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HUMAN RIGHTS, CULTURAL DIVERSITY AND CUSTOMARY LAW IN SOUTH AFRICA

EVADNÉ GRANT*

INTRODUCTION

The principle that human rights are universally valid is at the core of the modern international human rights regime. This is made explicit in the preamble of the Universal Declaration of Human Rights (UDHR),¹ proclaimed as “a common standard of achievement for all peoples and all nations”. The Final Declaration of the World Conference of Human Rights, held in Vienna in 1993, affirmed the universality principle in unambiguous terms:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”²

Notwithstanding the resolute language of the UDHR and Vienna Declaration, the question whether international human rights norms are universal and have, or should have,³ universal application continues to divide opinion around the world.⁴ The issue is particularly contentious in many African countries where arguments based on resistance to “Westernization” and the need to protect cultural values are often raised in opposing universalism.⁵ This is exemplified by the exclusion of a range of cultural practices from the ambit of anti-discrimination provisions in the constitutions of a number of African states.⁶ Women’s rights, in particular women’s claim to equality, are one of the key areas of disagreement. Indeed, some theorists maintain that the argument that cultural practices should be exempt from human rights claims is most often raised in response to the

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¹ Universal Declaration of Human Rights, 1948, UN GA Res. 217A (III) 1948.

² Vienna Declaration and Programme of Action, United Nations General Assembly, UN Doc. A/CONF.157/23, 12 July, 1993, para. 5.

³ Lindholt makes the point that arguments about the universality or not of human rights often confuse the questions whether human rights ought to be universal and whether they are universal. The first is a normative question; the second an empirical one. See L. Lindholt, *Questioning the Universality of Human Rights: The African Charter on Human and Peoples’ Rights in Botswana, Malawi and Mozambique*, Aldershot, 1997, 23.

⁴ There is an extensive literature in which different positions are explored. See A. An-Na’im, “Problems of universal cultural legitimacy for human rights”, in A. An-Na’im and F. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives*, Washington, D.C., 1990, 331; R. Falk, “Cultural foundations for the international protection of human rights”, in A. An-Na’im (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, Philadelphia, 1992, 44; R.E. Howard, “Dignity community and human rights”, in A. An-Na’im (ed.) op. cit.; M. Freeman, *Human Rights*, Cambridge, 2003, ch. 6; K. Hastrup (ed.), *Legal Cultures and Human Rights*, The Hague, 2001; K. Mickelson, “How universal is the Universal Declaration?” (1998) 47 *University of New Brunswick Law Journal* 19; M. Goodhart, “Origins and universality in the human rights debates: cultural essentialism and the challenge of globalization”, (2003) 25 *H.R.Q.* 935.

⁵ For a discussion, see F. Banda, “Global standards: local values”, (2003) 17 *International Journal of Law, Policy and the Family* 1; B. Ibhawoh, “Cultural relativism and human rights: reconsidering the Africanist discourse”, (2001) 1 *Netherlands Quarterly of Human Rights* 43; B. Ibhawoh, “Cultural tradition and national human rights standards in conflict”, in Hastrup, above n. 4, 85; T. Nhlapo, “Cultural diversity, human rights and the family in contemporary Africa: lessons from the South African constitutional debate”, (1995) 9 *International Journal of Law and the Family* 208, 215; M.E. Adjami, “African courts, international law, and comparative case law: chimera or emerging human rights jurisprudence?” (2002) 24 *Michigan Journal of International Law* 103, 118.

⁶ See F. Banda, *Women, Law and Human Rights: An African Perspective*, Oxford, 2005, 34; C.I. Nyamu, “How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?” (2000) 41 *Harvard International Law Journal* 381, 401.

violation of women's rights, and that the argument of cultural relativism is used mainly as a defence to the infringement of women's rights.⁷

In South Africa, the universalist versus cultural relativist debate has, on the face of it, been rendered marginal by the 1996 Constitution which is based on a universalist conception of human rights. The Bill of Rights, enshrining a range of internationally-recognized rights, is described as "a cornerstone of democracy"⁸ and applies, without exception, to all law in South Africa.⁹ In addition, South Africa has shown its commitment to international human rights by ratifying a range of international and regional human rights instruments. These include the International Covenant on Civil and Political Rights, 1966 (ICCPR);¹⁰ the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW);¹¹ the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD);¹² and the UN Convention on the Rights of the Child, 1989 (CRC).¹³ It is also a party to the African (Banjul) Charter on Human and Peoples' Rights, 1981;¹⁴ the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003;¹⁵ and the African Charter on the Rights and Welfare of the Child, 1990.¹⁶

The apparent consensus regarding the application of international human rights norms in South Africa masks a rather more complicated reality. South Africa is a culturally diverse society. Moreover, it is a society in which the culture of the majority, including the legal culture, has, over a long period of time, been disparaged and subjected to a minority "Western" culture, first under colonialism and subsequently under apartheid. The difficulties inherent in the application of universal human rights norms in culturally diverse societies, such as South Africa, are recognized in the Vienna Declaration, which, even while affirming the ultimate goal of universal protection, makes clear that:

"While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."¹⁷

The joint cases of *Bhe v. Magistrate Khayelitsha*, *Shibi v. Sithole*, and *South African Human Rights Commission v. President of the Republic of South Africa*,¹⁸ on the rights of females to inherit and decided by the South African Constitutional Court in October 2004, brings the tension between universality and cultural diversity into sharp relief. On a superficial level, the decision appears to cement the universalist

⁷ See, e.g., H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester, 2000, 222; S.M. Okin, "Is multiculturalism bad for women?" (1997) 22 *Boston Review* 25; F. Raday, "Culture, religion, and gender", (2003) 1 *ICON* 663.

⁸ S. 7(1) of the Constitution of South Africa, 1996 (Act 108 of 1996).

⁹ S. 8(1) of the Constitution states: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".

¹⁰ International Covenant on Civil and Political Rights, 999 UNTS 171. Ratified by South Africa on 10 March, 1999.

¹¹ Convention on the Elimination of All Forms of Discrimination against Women, 1979, 1249 UNTS 13. Ratified by South Africa on 14 January, 1996.

¹² Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195. Ratified by South Africa on 9 January, 1999.

¹³ Convention on the Rights of the Child, 1989, 1577 UNTS 3. Ratified by South Africa on 16 July, 1995.

¹⁴ African Charter on Human and Peoples' Rights, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5. Ratified by South Africa on 9 July, 1996.

¹⁵ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003. Available at <www.africa-union.org>. Ratified by South Africa on 16 March, 2004.

¹⁶ OAU Doc. CAB/LEG/24.9/49 (1990). Ratified by South Africa on 7 January, 2000.

¹⁷ See above n. 2.

¹⁸ 2005 (1) B.C.L.R. 1 (CC).

position. In short, the court ruled, unanimously, that the principle of male primogeniture, applied in the customary law of succession applicable in South Africa,¹⁹ offended the right to equality protected under section 9 of the Constitution. The decision on this point came as no surprise to human rights lawyers in South Africa. Indeed, it had long been canvassed and was widely anticipated.²⁰ However, the case raises a number of important questions about the way in which universal human rights norms are to be applied in a culturally diverse society and the implications of universality for cultural diversity and difference.

The aim of this paper is to explore the relationship between culture and human rights in light of the decision in *Bhe*. It begins by discussing the right to culture in international human rights law and how this is translated in the South African Constitution, focusing in particular on customary law as an aspect of the right to culture and the relationship between the right to culture and the right to equality. The second part of the paper considers the decision in the case of *Bhe*. Particular attention is paid to the way in which the Constitutional Court dealt with the question of culture in the context of determining the content of customary law. The final part of the paper considers the range of options open to the Court in this case and critically assesses the outcome. On the basis of this assessment, it argues that the decision paid insufficient regard to the importance of culture and cultural diversity within the South African context.

THE RIGHT TO CULTURE

The right to culture is often used as shorthand for a range of sometimes ill-defined rights which are to be found scattered among a diversity of international instruments.²¹ The importance of “cultural rights” is recognized in the Universal Declaration of Human Rights. Article 22 of the UDHR provides that:

“Everyone, as a member of society ... is entitled to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

In addition, article 27 states that:

“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”

Specific protection for a range of rights associated with culture is provided for in a variety of international human rights instruments. For example, article 15 of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) protects the right “to take part in cultural life” along with rights to the benefits of scientific progress and the protection of the rights of artists and

¹⁹ While the terms ‘customary law’ and ‘indigenous law’ are often used interchangeably, the 1996 South African Constitution uses the term ‘customary law’. The South African Law Reform Commission (SALRC) has taken the view that the term customary law is to be preferred as it is the more widely used and best understood term, not only in South Africa, but throughout Africa. See SALRC, Project 90, *The Harmonization of the Common Law and the Indigenous Law: Report on Conflicts of Law* (September 1999) 1; SALRC, Project 90, *The Harmonization of the Common Law and the Indigenous Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders* (21 January, 2003) 4, available at <www.law.wits.ac.za/salc/salc.html> (accessed 30 August, 2005).

²⁰ See F. Kaganas and C. Murray, “The contest between culture and gender equality under South Africa’s Interim Constitution”, (1994) 21 *JLS* 409, 427–428; L. Mbatha, “Reforming the Customary Law of Succession”, (2002) 18 *South African Journal on Human Rights* 259.

²¹ See J. Symonides, “Cultural rights”, ch. 5 in J. Symonides (ed.), *Human Rights: Concept and Standards*, Aldershot, 2000, 175, 179; L.V. Prott, “Cultural rights as peoples’ rights in international law”, in J. Crawford (ed.), *The Rights of Peoples*, Oxford, 1988, 93, 96; Y.M. Donders, *Towards a Right to Cultural Identity?* Antwerp, 2002, 2.

inventors.²² Article 27 of the ICCPR applies the right to culture specifically to minorities, and states:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has debated the definition of culture on a number of occasions.²³ In the Final Report of the 1982 World Conference on Cultural Policies, delegates agreed on a wide interpretation of culture, which includes the full range of creative activity associated with the arts and sciences, together with sporting activity and “the distinctive and specific features and the ways of thinking and organizing their lives of every individual and every community”.²⁴ Bennett summarizes the international law approach to culture as including “a people’s entire store of knowledge and artifacts, especially the languages, systems of belief, and laws, that give social groups their unique characters”.²⁵

What is the relevance of international human rights law to the South African Constitution? It is generally accepted that the rights enshrined in a variety of international human rights instruments provided the model for the South African Bill of Rights.²⁶ Van der Vyver states that the provisions in the South African Constitution extending protection for cultural rights are intended to implement the international norm contained in article 27 of the ICCPR.²⁷ As already noted, South Africa has signalled its commitment to upholding international human rights law by its ratification of the most important international and regional human rights instruments. Moreover, section 232 of the South African Constitution provides that customary international law is automatically part of South African law, although in the case of conflict, the Constitution or an Act of Parliament takes precedence.²⁸ The Constitution also secures an influential role for international law in the interpretation of the rights in the Bill of Rights. Section 39(1) provides:

“When interpreting the Bill of Rights, a court, tribunal or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.”

The peremptory terms of the provision relating to international law provides a strong direction to courts and is clearly intended to ensure widespread exposure

²² See also art. 13 of CEDAW, which provides for the rights of women to participate in “recreational activities, sports and all aspects of cultural life”. Similar rights are provided for children in art. 31 of the CRC.

²³ See Symonides, above n. 21, 179.

²⁴ World Conference on Cultural Policies, Mexico City, 26 July–6 August, 1982, Final Report, Paris, UNESCO, available at <<http://unesdoc.unesco.org/images/0005/000525/052505eo.pdf>> (accessed 19 August, 2005).

²⁵ See T.W. Bennett, *Human Rights and African Customary Law under the South African Constitution*, Cape Town, 1995, 23. See also Prott, above n. 21, 94.

²⁶ R. Keightley, “Public international law and the final constitution”, (1996) 12 *South African Journal on Human Rights* 405, 415; J. Sarkin, “The effect of constitutional borrowings on the drafting of South Africa’s Bill of Rights and interpretation of human rights provisions”, (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 176.

²⁷ J.D. van der Vyver, “Cultural identity as a constitutional right in South Africa”, (2003) 1 *Stellenbosch Law Review* 51, 52. Bennett notes that art. 27 applies only to minorities, but argues that the right to self-determination and the doctrine of aboriginal right provide the international law background to the right to culture in South Africa. See T.W. Bennett, *Customary Law in South Africa*, Cape Town, 2004, 84.

²⁸ See Keightley, above n. 26, 406.

to and application of international law in the courts. The position of international law is strengthened by section 233 which gives constitutional effect to the interpretive presumption of compliance of national legislation with international law:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

The effect of this provision is to extend the requirement to use international law as an interpretative aid beyond the confines of the Bill of Rights as provided for in section 39, making it applicable to all legislation.²⁹ International law has, since the drafting of the Constitution, thus played a significant role in the development of human rights protection in South Africa, a role which is endorsed and encouraged by the Constitution itself.³⁰

Protection of cultural rights in the South African Constitution is clearly heavily influenced by international human rights law and reflects the broad conception of culture contemplated by the ICCPR. The Constitution, while explicitly describing South Africa as “one sovereign democratic state”³¹ and establishing “a common South African citizenship”³² also recognizes and protects the diversity of languages³³ and cultures³⁴ represented within that commonality. Sections 30 and 31 provide particularly for the protection of culture. Section 30 states: “Every person shall have the right to use the language and to participate in the cultural life of his or her choice. . .”. Section 31 reflects the formulation of article 27 of the ICCPR³⁵ and states:

“(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—(a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”

The aim of protecting and maintaining cultural diversity is given further impetus by section 185 of the Constitution which mandates the creation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.³⁶ The stated objects of the Commission are the promotion of “respect for the rights of cultural, religious and linguistic communities” and the promotion and development of “peace, friendship, humanity, tolerance and national unity” among such communities. The Commission is empowered, subject to national legislation, to carry out these tasks by various means, including education, monitoring and reporting.³⁷ Implementing legislation was passed in 2002³⁸ and the members of the Commission were appointed in September 2003.³⁹

²⁹ Ibid., 415.

³⁰ The case of *Bhe* is testimony to the diligence with which the Constitutional Court applies the interpretative obligation imposed by the Constitution. See above n. 18, paras. 51; 53; 55 and 209.

³¹ S. 1.

³² S. 3.

³³ S. 6. The right to be educated in the official language of choice is provided for in s. 29.

³⁴ S. 30, discussed below.

³⁵ The terms “minority” and “ethnic” in art. 27 have been omitted. See Bennett, above n. 27, 86.

³⁶ See also ss.181 and 186 of the Constitution.

³⁷ S. 185(3) provides for matters to be reported to the Human Rights Commission for investigation.

³⁸ Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002 (Act 19 of 2002).

³⁹ See <<http://www.info.gov.za/speeches/2003/03092509461003.htm>> (accessed 18 August, 2005).

Separate provision is made for the application of customary law in section 211(3), which states:⁴⁰

“The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”⁴¹

The question that arises is whether subsection (3) merely entails the recognition of customary law beside common law as part of the South African legal system, or whether it establishes a right to application of customary law. Bennett argues that the right to culture provided for in section 30 implies the right to recognition and application of customary law.⁴² In his view, the Constitution as a whole contemplates a broad meaning of culture, one which would encompass customary law as an integral part of the life of the community to which it applies. An interpretation of culture consistent with that applied in international law is, moreover, contemplated by section 39 of the Constitution, which, as noted above, requires international law to be considered in interpreting the Bill of Rights. In addition, Bennett argues that the state, as the primary duty-bearer in relation to section 30, has an obligation to ensure the continued existence of a cultural community and, to this end, to support cultural institutions which form an integral part of the culture.⁴³

However, the right to culture and implied right to the application of customary law is not unlimited. Both sections 30 and 31 specifically provide that the exercise of the right to culture is subject to the other provisions of the Bill of Rights. Thus, in full, section 30 provides that:

“Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”⁴⁴

Section 211 also specifically requires the application of customary law to be consistent with the Constitution.⁴⁵ Section 39 emphasizes this first by obliging courts to “promote the spirit, purport and objects of the Bill of Rights” in interpreting legislation and developing common and customary law, and, secondly, by providing that the Bill of Rights “does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation” but only “to the extent that they are consistent with the Bill”.

The subsection of the right to culture and customary law to the Constitution, and in particular to the Bill of Rights, was bitterly contested during the constitutional negotiations which preceded agreement on the 1993 Interim Constitution⁴⁶

⁴⁰ S. 211(1) also recognizes the “institution, status and role of traditional leadership, according to customary law . . . subject to the Constitution”. For a discussion of the position of traditional leaders under the 1996 Constitution, see M. Pieterse, “Traditional leaders win battle in undecided war”, (1999) 15 *South African Journal on Human Rights* 179, 185.

⁴¹ See also s. 15(3) which permits the recognition of “systems of personal and family law under any tradition”.

⁴² Bennett, above n. 27, 88.

⁴³ The argument is made more explicitly in Bennett, above n. 25, 23, in relation to s. 31 of the Interim Constitution, which is substantially the same as s. 30 of the 1996 Constitution in respect of the right to culture.

⁴⁴ The proviso added to s. 31 is: “The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights”.

⁴⁵ See also s. 39(3) which provides: “The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill”.

⁴⁶ See T. Nhlapo, “African family law under an undecided constitution: the challenge for law reform in South Africa”, in J. Eekelaar and T. Nhlapo (eds.), *The Changing Family: Family Forms and Family Law*, Oxford, 1998, 617, 618–622; Kaganas and Murray, above n. 20, 410–411; Bennett, above n. 25, 20. For a detailed account of the negotiations, see H. Corder, “Towards a South African Constitution”, (1994) 57 *M.L.R.* 491.

and again during the process of ratification of the 1996 Constitution.⁴⁷ The lobbying to exclude culture from the reach of the Bill of Rights was led by the Congress of Traditional Leaders of South Africa (CONTROLESA). This position was motivated, in part at least, by resistance to the imposition of what is seen by many as Western values as well as a desire to reassert the worth and importance of customary law and tradition.⁴⁸ As Nhlapo points out:

“Decades of political and cultural domination have left African peoples highly suspicious of the agenda of the proponents of modernization. The culture protection lobby are concerned that, without appropriate language in the constitution specifying the rights of people ‘to be themselves’, the international human rights movement with its individualistic influences will swamp them on its march towards re-creating the world in the image of the West.”⁴⁹

The stand taken by the traditional leaders, in particular their attempt to exempt customary law and traditional practices from the requirements of the right to equality enshrined in section 9 of the Constitution, was fiercely resisted during the negotiations by women’s groups.⁵⁰ The disadvantages suffered by women under customary law are well known. At the time of the constitutional negotiations, these included the lack of contractual capacity and standing in law of customary law wives, the fact that they passed from the guardianship of their fathers to that of their husbands, their disqualification from being able to own land, and their inability to inherit under customary law of succession.⁵¹ As Bronstein concludes, “it is manifest that customary law is ‘systematically discriminatory’”.⁵²

The reasons for the special place occupied by the right to equality in the South African Constitution are obvious. As LANGA, D.C.J., notes in *Bhe*:

“The rights to equality and dignity are of the most valuable of rights in an open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender.”⁵³

Not only is the principle of equality enshrined in a comprehensive guarantee of equality and non-discrimination on an extensive list of grounds in section 9 of the Constitution,⁵⁴ but it is also identified as one of the values on which South African democracy is based.⁵⁵ Indeed, section 1 of the Constitution lists not only “the achievement of equality” but also non-racialism and non-sexism as founding values of South African democracy. The relevance of the founding values is

⁴⁷ See the Certification Case, *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) S.A. 744 (CC); 1996 (10) B.C.L.R. 1253 (CC) para. 189ff.

⁴⁸ Kaganas and Murray argue that they were also motivated by the fear that their power within their communities, which was based on a tradition of patriarchy, would be eroded. See Kaganas and Murray, above n. 20, 410.

⁴⁹ Nhlapo, above n. 5, 215.

⁵⁰ *Ibid.*, 210.

⁵¹ V. Bronstein, “Reconceptualizing the customary law debate in South Africa”, (1998) *South African Journal on Human Rights* 388, 390; Bennett, above n. 25, 90–91, 126–128. Many of these disabilities have now been abolished by the Recognition of Customary Marriages Act 120 of 1998.

⁵² Bronstein, above n. 51, 392.

⁵³ *Bhe*, above n. 18, para. 71. See also MOSENEKE, J., in *Minister of Finance v. Van Heerden* 2004 (6) S.A. 121 (CC); 2004 (11) B.C.L.R. 1125 (CC) para. 22; O’REGAN, J., in *Brink v. Kitchhoff* NO 1996 (4) S.A. 197 (CC); 1996 (6) B.C.L.R. 752 (CC) para. 33.

⁵⁴ For a discussion of the equality jurisprudence, see J. Small and E. Grant, “Dignity, discrimination and context: new direction in South African and Canadian human rights law”, (2005) 6 *Human Rights Review* 25; E. Grant and J. Small, “Disadvantage and discrimination: the emerging jurisprudence of the South African Constitutional Court”, (2000) 51 *Northern Ireland Legal Quarterly* 174.

⁵⁵ S. 1 of the Constitution.

re-emphasized in section 7 of the Constitution which introduces the Bill of Rights as follows:

“The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

The founding values are given specific application in section 39 which instructs that interpretation of the Bill of Rights “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. Equality also appears in the limitation clause, section 36 of the Constitution, in terms of which limitation of the rights in the Bill of Rights is permitted only to the extent that the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.⁵⁶

In light of the overriding importance of equality in the Constitution itself and in the project of transformation envisaged by the Constitution,⁵⁷ some commentators have concluded that in the inevitable clash between culture and equality, equality must necessarily take priority.⁵⁸ The fact that the right to equality is not internally limited in the same way as sections 30 and 31 by the proviso that the rights provided for in those sections are to be exercised subject to the Bill of Rights, strengthens the argument that the right to equality trumps the right to culture.⁵⁹ Other commentators are less categorical. Bronstein cautions against a simple assumption that culture and equality are irreconcilable. She argues for the recognition that culture is constantly evolving and urges a case-by-case investigation of customary practices and principles to determine the extent to which custom and culture in its contemporary manifestation already complies with human rights norms and how it can be progressively transformed in order to satisfy the demands of equality.⁶⁰

The anticipated constitutional challenges to customary law have been, to some extent, limited by legislative reform, which has addressed some of the most salient instances in which customary law disadvantaged women.⁶¹ The South African Law Reform Commission (SALRC) has embarked on a series of studies of various aspects of customary law in order to identify those aspects which require adjustment in order to be constitutionally compliant.⁶² However, it has proved to be difficult to secure agreement on the reform of the customary law of succession. Legislative proposals have twice been rejected by Parliament.⁶³ A number of constitutional challenges to customary law have been considered by the High Court, but the case of *Bhe* is the first case in which the Constitutional

⁵⁶ S. 36(1).

⁵⁷ See NGCOBO, J., in *Bato Star Fishing v. Minister of Environmental Affairs and Tourism and Others* 2004 (7) B.C.L.R. 687 (CC) para. 73; *Minister of Finance v. Van Heerden*, above n. 53, para. 22–24. See also K. Klare, “Legal culture and transformative constitutionalism”, (1998) 14 *South African Journal on Human Rights* 146.

⁵⁸ See Kaganas and Murray, above n. 20, 417; Bennett, n. 25, 56–57.

⁵⁹ See L. Fishbayn, “Litigating the right to culture: family law in the new South Africa”, (1999) 13 *International Journal of Law, Policy and the Family* 147, 157.

⁶⁰ Bronstein, above n. 51, 410.

⁶¹ See the Recognition of Customary Marriages Act 120 of 1998. For a discussion, see M. Mamashela, “New families, new property, new laws: the practical effects of the recognition of Customary Marriages Act”, (2004) 20 *South African Journal on Human Rights* 616; V. Bronstein, “Confronting custom in the new South African state: an analysis of the recognition of Customary Marriages Act 120 of 1998”, (2000) 16 *South African Journal on Human Rights* 558.

⁶² See SALRC, *Report on Conflicts of Law*, above n. 19; SALRC, *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, above n. 19; SALRC, Project 90, *The Harmonization of the Common Law and the Indigenous Law: Discussion Paper 93 Customary Law: Succession* (August 2000), available at <www.law.wits.ac.za/salc/discussn/paper93sum.html> (accessed 30 August, 2005).

⁶³ See SALRC, *Discussion Paper 93 Customary Law: Succession*, op. cit., 5–6; Mbatha, above n. 20, 284.

Court has had to grapple with the difficult question of the compatibility of customary law and the right to equality.

THE CONSTITUTIONAL CHALLENGE TO CUSTOMARY LAW: THE CASES OF
BHE AND *SHIBI*

Prior to the decision in *Bhe*, a parallel system of intestate succession operated in South Africa, governed by two statutes—the Intestate Succession Act, 1987⁶⁴ and the Black Administration Act, 1927.⁶⁵ Section 23 of the Black Administration Act applied only to deceased intestate estates of Africans.⁶⁶ In turn, the Intestate Succession Act specifically excluded those estates from its application.⁶⁷ The system of intestate succession regulated by section 23 purported to give effect to the customary law of succession, or in the words of the statute, “black law and custom”. Regulations made in terms of section 23(10) provided a number of exceptions to the application of customary law, in particular excluding the estates of Africans who had been married according to South African civil law, and the estates of those Africans who had been granted an exemption.⁶⁸

The central principle of customary law of succession was that of male primogeniture. This principle determined that as a general rule only a male relative of the deceased qualified as intestate heir. In a monogamous family, the eldest son succeeded. In the absence of male descendants, the father of the deceased became heir. If the father did not survive, the nearest male descendant related to the deceased through the male line became heir.⁶⁹

The facts in the case of *Bhe* were as follows: Ms. Bhe and her partner had lived as husband and wife for 12 years prior to his death in October 2002.⁷⁰ During this time, they had two daughters. Ms. Bhe and one of their daughters lived with the deceased in an informal temporary shelter on property acquired by the deceased with the help of state housing subsidies. Ms. Bhe and the children were financially dependent on the deceased. In spite of this, Ms. Bhe contributed to the household income and the purchase of building materials for the house that they were in the process of building. At the time of the death of the deceased, the estate comprised the property, the informal shelter and building materials for the house. In accordance with section 23 of the Black Administration Act,⁷¹ the father of the deceased was appointed sole heir of the deceased estate on application of the principles of customary law. When the relationship between Ms. Bhe and the deceased’s father subsequently broke down, he made known his intention to sell the property to offset funeral expenses which he had incurred. The effect of this would have been to render Ms. Bhe and her children homeless. She, therefore, on behalf of her daughters, launched an application in the Cape High

⁶⁴ Intestate Succession Act, 1987 (Act 81 of 1987).

⁶⁵ Black Administration Act, 1927 (Act 38 of 1927).

⁶⁶ LANGA, D.C.J., notes (n. 2 of the judgment in *Bhe*) that although the Black Administration Act used the term “black” to describe a member of the indigenous race in South African, the term “African” is used in the judgment. This is not intended to confer legal validity on such usage. The same approach is taken in this paper.

⁶⁷ S. 1(4)(b).

⁶⁸ Regulations 2, 3 and 4 of the Regulations of the Administration and Distribution of the Estates of Deceased Blacks (*Government Gazette* 10601 of 6 February, 1987) reproduced at para. 36 of the judgment. The circumstances in which an exemption may be granted are specified in the regulations.

⁶⁹ At para. 77 of the judgment. Different arrangements applied to polygynous marriages. See Mbatha, above n. 20, 261; Bennett, above n. 27, 337–338.

⁷⁰ It was clear that no civil law marriage had been contracted, but the existence or not of a customary union was in dispute. The Constitutional Court proceeded on the basis that a valid customary union had come into existence (at para. 12 of the judgment).

⁷¹ And the relevant regulations which applied.

Court challenging the appointment of the deceased's father as heir to the intestate estate. The High Court ruled unconstitutional those parts of section 23 and the implementing regulations which gave effect to the application of the customary law of succession and awarded the estate to Ms. Bhe's two minor daughters.

In the case of *Shibi*, a similar challenge was brought by Ms. Shibi, whose brother had died intestate. He was unmarried, without children and was predeceased by both parents and grandparents. In terms of customary law, Ms. Shibi was precluded from being heir to the estate and a male cousin had been appointed as sole heir.

A third case was heard together with *Bhe* and *Shibi* on instruction of the Chief Justice. This was a public interest application brought by the South African Human Rights Commission and the Women's Legal Centre Trust. The South African Human Rights Commission is a state body established in terms of section 184⁷² of the Constitution. Among a range of functions in relation to the promotion and protection of human rights, it has the responsibility "to take steps to secure appropriate redress where human rights have been violated".⁷³ The Women's Legal Centre Trust is a non-governmental organization whose aim is the promotion and protection of the human rights of women in South Africa.⁷⁴ The relief claimed in this third case was wider than in the other two cases, the contention being that the whole of section 23 was unconstitutional as inconsistent with the right to equality, the right to human dignity and the rights of children, protected under sections 9, 10 and 28 of the Constitution respectively. It was argued that it was not merely those parts of section 23 which gave effect to the application of the male primogeniture rule in customary law that were discriminatory and unconstitutional, but that the very basis of determining the applicability of customary law and compelling its application to a particular racial group, was discriminatory and violated human dignity.

There were thus two issues for consideration by the Constitutional Court: the constitutionality of section 23 of the Black Administration Act and the constitutionality of the customary law rule of male primogeniture.⁷⁵ The Court was unanimous in its judgment on both questions. On the first question, the Court agreed with the submission of the Human Rights Commission, finding that the scheme provided for in terms of section 23 and its associated regulations, which determined the applicability of a legal system governing intestate succession simply on the basis of race,⁷⁶ was "manifestly discriminatory" and in breach of section 9(3) of the Constitution.⁷⁷ On the second question, the court had little difficulty in holding that the exclusion of women from inheritance on the grounds of gender was also in breach of section 9(3), as well as being in violation of the right to human dignity guaranteed under section 10 of the Constitution.⁷⁸

THE FUTURE OF CUSTOMARY LAW

The ruling that section 23 and the male primogeniture rule were unconstitutional did not end of the matter. Following a finding of unconstitutionality and a

⁷² Read together with s. 181.

⁷³ S. 184(2) of the Constitution.

⁷⁴ Para. 29 of the judgment.

⁷⁵ Para. 3.

⁷⁶ See para. 66.

⁷⁷ Para. 68. At the time of writing, the Repeal of Black Administration Act and Amendment of Certain Laws Bill was before Parliament. The Bill makes provision for the repeal of many of the provisions of the Act. See <http://www.parliament.gov.za/pls/portal/web_app.app_bills_view?p_id=616994&p_page_name=PARLIAMENTARY_BILLS> (accessed 23 November, 2005).

⁷⁸ Para. 91–92 per LANGA, A.C.J.; para. 210 per NGCOBO, J.

consequent declaration of invalidity, the Court was empowered under section 172 of the Constitution to “make any order that is just and equitable”. It was on the question of what an appropriate remedy might be in the circumstances of this case that the Constitutional Court split. The court took the view that it had a range of options. First, it could leave the matter to be dealt with further by the legislature.⁷⁹ Secondly, it could apply the Intestate Succession Act in place of customary law. Finally, it could develop customary law in accordance with section 39 of the Constitution. Section 39(2) provides:

“When interpreting any legislation, and when developing the common law or customary law, every court tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

The majority of the Court, per LANGA, D.C.J.,⁸⁰ expressed a preference for legislative change to remedy the incompatibility of customary law with the right to equality.⁸¹ However, in order to fill the gap created by its declaration of invalidity of section 23 of the Black Administration Act, the majority⁸² ruled that the Intestate Succession Act should apply as an interim measure to intestate deceased estates which would formerly have been dealt with under section 23.⁸³ In terms of the Intestate Succession Act, if the deceased is survived by both a spouse and descendants, they are apportioned shares of the deceased estate. In the absence of descendants, the surviving spouse inherits, and in the absence of a surviving spouse, the descendants inherit in equal portions. If the deceased leaves neither spouse nor descendants, the parents of the deceased, and thereafter the parents’ descendants and blood relations benefit.⁸⁴ However, the Court emphasized that this should be seen as a temporary measure, operative only until the passage of appropriate legislation.⁸⁵ In the view of the majority, the modification of customary law to bring it in line with the Constitution was a matter for the legislature.⁸⁶ While this provided the relief sought by the applicants in the case, the effect of the judgment was to suspend the operation of the customary law of succession, with no indication as to whether and when it would again be operational.

In a separate, dissenting judgment, NGCOBO, J., held that the application of the Intestate Succession Act was inappropriate and that instead customary law should be developed to bring it in line with the Constitution by removing the male primogeniture rule and permitting daughters to be appointed heirs.⁸⁷

Both judgments were at pains to explain the system of customary law which applied. As NGCOBO, J., noted in the minority judgment, commentators commonly distinguish between “official” customary law and “living” customary

⁷⁹ The court could either make a declaration of invalidity, leaving a gap that the legislature would have to fill, or it could suspend the declaration of invalidity pending legislative reform of the measure.

⁸⁰ CHASKALSON, C.J., MADALA, J., MOKGORO, J., MOSENEKE, J., O’REGAN, J., SACHS, J., SKWEYIYA, J., VAN DER WESTHUIZEN, J., and YACOOB, J., concurring.

⁸¹ A draft bill aimed at bringing the customary law of succession into harmony with the Constitution had been submitted to the government by the SALRC in June 1998. When this was introduced into Parliament as the Customary Law of Succession Amendment Bill, 1998, it elicited so much opposition that it was withdrawn and the matter was returned to the Law Reform Commission for further investigation. The Law Reform Commission has issued a further discussion paper together with a draft bill, but the matter had not, at the time of writing, been returned to Parliament. See SALRC, *Discussion Paper 93 Customary Law: Succession*, above n. 62, 1.

⁸² It expressed some hesitation, see paras. 118–119 and 125.

⁸³ With some modification to accommodate polygynous unions. See paras. 122–125; 136.

⁸⁴ Para. 117 of the judgment.

⁸⁵ Para. 116.

⁸⁶ Para. 115.

⁸⁷ Para. 222.

law.⁸⁸ “Official” customary law consists of the law as it is found in “official” sources, namely, statute, case law or government documents. This form of customary law is widely accepted to be a distortion of what is known as “living” customary law, which is the law as lived in the community.⁸⁹ To understand why this distinction is made, a brief detour into South African legal history is required.

The history of customary law in South Africa is well documented.⁹⁰ When Britain occupied the Cape in 1806, the Roman-Dutch law, which had applied under the previous Dutch administration, was retained. Theoretically, under the previous administration, the indigenous KoiSan⁹¹ communities had continued to apply their own legal systems in respect of their personal relations. In practice, integration into settler society (albeit usually in subordinate positions as servants), the application of Roman-Dutch law to legal interaction with the Dutch settlers, and the prevailing attitude that the indigenous systems were inferior, had in the course of the eighteenth century led to virtual obsolescence of those systems.⁹² While the Dutch had perpetuated an ambiguous policy towards indigenous law, neither abolishing nor specifically recognizing it, the British approach initially specifically excluded the application of indigenous law. One of the justifications for the policy of non-recognition of indigenous law was, ironically, based on the principle of equality: that nobody should be subjected to an inferior system.⁹³ However, the extension of the borders of the colony made it increasingly difficult for the British administration to rule directly and to impose Roman-Dutch law. This ultimately led to a reversal of the policy of non-recognition in the newly annexed territories of Transkei. This reversal was based on pragmatic considerations. Customary law was in effect co-opted in the service of colonial rule.⁹⁴ Moreover, the reversal was only partial, customary law being applicable only in the newly annexed territories and only to the extent that it was “compatible with the general principles of humanity observed throughout the civilized world”.⁹⁵

A policy of recognition and co-option of customary law was already in operation in Natal, which had been annexed in 1843.⁹⁶ The application of customary law there was subject to a similar requirement of compatibility with “general principles of humanity observed throughout the civilized world”,⁹⁷ as applied in Transkei (and indeed in other British colonies in Africa).⁹⁸ The inferior status of customary law was underlined by legislation in 1864 that permitted Africans who were considered sufficiently “detribalized” to apply for exemption from the

⁸⁸ A third form or category, namely “academic” customary law, is also identified. This is the law used for teaching purposes. In order to teach customary law, it is necessary to introduce students to “official” customary law, but many academics take a critical view of the law applied in the courts and by state officials. See J. de Koker, “African customary law in South Africa: a legacy of many pasts”, in Eekelaar and Nhlapo, above n. 46, 322.

⁸⁹ See Bennett, above n. 27, 7; Bronstein, above n. 51, 398; W. van der Meide, “Gender equality v rights to culture: debunking the perceived conflicts preventing the reform of the marital property regime of the ‘official’ version of customary law”, (1999) 116 *South African Law Journal* 100, 105.

⁹⁰ See, e.g., M. Chanock, *The Making of South African Legal Culture 1902–1936*, Cambridge, 2001; Bennett, above n. 27, ch. 2; H.R. Hahlo and E. Kahn (eds.), *South Africa: The Development of its Laws and Constitution*, Cape Town, 1960.

⁹¹ The use of this term is problematic, but is the most generally used. See K. Lehmann, “Aboriginal title, indigenous rights and the right to culture”, (2004) 20 *South African Journal on Human Rights* 86, 104.

⁹² De Koker, above n. 88, 324; SALRC, *Report on Conflicts of Law*, above n. 19, 6.

⁹³ Bennett, above n. 27, 35; SALRC, *Report on Conflicts of Law*, above n. 19.

⁹⁴ Chanock, above n. 90, 250–257; Bennett, above n. 27, 37–38; De Koker, above n. 88, 325.

⁹⁵ S. 23 of Procs. 110 and 112 of 1879.

⁹⁶ Bennett, above n. 27, 37–38.

⁹⁷ Ordinance 3 of 1849.

⁹⁸ See Banda, above n. 6, 16; SALRC, *Report on Conflicts of Law*, above n. 19, 7.

application of customary law.⁹⁹ The policy of co-option in Natal led to the first attempts at codifying customary law with the publication of the Code of Zulu Law in 1878, made legally binding in 1891.¹⁰⁰

In the former Boer Republics of the Transvaal and the Orange Free State, a policy of non-recognition of customary law was followed until 1885, when customary law was recognized as applying in civil disputes between Africans.¹⁰¹ As in the Cape and Natal, the application of customary law was subject to a requirement of compatibility with principles of "civilization".¹⁰² In the Transvaal, the government and courts refused to recognize the validity of customary marriage and *lobola* agreements on the grounds that these were uncivilized practices.¹⁰³

As the South African Law Reform Commission notes in its *Report on Conflicts of Law*, the "grudging recognition of customary law" by the colonial administrators "had little to do with the well-being of the African people". It was predicated on a view of customary law as inferior, only to be tolerated "in areas of marginal significance to the colonial regime" and only to the extent that it was useful as an instrument of colonial rule.¹⁰⁴

At the establishment of the Union of South Africa in 1910, there were thus divergent approaches to customary law in different parts of the country. These ranged from complete non-recognition in the Cape, limited application in the Transvaal and full recognition and application in Natal and the Transkeian territories. Moreover, as we have seen, the application of customary law was subject to a variety of proclamations and other legislation. The new Union government was keen to unite the country under common policies and laws and drive forward its doctrine of racial segregation. The government was spurred on by the perceived threat to white domination from a growing black urban population.¹⁰⁵ In 1913, the Natives' Land Act¹⁰⁶ provided for territorial segregation, separating white-owned urban land and farms from the tribal reserves. This was followed in 1927 by the Native Administration Act (later to be renamed the Black Administration Act),¹⁰⁷ which established a separate system of justice for Africans. Section 1 of the Act appointed the Governor-General as the "Supreme Chief" of all Africans in South Africa with the power to appoint traditional rulers who were effectively co-opted as administrators and provided with judicial powers to hear civil disputes between Africans, applying customary law.¹⁰⁸ In addition, a system of native commissioners' courts was established, exercising both concurrent jurisdiction with courts of traditional leaders, and hearing appeals from those courts. Appeals from the commissioners' courts were heard by native appeal courts.¹⁰⁹

While the Native Administration Act gave official recognition to customary law and established a dual legal system, this recognition was clearly not based on

⁹⁹ Law 11 of 1864. See Bennett, above n. 27, 38.

¹⁰⁰ SALRC, *Report on Conflicts of Law*, n. 19, 7; See Chanock, above n. 90, 245–250.

¹⁰¹ Law 4 of 1885. See Bennett, above n. 27, 39.

¹⁰² De Koker, above n. 88, 326.

¹⁰³ On the basis that customary marriage was potentially polygynous and *lobola* amounted to "bride-purchase". See SALRC, *Report on Conflicts of Law*, above n. 19, 9. See also Chanock, above n. 90, 270–272.

¹⁰⁴ SALRC, *Report on Conflicts of Law*, above n. 19. See also M. Pieterse, "It's a 'black thing': upholding culture and customary law in a society founded on non-racialism", (2001) 17 *South African Journal on Human Rights* 364, 368–369.

¹⁰⁵ Chanock, above n. 90, 31; Bennett, above n. 27, 41.

¹⁰⁶ Act 27 of 1913.

¹⁰⁷ Act 38 of 1927.

¹⁰⁸ S. 12 of the Act. See Pieterse, above n. 104, 370; Bennett, above n. 27, 41.

¹⁰⁹ SALRC, *Report on Conflicts of Law*, above n. 19, 10.

equality with the dominant Roman-Dutch system. The Act simply perpetuated and entrenched the colonial attitude that customary law was inferior. It applied only to “blacks”.¹¹⁰ It was not recognized as law outside of the traditional courts and commissioners’ courts.¹¹¹ Its application remained subject to the proviso of not being repugnant to the principles of public policy and natural justice, often referred to as the repugnancy clause.¹¹² And, as previously, Africans could apply to be exempted from customary law on the basis of being sufficiently “civilized”.¹¹³ Moreover, the Act was clearly intended and widely perceived to be a tool of segregation.¹¹⁴ Part of the aim was to channel the growing demands of the urban African population into a revival of African culture and tradition. By recognizing customary law and creating a system for its application, the intention was, as under colonial rule, to co-opt customary law in entrenching white domination. The effect was to relegate customary law to the margins of the system of justice. It was largely ignored by white South Africans as of little consequence, and shunned by many Africans, tainted by its role as an instrument of segregation and domination.¹¹⁵ This regime persisted until 1988 when the Law of Evidence Amendment Act¹¹⁶ abolished the racial basis for the application of customary law and extended the jurisdiction to apply customary law to all courts.¹¹⁷

The history of reluctant recognition, co-option, segregation and ongoing denigration shaped not only the role, but also the content of customary law. Seen through the lens of Roman-Dutch law, its underlying values and essential aims were distorted. In relation to the customary law of succession, for example, the concepts of family, property and succession as understood in customary law bears little resemblance to the Roman-Dutch and English law concepts of family, property and inheritance.¹¹⁸ As Nhlapo notes, in pre-colonial society the family system based on kinship and marriage served first and foremost the basic need of survival.¹¹⁹ Land and livestock were the most important property, not held by individuals, but as family property.¹²⁰ The primary purpose of the customary law of succession was to ensure the maintenance of the family unit by keeping family property in the family.¹²¹ Succession in customary law is thus described by Bennett:

“In customary law succession is intestate, universal and onerous. Upon the death of a family head his oldest son succeeds to the *status* of the deceased. Emphasis on the term ‘status’ implies that an heir inherits not only the deceased’s property but also his responsibilities, in particular his duty to support surviving family dependants.”¹²²

Recast in terms of the concepts familiar to Roman-Dutch law, however, succession became mere inheritance, the concept of family property was abandoned and any obligation of support was cast off. What is more, the fact that by its very nature customary law is different from Roman-Dutch or English common law is

¹¹⁰ S. 11(1). “Blacks” was defined in s. 35 of the Act.

¹¹¹ Bennett, above n. 27, 42.

¹¹² S. 11(1).

¹¹³ S. 31.

¹¹⁴ Pieterse, above n. 104, 371–373.

¹¹⁵ See Chanock, above n. 90, 244.

¹¹⁶ Act 45 of 1988.

¹¹⁷ See Bennett, above n. 27, 42.

¹¹⁸ See Bennett, above n. 27, 6; De Koker, above n. 88, 333; NGCOBO, J., in *Bhe*, above n. 18, paras. 169–171.

¹¹⁹ Nhlapo, above n. 5, 211.

¹²⁰ See Mbatha, above n. 20, 261–262; Mamashela, n. 61, 621.

¹²¹ *Bhe*, above n. 18, paras. 75–76 per LANGA, D.C.J.; paras. 167–175 per NGCOBO, J.

¹²² Bennett, above n. 25, 126. See also SALRC, *Discussion Paper 93 on Customary Law*, above n. 81, 1.

misunderstood. While Western systems are based on written sources the validity of which depends on formal legal tests, customary law was originally unwritten. Its validity remains a question of social practice, to be tested by social observation.¹²³ Customary law itself, and the culture in which it is based, is neither static nor uniform.¹²⁴ In *Alexkor Ltd v. Richtersveld Community*,¹²⁵ the Constitutional Court acknowledged the evolving nature of customary law. It is also widely accepted that cultural practices and norms vary not only over time, but also from place to place. Indeed, the applicable norms are often contested among members of the same community. As Nyamu argues:

“In legal disputes or political debates, stated cultural norms are not neutral descriptions of a community’s way of life, rather such articulations should be read as competing efforts to preserve certain social, economic and political arrangements. Articulations of cultural norms are expressions of power relations that are often limited to the dominant voices in a specific social interaction.”¹²⁶

Within the South African context, the dominant voices which shaped the “official” version of customary law in the colonial period were the colonial administrators and powerful African leaders, who, according to the tradition of the time, were all male.¹²⁷ Codification and the subjection of customary law to a system of precedent sounded the death knell of a negotiated and responsive form of justice, fixing the formerly fluid rules of “living” customary law into rigid legal forms, frozen in time.¹²⁸ The combined effect of colonial rule and the Native Administration Act on the customary law of succession was to reinforce and lock in women’s subordinate legal position, while simultaneously robbing them of the protection afforded by the pre-colonial law which emphasized the duty of support of the heir.¹²⁹

The arguments presented and largely accepted by the court in *Bhe* was that the version of customary law applied in the cases of *Bhe* and *Shibi* was a distortion of the law as practised. In particular, it was argued that the official version failed to acknowledge the importance of ensuring that dependents of the deceased were properly provided for, which was an integral part of African culture. Evidence was presented of changing practices in some communities, including instances where agreement was reached between family members that the widow of the deceased be permitted to administer family property.¹³⁰ Both the majority and minority judgments acknowledged that official customary law had ossified and that African society was changing and with it customary law practices. However, it is noteworthy that ultimately neither the majority nor the minority make use of living customary law which they are at such pains to acknowledge.

As noted above, the majority of the court, while expressing a preference for legislative intervention, ultimately resorted to the application of existing legislation rather than opting for the development of customary law as authorized under section 39(2) of the Constitution. The court was urged either to develop the male primogeniture rule in order to bring customary law into compliance with the Constitution, or to introduce the necessary Constitutional principles into

¹²³ SALRC, *Report on Conflicts of Law*, above n. 19, 99.

¹²⁴ Fishbayn, above n. 59, 149; Kaganas and Murray, above n. 20, 422.

¹²⁵ 2003 (12) B.C.L.R. 1301 (CC) paras. 52–53.

¹²⁶ Nyamu, above n. 6, 405.

¹²⁷ Discussed in Banda, above n. 6, 17–19; Kaganas and Murray, above n. 20, 423; De Koker, above n. 88, 334; J.E. Stewart, “Why I can’t teach customary law”, in Eekelaar and Nhlapo (eds.), above n. 46, 217, 226.

¹²⁸ Bennett, above n. 27, 5–7; Kaganas and Murray, above n. 20; De Koker, above n. 88, 335. See also SALRC, *Report on Conflicts of Law*, n. 19, 101.

¹²⁹ Mamashela, above n. 61, 622.

¹³⁰ See paras. 84–87 per LANGA, D.C.J.; paras. 190 and 217 per NGCOBO, J.

the customary law system to permit it to develop within the community, along the lines of existing exceptions.¹³¹ The reasons provided by the court for rejecting these suggestions were largely pragmatic. While explicitly accepting the idea of living customary law, the problem lay, according to the majority judgment, with the lack of evidence required to determine its content.¹³² The proposal that the court should sanction the evolution of customary law in accordance with constitutional principles was dismissed by the court as requiring a case-by-case development, which, in its view, was too slow and likely to result in different outcomes. There was a danger, according to the court, that in order to deal with the uncertainty generated by the lack of clarity over the content of living customary law, magistrates and courts may fall back on either official customary law or substitute common law.¹³³

In contrast, NGCOBO, J., in his minority judgment, emphasized both the obligation of the court to develop customary law and the importance of the development of customary law in order to ensure its continued viability. However, NGCOBO, J., did not find it necessary to rely on living customary law in this instance. The judge distinguished between two different circumstances in which the need to develop customary law may arise. First, development may be required in order to provide for the changing needs of the community. Secondly, development may be necessary in order to ensure its compliance with the Constitution, and in particular, the Bill of Rights.¹³⁴ The requirement to develop customary law in order to bring it into conformity with the Bill of Rights was, according to NGCOBO, J., a separate issue from the question of applying living customary law. Such development did not require the court to determine the content of living customary law and the lack of evidence regarding actual practice was, therefore, irrelevant.¹³⁵ In this case, the issue was purely one of compliance with the Bill of Rights. What the court was required to do, in the view of NGCOBO, J., was to effect such change as to bring the offending norm, the male primogeniture rule, in compliance with the right to equality, which could be done by permitting daughters to succeed to the deceased estate.¹³⁶

OPTIONS FOR CHANGE

As the judgment in *Bhe* shows, on one level, reconciling equality and culture is simply a matter of identifying those aspects of customary law which offend the constitutional guarantee of equality, and striking them down. This entailed, in the first instance, the invalidation of section 23 of the Black Administration Act which determined the applicability of customary law of succession solely on the basis of race.¹³⁷ Secondly, it required the striking down of the male primogeniture rule in customary law as incompatible with the right to gender equality under section 9 of the Constitution.¹³⁸ What to put in its place is a far more complicated matter. It is complicated not merely because of the practical problems which preoccupied the majority of the court in *Bhe*, but because of the potentially contradictory demands of equality and the maintenance of legal dualism.

¹³¹ See paras. 109–110.

¹³² Para. 109.

¹³³ Paras. 111–113.

¹³⁴ Paras. 216–218.

¹³⁵ Paras. 218–219.

¹³⁶ Paras. 220–222.

¹³⁷ Paras. 66–67.

¹³⁸ Paras. 91–92.

Three possible solutions to the problem underlie the three options proposed by the court in *Bhe*.¹³⁹ The first of these is to interpose common law in those areas of customary law incompatible with the Constitution. This is the temporary solution proposed by the majority in *Bhe*. It is also the permanent solution advocated by the SALRC in its Discussion Paper on the customary law of succession.¹⁴⁰ The Draft Bill for the Amendment of the Customary Law of Succession, which is attached to the Discussion Paper, proposes the amendment of the Intestate Succession Act to include the estates of customary law subjects. In spite of minor amendments which attempt to provide for the different cultural contexts of those previously dealt with in terms of customary law, the overall effect of this, as noted above in relation to the decision of the majority of the Court, would be to abolish the customary law of succession and replace it with common law.

Both the majority in *Bhe* and the SALRC put this forward as the most practical way of dealing with the incompatibility of the male primogeniture rule with the right to equality. It is certainly efficient, financially and in terms of time, to proceed on the basis of amendment of existing legislation. It ensures equality of treatment for people of all races by applying a uniform system of administration of estates. Moreover, it brings about an immediate improvement in the rights of African women. However, as Mbatha points out, while catering for the property rights of women, it is premised on a particular model of the family, namely the Western nuclear family and simply ignores the very existence of the extended family, which forms the basis of traditional African society.¹⁴¹ In any event, the history of the relationship between common law and customary law militates very strongly against this solution. Whatever its practical benefits, the symbolic implications of replacing the customary law of succession with the Intestate Succession Act, which by origin and design imposes the norms of Roman-Dutch common law, are deeply troubling.

The second solution, chosen by NGCOBO, J., in *Bhe*, is to develop customary law to ensure compatibility with the Constitution. This solution entails the maintenance of separate systems of customary and common law on the basis of equality. The South African Constitution clearly envisages legal dualism, providing specifically for the application of both customary law and common law.¹⁴² Of particular importance from the point of view of customary law, which had been systematically denigrated since the beginning of colonial rule, is that both systems enjoy equal status under the Constitution.¹⁴³ However, unlike many other African constitutions, both customary law and common law are subject to the rights protected in the Bill of Rights. Maintaining legal dualism is arguably the solution most in tune with the Constitution. In the view of NGCOBO, J.:

“this approach reflects recognition of the constitutional rights of those communities that live by and are governed by indigenous law. It is a recognition of our diversity, which is an important part of our constitutional democracy.”¹⁴⁴

However, given the historically dominant position of common law, there are a number of complex problems that must be addressed in order to render such a

¹³⁹ These are not the exact solutions proposed, but they are arguably inherent in the proposals. See also Pieterse, above n. 104, 393, who proposes four possible routes to change.

¹⁴⁰ SALRC, *Discussion Paper 93 Customary Law: Succession*, above n. 81.

¹⁴¹ Mbatha, above n. 20, 285; NGCOBO, J., in *Bhe*, above n. 18, para. 229.

¹⁴² Ss. 211(3) and 39(2).

¹⁴³ See *Bhe*, above n. 18, paras. 40–43.

¹⁴⁴ *Bhe*, above n. 18, para. 235.

solution workable. Whether development of customary law is to be undertaken by the courts or the legislature,¹⁴⁵ the attendant difficulties of this task are legion. The Constitutional Court accepted in *Bhe* that the official version of customary law is based on a view of customary law frozen in time and skewed by gender. The starting point for the development of customary law must therefore be living customary law rather than official customary law. But what is living customary law? Given the denigration of African culture in both the colonial period and subsequently under apartheid, it is entirely fallacious to imagine that living customary law has been able to develop without being tainted by this history.¹⁴⁶ Moreover, although many rural communities maintain at least some elements of the traditional African social structure, apartheid and industrialization have wrought irrevocable changes. And while many Africans would adhere to at least some aspects of traditional culture, it is no longer the case, if it ever was, that their identities are entirely bound up with that culture. It is widely recognized that cultural adherence in modern societies shifts and varies depending on the issue at stake.¹⁴⁷ The development of customary law is, therefore, a difficult and sensitive task, which requires both time and resources. It is little wonder that the Constitutional Court shied away from this undertaking in *Bhe*.

As noted above, unlike the common law, the validity of customary law is not dependent on formal written sources. The existence and content of customary law is to be proved on the basis of evidence of social practice.¹⁴⁸ Legislative development of customary law faces particular problems. Indeed, Bennett and Vermeulen have argued that since it is a system deriving from social practice, codification is incompatible with the very essence of customary law.¹⁴⁹ While legislative development of customary law appears attractive, both in order to update it and ensure compatibility with the Constitution, such an undertaking runs the risk of arresting further development. It also risks imposing homogeneous rules on communities that do not at present apply homogeneous rules. While legislation has the advantage of legal certainty and consistency, it risks the loss of diversity and difference and the alienation of communities that value their particular practices. Careful consideration will, therefore, have to be given to the question of whether this is appropriate and desirable, and if so, how this is to be done. Bennett suggests that restatement of the law may be preferable to legislation. Restatements do not have binding legal authority. They are inherently more flexible as additional evidence can be called for to ensure currency and accommodate local differences.¹⁵⁰

As noted above, the SALRC is engaged in a process of investigating various aspects of customary law with a view to law reform.¹⁵¹ In relation to the customary law of succession, the Commission has rejected an in-depth investigation of living customary law as too time consuming and expensive.¹⁵² It has instead opted for a practical approach, publishing a range of issue and discussion papers, and canvassing opinion with a view to, in the first instance, identifying areas of customary law which raise constitutional questions that can be addressed by legislative amendments.¹⁵³ This approach is explicitly aimed at dealing with the question of constitutional compatibility of customary law, and so is limited in

¹⁴⁵ See s. 211.

¹⁴⁶ See Nhlapo, above n. 46, 631.

¹⁴⁷ See Bennett, above n. 27, 79; Ibhawoh (2001), above n. 5, 88.

¹⁴⁸ SALRC, *Report on Conflicts of Law*, above n. 19, 99.

¹⁴⁹ T.W. Bennett and T. Vermeulen, "Codification of customary law", (1980) 24 *J.A.L.* 206, 219.

¹⁵⁰ Bennett, above n. 27, 47.

¹⁵¹ See n. 62.

¹⁵² See SALRC, *Discussion Paper 93 Customary Law: Succession*, above n. 81, 8.

¹⁵³ *Ibid.*, 9.

scope. The problems of cost and complexity in embarking on detailed codification or restatement of customary law raised by the Commission cannot easily be dismissed. In any event, even if it were possible to compile a complete restatement of customary law, this would almost immediately be contestable on the basis of having been superseded by new practices.¹⁵⁴

A different set of problems arises in relation to development of customary law by the courts. Given the nature of customary law, in principle, this requires the courts to investigate actual social practice. However, in terms of the Law of Evidence Amendment Act, 1988, it is not necessary for customary law to be proved in every case. Courts are permitted to take judicial notice of customary law, but only "in so far as such law can be ascertained readily and with sufficient certainty".¹⁵⁵ In addition, in terms of the Act, parties to litigation are permitted to adduce evidence of the content of customary rules.¹⁵⁶ Historically, the basis for taking judicial notice was often the codified sources.¹⁵⁷ Taking judicial notice of customary law on the basis of codified law is problematic for reasons already discussed. It is also problematic due to the lack of training and experience of members of the judiciary of customary law. Moreover, even where presiding officers are experienced in customary law, for example in traditional courts, that experience is not necessarily comprehensive and current.

In order to do full justice to living customary law, it is necessary to ensure proper training not only of judicial officers, but also of members of the legal profession more generally regarding the nature and requirements of customary law.¹⁵⁸ Secondly, the taking of judicial notice must be properly limited to situations where the law is clear. Where necessary, additional evidence must be called for. Historically, this was done by calling witnesses.¹⁵⁹ Witnesses could be called either by the parties themselves or by the court. Under the Black Administration Act, provision had been made for the calling of assessors to advise on customary law.¹⁶⁰ The SALRC has recommended legislative revival of this provision. In its view, this would solve the problem of litigants having to bear the costs of calling witnesses. It would also enable courts to make a ruling where the parties are not able to prove a rule of customary law.¹⁶¹ However, the appointment of assessors requires careful consideration. In the past, assessors were usually appointed from among traditional leaders. The danger of continuing this practice is that, once again, the interpretation of customary law would depend on the view of a particular section of the community, which in many cases would exclude women. The Law Reform Commission has, therefore, recommended that steps be taken to ensure that assessors are representative of a broad range of members of the community affected.¹⁶²

While case-by-case judicial development is preferable to codification to the extent that it can accommodate diversity and will preserve the essential quality of customary law as based on practice, the associated costs are high and the lack of certainty will remain a problem. Development of customary law appears poised between the Scylla of legislative ossification and the Charybdis of case-by-case development with all its attendant difficulties. The Law Reform Commission's proposals attempt to steer a middle course between these alternatives. The

¹⁵⁴ See SALRC, *Report on Conflicts of Law*, above n. 19, 104.

¹⁵⁵ Act 45 of 1988 s. 1(1).

¹⁵⁶ S. 1(2).

¹⁵⁷ Bennett, above n. 27, 45.

¹⁵⁸ See Pieterse, above n. 104, 397.

¹⁵⁹ See Bennett, above n. 27, 48; SALRC, *Report on Conflicts of Law*, above n. 19, 105.

¹⁶⁰ S. 19.

¹⁶¹ Proof on a balance of probabilities is required. See SALRC, *Report on Conflicts of Law*, above n. 19, 107.

¹⁶² *Ibid.*, 108.

submission is that proof of customary law should be sought by the courts in both written and oral sources. Oral sources would include expert opinions, witnesses and assessors.¹⁶³

In spite of the problems identified with official customary law, the high cost and other difficulties in relying on witness evidence alone to ascertain the content of customary law means that the Law Reform Commission's proposal warrants serious consideration. If implemented sensitively, taking full account of the problems with official customary law, together with a commitment to ensure that witness evidence is drawn from a broad range of opinion, it is perhaps the most practical way forward. The appointment of assessors could assist in smoothing the process of bringing the law up to date. At the same time, the restatement option cannot be dismissed. Although, as noted, any restatement will almost immediately be contestable, the combination of current restatement, which is subject to ongoing revision, and, where necessary, additional witness evidence would provide the courts with a workable solution to ascertaining the content of living customary law.¹⁶⁴

A further question arises as a necessary consequence of the application of two systems of law, namely on what basis is one or the other system to apply? The application of customary law on the basis of race was one of the grounds on which the challenge to the application of customary law succeeded in *Bhe*. This is another area in which the SALRC has made detailed proposals. The starting point is that choice of law depends on the will of the parties involved.¹⁶⁵ Where there is no clear evidence of choice, however, the Commission proposes that evidence of the parties' connection with common or customary law be sought, using a range of indicators, identified by the Commission as:

- (a) the nature, form and purpose of any transaction between the parties;
- (b) the place where the cause of action arose;
- (c) the parties' respective ways of life;
- (d) for purposes of deciding interests in land, the place where that land is situated.¹⁶⁶

Pieterse, however, argues that in taking account of the "ways of life" of the parties, it will be difficult for courts to avoid racial stereotypes. This may reinforce the view of adherents of customary law as "uneducated, unrefined and 'primitive'".¹⁶⁷ Similarly, Pieterse argues, the use of physical locations as indicators of adherence, runs the risk of stereotyping rural and urban communities as necessarily adhering or not to customary law. Instead, Pieterse argues that choice of law must be predicated on the protection of the rights of parties:

"In the absence of any agreement, it could be useful to ascertain which system of law would provide the stronger remedy in the circumstances of the case, and to apply that system unless it can be shown that to do so would have illogical or unjust consequences. Such an approach would not only address equality concerns relating to the position of black women under customary law, but would also allow 'urban' black people to rely on cultural remedies, where the circumstances of the case permit."

Ultimately, however, the question arises whether the maintenance of two culturally based systems of law can be reconciled with the ideal of equality which is

¹⁶³ Ibid., 111.

¹⁶⁴ See also A. Costa, "The myth of customary law", (1998) 14 *South African Journal on Human Rights* 525, 536.

¹⁶⁵ SALRC, *Report on Conflicts of Law*, above n. 19, s. 3 of the Draft Bill.

¹⁶⁶ Ibid., s. 4.

¹⁶⁷ Pieterse, above n. 104, 396.

fundamental to the South African Constitutional transformation. Pieterse suggests that in certain circumstances the maintenance of legal dualism may breach the right to equality, guaranteed under section 9 of the Constitution.¹⁶⁸ In the context of customary law, cultural differentiation and racial differentiation are one and the same thing,¹⁶⁹ and so the question arises whether the very existence of two systems, separated by race and culture, is inimical to the fundamental ideal of equality which underlies the Constitution.¹⁷⁰

A third possible solution lies in the unification of common and customary law. This would entail new legislation to create new law out of both the old systems. One major advantage of this approach would be that the law would apply equally to all, without any lingering taint of superiority or inferiority of either system, and so comply fully with the ideal of equality before the law. Costa's question whether "a plural system [can] be tolerated in a nation state, without undermining the state's authority or ghettoizing parts of its citizenry"¹⁷¹ goes to the heart of the issue. Costa doubts whether any other solution is compatible with the Constitutional vision of a "united and democratic South Africa".¹⁷² However, such an undertaking would require both enormous resources to investigate both common and customary law (especially customary law given its embeddedness in the communities it serves) and draft legislation to do justice to both systems and the right to culture. The drafters would require the wisdom of Solomon in reconciling differences between the two systems.¹⁷³ Moreover, any attempt at unification must proceed on the basis of equality of common and customary law, requiring drafters to consider the needs of a diverse community and to seek solutions that may entail changes to both systems.

It is arguable that it is too soon to attempt this. The wounds inflicted on African culture and customary law by apartheid and colonialism are still too raw. Customary law needs time to recover. Over time, as development is normalized and the system of customary law is strengthened, unification will be, and will be seen to be, less threatening. There is much to commend it as a future ideal. But for the moment, it is suggested that the maintenance of a plural system, developed on the basis of full equality, is the approach most likely to reconcile the competing demands of culture and equality.

CONCLUSION

The decision in the case of *Bhe* may have provided a satisfactory outcome for the parties to the disputes at issue, but the questions arising from the case go far beyond justice for the immediate parties. At the heart of the case lies the fundamental issue of how universal human rights norms can be realized in a complex multi-cultural modern society. This is a dilemma facing not only South Africa, but most societies in the modern world. Culture is important. It provides people with ways of being, ways of being different. In South Africa, history heightens that importance. The significance of equality of cultures, and in this context therefore, equality of common and customary law, cannot be underestimated.

The Constitution makes space for cultural diversity. Indeed, the retention of cultural diversity was part of the South African Constitutional settlement. At the

¹⁶⁸ *Ibid.*, 380. See J. Small and E. Grant, "Equality and non-discrimination in the South African Constitution", (2000) 4 *IJDL* 47, for a discussion of the application of the equality clause.

¹⁶⁹ Pieterse, above n. 104, 367.

¹⁷⁰ See also Costa, above n. 164, 532.

¹⁷¹ *Ibid.*, 538.

¹⁷² Preamble to the Constitution. See also s. 1 of the Constitution.

¹⁷³ Pieterse, above n. 104, 393.

same time, equality, dignity and democracy are key values underlying the Constitution. Equality applies not only to race and culture, however, but also to gender. Thus, the Constitution requires respect for culture to the extent that it can be reconciled with equality, dignity and democracy. The case of *Bhe* illustrates not only the difficulties of doing so, but also the possibilities. As argued above, the difficulties in ensuring that both the right to equality and the right to culture are promoted and protected are substantial, as is the potential cost of such an undertaking. But it is possible. What is required is first an acknowledgment of the importance of both culture and equality and their interrelationship. Secondly, there is a need for training and research. Thirdly, a commitment to sensitive and sustained legal development of both customary and common law to serve the purposes of the Constitution is necessary. And finally, in the long term, creative ways must be found of reconciling the practical needs of a modern legal system, the cultural heritage of the society it serves and the observance of internationally recognized human rights norms.