2017.

17 Ndulo (n 11) 153 and TW Bennett, *A Sourcebook of African Customary Law for Southern Africa* (Juta 1991).

18 2003 (5) SA 460 (CC) ('*Alexkor Ltd*').

19 ibid para 52n51.

20 Gluckman (n 7).

Customary Law, Discrimination and Women

In its application, customary law is often perceived as being discriminatory, especially in relation to the capacity of women in areas of inheritance, property ownership and traditional authority.[21] It tends to treat women as adjuncts to the group they belong to, such as a clan, a family or a tribe rather than as equal with men. There is a major debate between human rights activists and traditionalists on the continued application of customary law.[22] Whereas traditionalists argue that, by promoting traditional values, customary law makes a positive contribution to the promotion of human rights and African values, human rights activists argue that discriminatory practices in customary law undermine the dignity of women and that customary law is used to justify treating women as second-class citizens.[23]

One of the major causes of the tension between customary law and the common law is that whereas African customary law emphasises rights in the context of the community and the kinship rights and duties of individuals to their communities, human rights norms typically enjoin states parties to treaties to respect individual human rights. African constitutions, which are still based on the independence (Lancaster House) model, contain provisions guaranteeing equality and human dignity and prohibiting discrimination based on gender. However, the same constitutions recognise the application of customary law without providing a mechanism for resolving conflicts between some customary-law norms and human rights norms where they arise.[24] This results in conflicts between human rights and customary-law norms[25].

Indicative of these conflicts between the customary-law norms and human rights—particularly of the female citizen or the girl child, as the case may be—is the trilogy of cases that came up for adjudication before the South African Constitutional Court during the time Justice Ngcobo was on the Court. The cases in *Bhe* revealed clearly the controversies regarding human rights and the application of customary-law norms.[26] In the case in point, the central issues revolved around the application of the rule of

21 Bennett (n 17); TW Bennett, 'The Compatibility of African Customary Law and Human Rights' (1991) Acta Juridica 18; Lea Mwambene, 'Marriage under African Customary Law in the Face of Bill of Rights, International Human Rights Standards in Malawi' (2010) 10 AHRLJ 82.

22 Bennett (n 17); Mwambene (n 20).

23 BA Rwezaura, 'Traditionalism and Law Reform in Africa 539' (28 January 1983), unpublished paper presented at a seminar jointly organised by the Fundamental Rights and Personal Law Project, Centre for Applied Social Sciences, and the Department of Law, University of Zimbabwe.

24 The Constitution of Zambia, 1991, s 23(1) provides: 'Subject to clause (4) (5) (7), no law shall make any provision that is discriminatory either of itself or in its effect.' Clause 4 states: 'Clause (1) shall not apply to any law so far as that law makes provision … (*b*) with respect to persons who, (*c*) with respect to evolution of property, on death or other matters of personal law, (*d*) for the application in the case of members of a particular race, or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.'

25 Mwambene (n 20).

26 The *Bhe* case (n 1) consisted of three cases heard in one. See paras 5 and 6.

primogeniture as it affects intestate succession of black South Africans. Section 23 of the Black Administration Act 38 of 1927 was challenged as being invalid under the Constitution, 1996, because it not only segregated and discriminated against blacks in general,[27] but the law and the regulations ensuing from it in particular discriminated against women by elevating the doctrine of primogeniture.[28]

In that case, Ms Bhe sought no relief for herself but for her two minor daughters—Nonkulueko Bhe, born in 1994, and Analisa Bhe, born in 2001. The Court in its decision was of the view that the material consideration should not be whether the law offers similar remedies to intestate succession but whether it is constitutional, because in the new era customary norms are protected by and subject to the Constitution. It therefore had no difficulty in striking down the rule of primogeniture and the laws and regulations propping it up for violating the spirit and letter of the South African Constitution. The Court was also proactive in creating an interim measure that will prevail pending legislative intervention crafted to produce detailed legal reform in this sphere. In the words of the Court, *per* Langa DCJ:

> I consider nevertheless that the legislature is in the best position to deal with the situation and to safeguard the rights that have been violated by the impugned provisions. It is the appropriate forum to make adjustments needed to rectify the defects identified in the customary law of succession. What should however be borne in mind is that the task of preventing ongoing violations of human rights is urgent. The rights involved are very important, implicating the foundational values of our Constitution. The victims of the delays in rectifying the defects in the legal system are those who are among the most vulnerable in our society. The court's task is to facilitate the cleansing of the statute book of legislation so deeply rooted in our unjust past, while preventing undue hardship and dislocation.[29]

Justice Ngcobo wrote a nuanced partial dissenting opinion in this case depicting his deep appreciation of the jurisprudence of constitutional and customary law. In his view, section 23 of the Black Administration Act 38 of 1927 together with the regulations made under that Act and section 1(4)(*b*) of the Intestate Succession Act violate the rights of equality and are therefore unconstitutional. He equally agreed with the majority judgment that the customary-law doctrine of primogeniture was unfair and prejudicial to the rights of women in general. However, he dissented on the matter of the succession rights of minors or younger children. To him, the one cardinal reason for the doctrine was to determine the individual capable of assuming the responsibilities of the deceased. Such responsibilities included taking care of and providing for the young children of the

27 Paragraph 66.

28 Paragraph 77. This doctrine, which has been criticised for the abuse it has engendered, is also found in English common law, but it has become vestigial within the English system. It is the right, by customary law, of the first-born son to inherit his parents' entire or main estate to the exclusion of or in preference to daughters or younger male siblings. Thus, a critical question before the Court was to interrogate the constitutional validity of the custom in the present post-apartheid South Africa.

29 *Bhe* (n 1) paras 115–116.

family. That obligation to maintain and support the young of the family was essential to the sustenance and perpetual succession of the family—a value the Court could have preserved while also giving women equal opportunity to play the role.

This opinion no doubt speaks to the larger questions that have been of concern to both legal history and sociological jurisprudence. Society is in a constant flux; yet laws must be predictable and values which held society together may not simply be discarded without thorough interrogation. This is the dilemma for both jurisprudence and legal pluralism. It is indeed true that one of

> the chief problems to which legal thinkers have addressed themselves has been how to reconcile the idea of a fixed body of law … with the idea of change and growth and making of new law.[30]

In navigating this concern, Justice Ngcobo adopted an analytical approach that sought to evaluate the meaning of the words 'succession' and 'inheritance', bearing in mind that concepts in law can have very different meaning although they might be used interchangeably. He averred that both concepts should be distinguished because within the customary-law milieu they do not mean the same. To further elaborate on this, he quoted with approval the opinion of Bennett:

> The words 'succession' and 'inheritance' are often used as synonyms, but for analytical purposes they should be distinguished. The latter denotes the transmission of rights to property only, and in those societies emphasizing material wealth, inheritance predominates. Succession is more general; it implies the transmission of all the rights, duties, powers, and privileges associated with status. So, in the case of customary law one should speak of a process of succession rather than inheritance.[31]

Drawing further inspiration from the culture and African value system, he sought to trace the origins of succession founded on primogeniture from the overarching and deeply resonating philosophy of ubuntu. In other words, it is critical to examine the background and history upon which indigenous or customary-law norms evolved in order to better appreciate their meanings and how best to execute their reforms in the present. To him the rule of primogeniture has its foundation in the traditional family unit as the focus of social concern. This family unit conceptualisation de-emphasised individual interests which are 'submerged in the common will'. It emphasised duties as opposed to rights. Indeed,

> a sense of community prevailed from which developed an elaborate system of reciprocal duties and obligations among the family members. This is manifest in the concept of Ubuntu – *umuntu ngumuntu ngabantu* – a dominant value in African traditional culture … encapsulates communality and the interdependence of members of a community.[32]

30 Roscoe Pound, *Law and History* (MacMillan 1923).

31 Bennett (n 17).

32 *Bhe* (n 1) para 163. The opinions expressed by Ngcobo J are plausible and erudite. They are, however,

One issue one could take with Justice Ngcobo's dissent is that it does not give illustrations on how, in practice, the rule of primogeniture could be developed in a way that would avoid its discriminatory effect. The Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) calls on states to eradicate any practices or law whose effect is to discriminate against women even where the intention of the practice or law is not to discriminate against women.[33]

Customary Law, Reform and Development

Taking into account the observations made earlier on in the article that during the colonial era customary law was denied the chance to adapt to changing conditions in African societies, the fundamental question that arises is how to reform customary law so that norms that discriminate against women in such areas of the law as inheritance, land allocation, access to resources and traditional authority can be eradicated. A strategy is needed because opposition to reform by those who benefit most from maintaining and abusing the customary system, as well as from political players, should not be underestimated. There are also those who view customary law as part of the African identity that should not be compromised by what they perceive as 'Western influences'. Approaches to the reform of customary law can be divided into three. The first approach should be ensuring that African states adopt both international and regional human rights instruments that outlaw all forms of gender discrimination. These instruments lay a foundational framework within which women's rights can be advanced. The second should be to ensure that African states incorporate into their national constitutions and

not unassailable. It is important to note that the values talked about even in their precolonial state did not accord equality to women and it is merely nibbling at the edges by giving women the right of primogeniture; doing so will also not protect their best interests, as the overwhelming strength of patriarchy is still noticeable in society. Also, there is generally a weak or non-existent traditional procedure for policing the successor to live up to his assumed obligations and duties to the children in the family. As we saw in this case, the intention was to sell the property without making clear provision for taking care of the minors. This becomes even more precarious in a situation where the paternity of the children is under scrutiny. Often society shrugged it off if the successor failed to carry out the obligations and duties effectively. Where, then, is the value of trusteeship if the trustee cannot be held accountable? The critical value of Ngcobo J's exposition of the custom and the values behind primogeniture is that it draws attention to the need for circumspection and informed evaluation by judges and legislatures when making pronouncements and introducing legislation on customary law. The value in this cannot be over-emphasised. Indeed, customary-law reforms are likely to create absurdities or cause greater hardship if these concerns are not thoroughly considered and weighed up.

33 UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol 1249, 13 <http://www.refworld.org/docid/3ae6b3970.html> accessed 13 November 2017; Art 1 provides: 'the term "discrimination against women" shall mean any discrimination, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

legislation human rights norms contained in the international and regional human rights instruments they sign on to. The third approach should be a concerted effort at legal reform.

Colonial administrations recognised customary law and its institutions, albeit that the recognition was limited to governance in certain areas and to governing the resolution of disputes between 'natives'.[34] Human rights protections did not arise in this period as colonialism was premised on the most grotesque violation of human rights. The post-independence constitutions recognised customary law together with the common law as sources of national law. Unfortunately, the post-colonial constitutions introduced in the context of decolonisation left much to be desired on the issue of women's rights. These constitutions contained bills of rights that guaranteed human rights to all based on the notion of equality between men and women. However, at the same time, they immunised customary law against human rights scrutiny.[35] This has changed with the post-democratisation constitutions: the new constitutions do not immunise customary law from human rights norms. For example, article 33 of the Ugandan Constitution, 1995 provides that

> (1) women shall be accorded full and equal dignity of the person to men ... (4) women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities; (6) laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this constitution.[36]

Similarly, the Constitution of South Africa, 1996, provides 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.[37]

The Kenyan Constitution, 2010, provides that

> traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights and that the Bill of Rights trumps customary law norms that conflict with constitutional provisions.[38]

The post-democratisation approach is informed by international and regional human rights norms that outlaw all forms of discrimination, more especially that against women.

34 Chuma Himonga and Craig Bosch 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 SALJ 306.

35 Constitution of Zambia, 1991.

36 Constitution of Uganda, 1995 <https://www.ulii.org/node/23824> accessed 13 November 2017.

37 Section 211(1) of the Constitution, 1996.

38 Article 159 of the Constitution of Kenya, 2010 <http://www.wipo.int/edocs/lexdocs/laws/en/ke/ke019en.pdf> accessed 13 November 2017.

These include: the Universal Declaration of Human Rights;[39] CEDAW,[40] the Civil and Political Rights Covenant;[41] the Convention on the Elimination of All Forms of Racial Discrimination,[42] The African Charter on Human and People's Rights,[43] the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,[44] and the SADC Protocol on Gender, all of which prohibit all forms of discrimination.

Every African constitution should outlaw all forms of discrimination against women without any reservations and none of them should immunise customary law against human rights provisions. There is a need for constitutional provisions that declare the rights of women and reaffirm their equality with men in all respects. The guiding principle should be the equality of all human beings regardless of gender. As the Namibian High Court observed with respect to the Namibian Constitution:

> a constitution with a rights framework cannot but mediate and influence traditional culture. While traditional culture forms part of an individual's identity, so does state culture, which includes the understanding that there is a constitutional framework that represents the "emerging consensus" of values which Namibians share.[45]

The third major effort should be focused on the legal reform of both customary law and ordinary legislation in all African countries to rid them of gender-discriminatory laws. Reform efforts should start with a comprehensive diagnostic study of each African country's legal system that is aimed at identifying laws which require reform to meet the 'non-discrimination' test. There are several things that a legal reform project must take account of in order to be successful. It must begin with the underlying task of ascertaining which laws conflict with the human rights norms of equality and non-discrimination. Secondly, reform must examine the social, economic and cultural developments in the affected country. Thirdly, it must understand the aspirations of the contemporary legal system and the status of the authority upon which the rules are based. Customary rules that have been undercut by the march of time and social progress should be modified or eliminated. Many of them were codified or frozen in time by denying them the political

39 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III) <http://www.refworld.org/docid/3ae6b3712c.html> accessed 13 November 2017.

40 CEDAW (n 32).

41 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999, 171 <http://www.refworld.org/docid/3ae6b3aa0.html> accessed 13 November 2017.

42 UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol 660, 195 <http://www.refworld.org/docid/3ae6b3940.html> accessed 13 November 2017.

43 *African Charter on Human and People's Rights*, 1981, OAU Doc CAB/LEG/67/3rev5 21 ILM 58.

44 *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 2003, AHG/Res 240 (XXXI).

45 *Ex parte Attorney General: In re Corporal Punishment by Organs of State* 1991 NR 189.

and social structures that were the vehicle for adaptation to changing circumstances. In *Gumede v President of the Republic of South Africa,* Justice Moseneke observes that

> [d]uring the colonial times, the great difficulty resided in the fact that customary law was entirely prevented from evolving and adopting as the changing circumstances of the communities required. It was recorded and enforced by those who neither practiced it nor were bound by it.[46]

With respect to rights to property within marriage, Judge Moseneke observes:

> Even when notions of spousal equality and equality and equity and the abolition of marital power of husbands over wives were introduced in this country to reform the common law, official customary law was left unreformed and stone-walled by state rules and judicial precedent, which had little or nothing to do with the lived experiences of spouses and children within customary marriages.[47]

With respect to customary law, any efforts at reform, therefore, must be mindful that the rules one is dealing with are often distorted and do not reflect the lived realities of the people. One must also be mindful of the weapons of the traditionalists who base their opposition to change on an ideology that characterises attempts at reforming customary law as contrary to African traditions and culture. They argue that human rights norms are the product of Euro-Christian societies.[48] Reformers must assure the public that the human rights project is not about westernising African societies and that, on the contrary, it is an attempt to integrate the traditional and modern values of the African people with the concepts of human rights and dignity for all persons.[49] It is about human dignity and advancing the values of ubuntu. The values of customary law should be studied so that the important and non-discriminatory parts are preserved and included in the law reform. This, to my mind, is the importance of the nuanced dissenting view of Ngcobo J in the *Bhe* case. Getting to the heart of the values of customary law may be a daunting task, but including those values in a new legal system free from discrimination is the best way to ensure stability, predictability, equality and the continued relevance of customary law in African legal systems.

The fourth element of the project should take the fight for gender equality to the courts and the people. This suggests that we need to improve access to the courts so that women can bring claims based on discrimination, in so doing giving opportunities to the courts to reform the law. We must also ensure that the courts interpret the law in such a way that gender equality is advanced and the people should put pressure on the courts and society to act in the interests of gender equality. Here the work that the Southern

46 *Gumede (born Shange) v President of the Republic of South Africa & Others* 2009 (3) SA 152 (CC) para 20.

47 ibid.

48 Carlson Anyangwe, 'The Whittling Away of African Indigenous Legal and Judicial System', (1998) Zambian LJ, Special Issue 46.

49 Rwezaura (n 22).

African Litigation Centre (SALC) does deserves our utmost admiration.[50] In *Mmusi & Others v Ramantele*,[51] the SALC joined the litigants and local NGOs to litigate the constitutionality of Batswana tribal custom, which preferred men over women. This resulted in the 2012 High Court of Botswana landmark decision on women's inheritance rights, for the first time according women the right to inherit a family home despite customary practices. The Court held that a customary law that gave the right only to the youngest-born son contravened the country's constitution, which guarantees gender equality. Courts should be encouraged to contextualise their decisions in the prevailing social and cultural conditions as well as in the light of the goals of the justice system. Customary law, like any other law, is not static, it cannot stand still.[52] It does change,[53] and it is in a constant state of flux in order to reflect the way people are living today.[54]

In addition, legal reform must involve educating society about the laws and the rights and obligations that flow from them. Legal education should target a range of different actors: individuals, religious leaders, judges, traditional rulers and lawyers, for instance.

It is important to understand the dynamic and ever-changing nature of customary law. As Mann and Roberts observed:

> In Africa, as elsewhere in the world, laws reflect the imperatives of changing economic, political, and social circumstances and were both transforming and transformed over stretches of time. At the time of European conquest, in most African societies, there was no single, unchanging tradition. There were, instead, contested and continuously reconstituted traditions, best understood as clusters of rules, moralities, expectations, and conflicts, which gave rise to changing regulatory practices.[55]

50 Southern African Litigation Centre, Annual Report, 2015.

51 CACGB-104-12, [2013] BWCA 1 (3 September 2013).

52 It has been canvassed by many scholars that the 'law must be stable and yet it cannot stand still. Hence, all thinking about law has struggled to reconcile the conflicting demands of need of stability and the need for change. The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as the new modes of endangering security. Thus, the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of changes no less than principles of stability.' See Pound (n 29) 1.

53 In the English case of *Parker v Parker* (1954) All ER 22, Lord Denning had this to say about the common law and the need for change in response to the demands of justice and changing milieu: 'What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both.'

54 Thandabantu Nhlapo, 'Customary Law in Post-apartheid South Africa: Constitutional Confrontations in Culture, Gender and "Living Law"' (2017) 33 SAJHR 1.

55 Mann (n 10) 8.

The ability of customary law to keep up with the changing norms of society can only increase its legitimacy and role in society for the betterment of all our societies. It should not be forgotten that the common law has survived largely because it has been flexible and has changed with changing social and economic circumstances. In discussing the rule of *stare decisis* Blackstone observed:

> yet this rule (*stare decisis*) admits of exception, where the former determination is most evidently contrary to reason; much more of if it be clearly contrary to divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law, that is that it is not the established custom of the realm, as has been erroneously determined.[56]

As Chief Justice Black observed in the Pennsylvania case of *McDowell v Oyer,* in discussing grounds for rejecting a common law norm:

> There are old decisions of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion. *Tempora mutatur*. We change with times, as necessary as we move with the motion of the earth.[57]

So clearly, under the common law, where the expectations and conditions of modern society have rendered a rule obsolete or repugnant to the extent that it offends the values of justice and equality, the courts can declare the rule inoperable. The fact that the common law has endured through the centuries is due to its ability to adapt to and reflect the living law of those whose lives it seeks to regulate.

Land Rights and Traditional Authority

For example, with respect to land tenure and women's rights, African customary law regarding land is predicated on a pre-market economy. Before the rise of the modern state, people occupied land through a variety of customary systems, all without the benefit of formal title to the land, which, as observed by Harring, is a European innovation spread around the world through various legal systems.[58] The most common legal status of communal land in southern Africa is that the government might hold some administrative power over the land, but it is subject to some formal requirements that the land be held for the benefit of the communal landholders.

56 William Blackstone, *Commentaries on the Laws of England Vol 1* (JB Lippincott Co 1753) 69–72 <http://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-1> accessed 13 November 2017.

57 *McDowell v Oyer* (1853) 21 Pa St 417.

58 Sidney L Harring, '"God Gave Us This Land": The OvaHimba, the Proposed Epupa Dam, the Independent Namibian State, and Law and Development in Africa' (2001) 14 Georgetown International Environmental LR 75–76.

In Zambia for example, the state claims title to all land in Zambia but with respect to communal land generally defers to the traditional authorities to organise and distribute the land according to customary law.[59] This presents unique challenges about proprietary rights over land. While projecting the virtues of the communal ownership approach of customary law, we must find ways to ensure that women have access to land and that the land-tenure system accommodates large-scale faming and mining, both of which require title to large tracts of land.

We must also address the abuse of traditional authority by chiefs who use their control of the land and their authority to alienate huge tracts of land to landgrabbers, both national and foreign. Generally, African customary land tenure does not recognise individual tenure. Under African tenure, the land belongs to the community, rarely to an individual. All members of the community, village or family have equal right to the land, but in every case the chief or headman of the community is in charge of the land.[60]

At independence, African countries inherited a dual system of land usage or ownership: the English system of freehold and leasehold, on the one hand, and customary law, on the other. The received law applied to a category of land known as 'state land' originally intended for European settlers, whereas the indigenous customary law applied to land especially carved out as reserves and trust land for exclusive occupation by Africans.[61] In the so-called Customary Land Areas, land tenure is administered under customary law. It is in these areas that land grabs are taking place: chiefs are abusing their power to capture communal resources in areas under their jurisdiction and alienating huge tracts of land to foreign corporations, local elites and powerful politicians. These deals are being concluded without any transparency or local consultation. Poor villagers are being forced off their lands in large numbers. The Oakland Institute has observed that the land grab that is taking place is accompanied by a major 'water grab', which raises serious concerns over the future of freshwater resources when the vast areas of newly acquired land come under cultivation.[62] The Oakland institute suggests that this new pressure on water resources will adversely affect small farmers and pastoralists who rely on water resources for their livelihoods.[63] Researchers warn further that jeopardising Africa's fragile river systems will also have political and ecological consequences.[64] These land grabs are happening because in many of these communities local farmers have only insecure legal title to the land, with most of them having no documents relating to their land. The reform of customary law in this area must therefore seek to secure land

59 AC Mulimbwa, 'Land Policy and Economic Development in Zambia' (1998) Zambia LJ, Special Edition 84, 90.

60 *Amodu Tijani v Secretary to the Government of Southern Nigeria* (1921) 2 AC 399 at 404.

61 Mulimbwa (n 58) 80.

62 The Oakland Institute, *Understanding Land Investment Deals in Africa*: *Land Deal Brief* (December 2011) <https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_brief_land_grabs_leave_africa_thirsty_1.pdf> accessed 13 November 2017.

63 ibid.

64 ibid.

rights as well as institute transparency in land deals and ensure the establishment of consultative processes for the alienation of land held in terms of customary law.

In addition, traditional authority must be reformed. It is often forgotten that the distortion that has happened to customary law through the agency of colonial rule did not spare the traditional authorities:[65] in terms of accession to the throne, many chiefs embrace patriarchy,[66] and are corrupt and authoritarian. There are three views on what is to be done with traditional authority. One is that the continuing existence of chiefs in the age of modern liberal democracy in Africa is anachronistic; this view would call for the abolition of traditional authority. The second is that the continuing existence of chiefs is a mode of expropriating the modern into the traditional realm. The third view—largely led by anthropologists—sees chiefs as necessary for the maintenance of the social structure of traditional societies in the face of rapid social change.

Whichever approach is adopted, we must come to grips with the fact that these institutions can at times be oppressive, exploitative, discriminatory and intolerant. The challenge, therefore, is how to secure land rights for women and poor people and to ensure that traditional structures are accountable to their people. It is only when we have guaranteed these matters that we can ensure the sustenance of the customary norms that Africanists idolise and we can all identify with and embrace. Such idolised ideas include: that land in traditional society belongs to the people and that it is held by the chief in trust for the people. Equally, chiefs are duty bound as trustees to ensure that the needs of those working and living on the land are protected and that justice always prevails. We must not forget that inequality prevails and entrenches itself as the traditional institutions lose their indigenous mechanisms for accountability.

As we work towards these goals, we must not underestimate the challenges that are inherent in the task. In Africa, the national government and politicians are loath to challenge traditional leaders for fear of losing their loyalty and, with it, the votes of the people under their authority—chiefs tend to make good electoral allies of government leaders during election times.

Conclusion

In conclusion, I would argue that the reform of customary law and the integration of customary law into the mainstream legal system is the only way to ensure that customary law endures, remains relevant and plays a role in African legal systems. Failure to reform

65 Wim van Binsbergen, 'Chiefs and the State in Independent Zambia' (1987) 26 Journal of Legal Pluralism 156. See also Donald I Ray and E Adriaan B van Rouveroy van Nieuwaal, 'The New Relevance of Traditional Authorities in Africa on Future Directions' (1996) 37 Journal of Legal Pluralism 1.

66 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC). For a critique of the case, see also Nomthandazo Ntlama, '"Equality" Misplaced in the Development of the Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 22 SA 66 (CC)' (2009) 20 Stellenbosch LR (2009) 333.

it will relegate it to the law of the 'reserves'.[67] The courts can help with this process, and are already doing a fair amount, as can be seen from the Botswana case of *Mmusi v Ramantele;* the South African cases of *Shilubana, Bhe* and *Gumede*; and the Nigerian cases of *Muojekwu v Ejikeme*,[68] *Ukeje v Ukeje*[69] and *Anekwe v Nweke.*[70] The courts can help, but their achievements will always be limited by the case method in which they are obliged to wait until cases come before them. They cannot wade into the arena of conflict.

Furthermore, the courts operate in a legal culture that might not always be conducive to speedy reform. Customary law is often unwritten; decisions handed down in customary contexts contrast strongly with the common law, which is based on a series of previous written decisions with precedential value. The common law is structured around lawyer-governed adversarial proceedings in a case, whereas customary proceedings generally lack lawyers and often focus on reconciliation or social redress rather than on individual claims. For example, the court in *Shilubana* termed its work as 'recognizing the development by a traditional community of its own law', and if this is true, then a court within the legal culture could recognise, and enforce, living cultural practices. This approach, however, poses some danger because of the precedential value of decisions in the common-law legal domain. The danger is that in view of the *stare decisis* doctrine, such a finding may harden into a new official rule of customary law. But for the difference that the judges are local, this might not be different from what was happening in the colonial courts with the British.

The courts sometimes use assessors and experts on traditional law to help them ascertain the living-law customary norms. But the choice of experts and people knowledgeable to testify on customary law nevertheless limits the voices allowed to pronounce 'officially' what is custom and therefore what is law. Where culture has changed in a manner that dispossesses the traditional sources of some of their power, that is, where the cultural practice itself is contemporaneously being contested or modified, as it arguably was in *Shilubana*, those typically asked to speak for custom have their own motives for prescribing an advantageous rule than a rule that reflects the traditional culture. Where there is a contest within a culture as to a new norm, or the continuation of an old one, the legal culture's search for expertise often leads to the voice of vested interests in an intra-cultural dispute being heard, and therefore those on the opposite side being silenced.

Given the issues raised above, it would appear that the legislature is the appropriate agency to undertake the reform agenda. Unlike the courts, the legislature can undertake a comprehensive analysis of the whole area of law affected and devise a law that is neither customary nor common law but South African, Zambian or Lesotho law. The

67 Robert Seidman, 'Law and Stagnation in Africa' (1973) 5 Zambia LJ 39; Ndulo (n 11) 271.
68 2000 5 NWLR 402.
69 (2014) 11 NWLR (Pt 1418) 384
70 (2014) 11 NWLR (Pt 1412) 393.

legislature's actions can be informed by national debates on solutions to changes to the law that draw inspiration and ideas from a wider audience than the courts. If that process were to be followed properly, it would be likely to reflect the needs of the people and advance justice for all regardless of race, gender, social status or ethnicity.

This is not to say that the courts have no role to play in the reform of customary law. On the contrary, this article supports the role of the courts. However, it does point out that there are limits to the courts' approach and that large-scale reform can be properly implemented only by the legislative process.

One undeniable fact is that law is the pillar of society, and justice is what accords legitimacy and obligation to the law. In a country such as South Africa, this assertion can only be self-evident. If we consider that justice is the supreme value of law, then our goal through any form of law—whether customary or otherwise—should be to keep the refreshing waters of justice flowing continuously to all, irrespective of gender, race, ethnicity, colour, sex, religion and any parochial or primordial sentiments. In matters of inheritance and succession there is still an enormous gap between the laws and the *de facto* experience of women and girl children across Africa. This requires urgent action, because justice is the minimum duty we owe to every individual in society. To deny them justice is to announce to the world that they are worthless. The denial of justice was the basis of apartheid. Justice Sandile Ngcobo played a key role in rejuvenating the streams of justice in southern Africa through his erudite jurisprudential contributions. He was not only true to his oath of office—to do justice to all manner of persons—he brought an uncommon analytical, historical and sociological approach to decisions. The *corpus juris* of southern Africa will no doubt continue to draw from his eminent contributions in these respects for a long time. The legislature should now take up the gauntlet and further expand access to the dividends of justice to all citizens.

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