

The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience

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I INTRODUCTION

Although classification of the South African system as a separate member of what may be termed the family of mixed legal systems is new,¹ the legal system has long been recognized by South African writers as hybrid, likened by one, for example, to a “three-layer cake” consisting of Roman, Dutch and English law.²

It has only recently been suggested³ that cognizance should also be taken of the African indigenous component in the mix. In a valuable contribution to South African legal literature published in 1996 the editors acknowledge that indigenous law is part of South African law referring to it as the third of the “three graces” of South African law.⁴ Some two decades ago Professor Lawrence Baxter, then of the University of Natal, had already deviated from the erstwhile euro-centric approach. As he put it:

Although one still hears our legal system as described as ‘Roman-Dutch’ it is surely clear to all those who view the system as a whole that this label is an anachronism, remaining literally valid at the most formal level only, and then probably only with regard to private law. Our modern ‘Roman-Dutch’ law is really a blend of institutions, procedures, concepts, doctrines and rules inherited from Holland and England or developed locally, added to which is a *significant element of indigenous law*. (Emphasis added.)

Baxter was one of the first writers to suggest that indigenous African customary law was part of the South African ‘mix’.⁵

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¹ See Palmer (ed) *Mixed jurisdictions worldwide* (2001).

² See for example Hahlo and Kahn, *South Africa: the development of its laws and constitution* (1960) 41; Hahlo & Kahn, *The South African legal system and its background* (1973) 584; Hosten et al, *Introduction to South African law and legal theory* (1995) 1268. In this regard though obviously mixed, the system has been classified as falling within the civilian tradition: see Hosten, “The Permanence of Roman law concepts in South African law” [1969] CILSA 192, 197. Though the civilian heritage is undoubtedly strong particularly with regard to the private law sphere whether the system should presently be classified as mixed but fixed within the civilian mould in the same way as it has been in the past, is debatable: see van der Merwe “The Roman-Dutch law: from virtual reality to constitutional resource” [1996] TSAR 1.

³ See for example Church, “The convergence of the western legal system and the indigenous African legal system in South Africa with reference to legal development in the last five years” [1999] *Fundamina* 8, 10.

⁴ Zimmermann & Visser (eds) *Southern Cross Civil Law and Common Law in South Africa* (1996) 12.

⁵ With regard to the mix: Roman-Dutch/English/Indigenous law, South Africa may be regarded to form part of what has been termed a Southern African Association that includes countries like Lesotho, Botswana and Swaziland; see *Annah Lokudzingwa Mathenjwa v R* 170 (1976) SLR 25, 29 where Schreiner J coined the term.

However, particularly in the colonial and apartheid climate, although indigenous law was recognized it was so recognized only as a special and personal law that operated outside of but only as determined by the general law.⁶

Even in more recent times in terms of a policy that afforded greater recognition of the indigenous system when judicial notice of indigenous law was sanctioned by statute⁷ to be applied no longer only by special courts created for that purpose but by the ordinary courts of the land,⁸ its application was subject to a so-called “repugnancy clause”.⁹

It might perhaps be argued that recognition of indigenous law alongside the general law indicates legal dualism that recognizes cultural diversity. At least historically, this has not been dualism in the strict sense of the interaction of two legal systems (here a western and an African system) on the basis of equality. Rather the interaction between the two has been based on an assumption that the western system is the “dominant” system and the indigenous system, the “servient” system.¹⁰

With regard to the classical mix long accepted in the South African model, the mix is in the civilian and common law traditions and the notion of indigenous law as one of the “three graces” of South African law, has not accorded with reality. Although there was recognition of indigenous law in the administration of justice in the nineteenth and twentieth centuries, the system was recognised not as part of the South African “mix” but only as a system of “law and customs” that did not apply to the populace as a whole. Thus, the general works on legal history have not dealt with the history of indigenous law more particularly in pre-colonial times.¹¹ However, if the indigenous system is to be regarded as part of South African legal history this is where one should begin.

II THE KHOISAN

Until the middle of the last century, historical research into pre-colonial history and oral traditions in Africa was a much neglected field. Nonetheless, it has been established that the Bantu-speakers – who presently occupy the greatest part of sub-Saharan Africa and who migrated from North-East Nigeria and the Cameroon over a period of 2000 years –

⁶ This was the effect of decisions like those in *Ex parte Minister of Native Affairs: in re Yako v Beyi* (1948) 1 SA 388 (A) and *Umvovo v Umvovo I* (1953) 1 SA 195 (A) 201. See generally: Church, *Marriage and the woman in Bophuthatswana: an Historical and comparative study* LLD SA (1989); Olivier, “The judicial application of African customary law” in Sanders (ed) *The internal conflict of laws in South Africa* (1990) 41; van Niekerk “Indigenous law in South Africa: a historical and comparative perspective” in [1990] *Codicillus* 34; Bennett, *A sourcebook of African customary law for Southern Africa* (1991).

⁷ Section 1 of Act 45 (1988).

⁸ Formerly, application of indigenous law was regulated by s 11(1) of the Black Administration Act 38 (1927) that allowed for special commissioner’s courts to apply indigenous law in civil suits. In 1986 this section was repealed and re-enacted as s 54A(1) of the Magistrates’ Courts Act 32 (1944). Criminal matters were included. Subsequently this provision was also repealed and provision made for the recognition and application of indigenous law in terms of the Law of Evidence Amendment Act 45 (1988).

⁹ Section 1 of Act 45 (1988).

¹⁰ See Hooker, *Legal Pluralism: An Introduction to colonial and neo-colonial laws* (1975) 454; Van Niekerk “People’s courts and people’s justice in South Africa” [1994] *De Jure* 19.

¹¹ In more recent publications some authors have taken cognizance of this, however: see for example Fagan, “Roman-Dutch law in its South African historical context” in Zimmermann & Visser (eds), *supra* note 4, 33.

were not the original inhabitants of the Southern African region. The people generally regarded as the original people, at least in the South Western regions of Africa, were the San and the Khoisan encountered by the Dutch and subsequently by the British in the Cape.¹² Although research has established that indigenous law was indeed known in the pre-colonial period, when the British occupied the Cape in 1795 the Roman-Dutch law was maintained as the general law because it was deemed to be a “civilized” system and no account was taken of any other legal system.

While this may doubtless be attributed to an ethnocentric attitude, it may also be explained by the circumstances in the Cape at the time. The Khoisan people living there were few in number and widely dispersed. The Khoi had succumbed to Dutch rule and sold their lands and cattle. Some had drifted away and others were employed by Dutch farmers. The San had been hunted down or had moved into the interior. Without a living society to sustain it, there was no indigenous legal system to recognize. In 1828 Ordinance 50 of 1828 guaranteed equality for all within the Colony. It was aimed first at “improving the conditions of the Hottentots and other free persons of Colour” and ultimately at the abolition of slavery which was effected some five years later. However, at this stage there was still no recognition of an African legal system as such. This was to change towards the middle of the nineteenth century and later during the second British occupation when government policy was to be shaped by expediency and in a type of laissez-faire administration. The application of indigenous law was to be sanctioned in respect only of certain people and within certain territories.¹³

III EARLY COLONIAL LAW

For example, in terms of the treaty system initiated by Sir Benjamin D’Urban after the Frontier War in 1835 aimed at keeping peace in the territory between the Kei and Keiskamma rivers, provision was made for “domestic and internal regulations of their tribes and families” to be determined by indigenous people themselves “according to native law and custom”.¹⁴ Nevertheless, they were still regarded as British subjects and English law was to be applied by the Resident Government Agents who had been placed among them with regard to criminal matters such as murder, rape, arson and theft.¹⁵ Subsequently after the War of the Axe and during the governorship of Sir Harry Smith, the treaty policy was abandoned in 1847 with the Crown’s annexation of the territory as British Kaffraria. Administration was in the hands of a military officer who was appointed as chief commissioner and who was assisted by assistant commissioners acting as magistrates, advisors and arbitrators among the several tribes. The authority of the chiefs was recognized but their decisions were subject to review and could be reversed if found to be “incompatible with justice and humanity”. In 1850 war broke out again and on its termination in 1853 the territory was governed by martial law. Colonists were to be “restricted to well-defined limits” and the indigenous people,

¹² See generally van Niekerk, *The interaction of indigenous and western law in South Africa*, LLD thesis, Unisa (1995) ch 1; Bennett, *A sourcebook of African customary law for Southern Africa* (1991) 111.

¹³ See generally Church, “Historical Perspective” in Church, *supra* note 6, 112. For an historical account of colonial administration particularly with regard to the application of indigenous law see Bennett, *The application of African customary law in Southern Africa* 1985 and Brookes, *The history of native policy in South Africa* (1924).

¹⁴ See Cape Government Commission on Native Laws and Customs Report G4 (1883) 15.

¹⁵ *Ibid* at 16.

though recognized as British subjects in an imperial dependency, were for purposes of “interior discipline” subject to their authority of their chiefs “according to their existing laws”.

The “segregation” policy was to be replaced in the mid-fifties by the “assimilation” policy of Sir George Grey. White magistrates came to replace the Ciskeian chiefs. In 1865 British Kaffraria was incorporated in the Cape Colony and the population as a whole brought within the pale of Cape Colonial law. Theoretically except with regard to succession,¹⁶ indigenous law had no place in the administration of justice. Although it was being applied informally by magistrates in the adjudication of minor disputes,¹⁷ in 1887 the Cape Supreme Court determined that in the absence of legislation, the only legal system it could apply was the Roman-Dutch system.¹⁸ It was otherwise in the tracts further east, in the Transkeian territories and in the area south of the Molopo river that constituted British Bechuanaland.

There were few white inhabitants in British Bechuanaland. The operation of indigenous law that had been recognized under British rule continued after annexation of the territory to the Cape in 1895 while the autonomy of the chiefs to determine civil disputes was upheld.¹⁹ With regard to the Transkeian territories, annexed in three stages from 1877 to 1894, broadly speaking the recognition of indigenous law was effected by allowing for its application by means of a judicial discretion²⁰ as determined from case to case. From 1894 civil appeals from the Transkeian magistrates’ courts was allowed to the Native Territories Appeal Court.²¹ It is clear that the policy regarding communities in the Transkei (at present part of the Eastern Cape) was one of expediency. No doubt past experience of conflict demanded that the Cape Government should be wary about the unequivocal imposition of European law on indigenous peoples and a cautious approach was politically expedient.²²

In the colony of Natal and in the Transvaal and Orange Free State Republics official policy was also based on political expediency. The announcement by the Cape Governor Napier in 1943 that Natal would become a British colony led to an exodus of the voortrekker population and by the time the territory was annexed the population consisted of some 3 000 people of European descent and 100 000 indigenous people. Sir Theophilus Shepstone who came to Natal as a diplomatic agent to the tribes in 1846, advocated a policy of control through the chiefs and only ultimately by the Crown. His policy was supported by the indigenous people and also by the Lieutenant Governor

¹⁶ In terms of the Native Successions Act 18 of 1864 (C) and Ordinance 10 of 1964 (British Kaffraria) the application of the indigenous law relating to succession was sanctioned in certain circumstances.

¹⁷ The Cape Government Commission appointed in 1880 to enquire into “Native laws and customs” found this to be the case in the “divisions of King William’s Town and Queen’s Town more particularly”: supra note 14, 19.

¹⁸ *Tabata v Tabata* (1887) 5 Juta 328.

¹⁹ See British Bechuanaland Annexation Act 41 of 1895 (C) s 16; British Bechuanaland Proclamation 2 of 1885, Laws and Regulations ss 20 31 32 33.

²⁰ Act 38 of 1877 read with Procs 110 and 112 of 1879; Act 3 of 1885 read with Proc 140 of 1885; Act 35 of 1884; Act 37 of 1886 read with Proc 174 of 1886; Act 45 of 1887 read with Proc 201 of 1887; Act 5 of 1894 read with Proc 340 of 1894.

²¹ Ss 2, 3 of Act 26 of 94. At this time the Native Appeal Courts Reports commenced and cases involving indigenous law were reported as part of the general administration of justice.

²² This is clear from the Cape Government Commission, supra note 14, 28. The Commission concluded that indigenous law was “so interwoven with the social conditions and ordinary institutions of the native population, especially in the recently annexed Territories that any premature or violent attempt to break them down or sweep them away would be mischievous and dangerous in the highest degree...” and that it would therefore be “most inexpedient wholly to supersede the native system by the application of Colonial law in its entirety...”

West but not by Sir Henry Cloete, sent by the Cape Governor as a special commissioner to Natal, who advocated the abolition of tribal law and the application of common law in respect of all the inhabitants of the colony. In the event, Shepstone was to win the day and his administration was entrenched: tribes-people were exempted from the application of Roman-Dutch law and, subject to a repugnancy clause, indigenous law was to apply while the traditional authority of the chiefs was to vest ultimately in the governor as supreme chief.²³ This was the genesis of a policy that was to be followed in the post-Union administration with regard to indigenous law. Although indigenous law was officially recognized it was to become distorted inter alia by the application of the repugnancy clause, by means of memoranda to the chiefs instructing them to bring about certain changes and by the subsequent codifications of Zulu law that took place in Natal.²⁴

The policy in the Free State Republic was one of legal uniformity. There was no recognition of the indigenous system except for the small territory of Witzieshoek where the headman was authorized by the Volksraad to determine minor civil disputes according to indigenous law and in the Thaba 'Nchu Reserve where specific recognition was given to customary marriages. Other than these two reserves there were no areas of a concentrated indigenous population which would demand a considered policy.

The early attitude in the Transvaal was that the indigenous inhabitants like the rest of the population were subject to the "laws of land"²⁵ and within a framework that was ostensibly non-partisan, there was no recognition of indigenous law. A change of policy was to be effected in the enactment of Law 4 of 1885. This followed upon the British interregnum (1877-1881) during which period the administration of "Native Affairs" based on Shepstonian principles in the Natal mould, was introduced by Henrique, son of the redoubtable Theophilus. These principles were to be embodied in the 1885 law. The recognition of indigenous law was based on the premise posited in the preamble (freely translated) that "since the indigenous population had not yet reached a level of sophistication sufficient for civilized life" it was necessary in the interests of a better and a fairer administration that they should be subject to indigenous law. Civil disputes were to be determined in terms of indigenous law by appointed commissioners who also had jurisdiction with regard to minor common law crimes. The application of indigenous law was subject to a repugnancy clause. The principles that the application of indigenous law should be subject to a repugnancy clause and only in special tribunals were to be reflected in the Post-Union Administration Act in 1927.²⁶

Before the enactment of this statute the position regarding indigenous law was different in the various post-union South African territories. Dissatisfaction was expressed concerning the confusion that resulted from conflicting statutes and policy, and calls for reform were voiced.²⁷ However, civil disturbance and international strife precluded government action before the late twenties when the Native Administration

²³ In terms of Ordinance 3 of 1849.

²⁴ See Bennett, supra note 13, 44. The codification of Zulu law never formed part of Shepstone's policy. He supported the Transkeian idea that there were tribal differences and that indigenous law should be determined from case to case.

²⁵ In terms of the 1958 Instructions to Veldcornets and repealed in article 1 of Law 4 of 1985,

²⁶ Act 38 (1927).

²⁷ For example in *Roodt v Lake* (1906) SC 561, 564 the court referred to "the chaotic state of affairs" and in *Sekelini v Sekelini* (1904) SC 118, 124, reference was made to "the curious jumble" of legislative provisions. The matter was to receive the attention of various commissions of enquiry; see the Report Native Affairs Commission (Cape) G 26 (1910); Report Select Committee on Native Custom and Marriage Laws (SA) SC 6 (1913).

Bill was introduced.²⁸ The subsequent enactment determined that indigenous law would be applied throughout the then Union (and subsequent Republic) of South Africa but then only as a personal law and subject to a repugnancy clause and only in special courts.²⁹ This has been the position until recent times.

Regarding indigenous law and its application the dispensation created by the Administration Act of 1927 remained virtually the same until recent times. Change was effected by amendment to the law of evidence to determine that the application of indigenous law was no longer the province of special tribunals but also that of the ordinary courts. However, its application still remained subject to a repugnancy clause.³⁰ Nonetheless, it may be argued that indigenous law (though distorted) was part of the South African mix; its application sanctioned by legislation. A special statute presently recognizes and regulates customary marriages and a measure of harmonization has taken place.³¹

Before continuing the story in the light of the new constitutional dispensation a brief reference to the characteristics of the system would not be out of place.

IV FEATURES OF THE INDIGENOUS SYSTEM

The fact that during the various colonial and post-colonial periods there was a distortion of indigenous law is widely recognized as is the fact that the traditional way of life is changing. Nonetheless it is clear that there are what may be termed common legal fundamentals across the various indigenous cultures and groupings in South Africa and there is a unity of spirit and approach albeit difference in detail.

Some of the distinctive features that link the various indigenous systems are the communal character of the law and the importance of the group, illustrated, for example, in the judicial process which is oriented towards preservation of group interests and of peace within the group and the fact that the law is mainly unwritten and the lack of abstraction. Two of the most significant features are that duties as well as rights are stressed and that both are shared.³² It is argued that one of the most significant criteria for classifying the system is its “non-specialization.”³³ And that it is this together with communalism that characterizes the system.

²⁸ Regarded as a “non-political” bill the measure enjoyed a relatively easy passage in Parliament. General Smuts, the then member for Standerton, questioned the desirability of “differentiation” whereby there would be two legal systems and a parallel system of courts which he considered would produce “the greatest confusion in determining whether the Roman-Dutch or the indigenous system should apply in a particular case. While he agreed with the then Prime Minister Hertzog that to uphold the power of the chiefs would be expedient, he favoured the “assimilationist” policy of the Cape: see Church, *supra* note 6, 131.

²⁹ This is essentially what was determined in s 11 of Act 38 of 1927. The Act was criticized by Simons, *African Women: Their legal status in South Africa* (1968) 55, perhaps paradoxically, as “a segregation measure” which nonetheless “created a climate favorable” to indigenous law. The policy of differentiation was also evidenced in the subsequent Act 9 (1929) that provided for the dissolution of the civil marriages of black persons by a specially constituted Divorce Court.

³⁰ In terms of the Amendment to the Law of Evidence Act 45 of 1988.

³¹ Act 120 (1998). See further Church, *supra* note 3, 8 and van Niekerk “The convergence of legal systems in Southern Africa” [2002] CILSA 308.

³² See for example the African Charter. The concept of *ubuntu* “I am because you are” is a concept central to the system.

³³ See Myburgh, “Perspectives of South African Bantu law” [1965] *Codicillus* 6.

Although indigenous law has been distorted by western influences and many facets of the traditional way of life are fast disappearing I would like to mention some of the principles of the indigenous law as it has applied and to some extent still does apply in the South African context with regard to family matters and land tenure.

In the sphere of what may be termed family relationships, for example, though an individual would incur liability for wrongful conduct, the liability would be shared by the group and action would be taken against it. Succession is to a position rather than to property and the family head would administer the property that is owned by the group. The family groups are also intimately involved in the marriage of group members and the giving of marriage goods (*lobola/ikhazi/bogadi*) by the group of the prospective husband to that of the bride is an essential incident of marriage.

While the interests of the individual are subsumed in those of the group, there are control measures which may be taken against arbitrary action by the head of a group. Nonetheless in the typically patriarchal African society group interests are framed in favour of men. As will be explained, this may bring features of indigenous law, especially as these relate to women, in conflict with the equality provisions embodied in the Constitution³⁴ with resultant litigation.

V MULTI-CULTURALISM AND THE CONSTITUTION

The year 1994 saw a new constitutional dispensation in South Africa in terms of first the interim³⁵ and then the final constitution.³⁶ While the rights to culture (including religion and language) are clearly recognized,³⁷ the matter of interpretation and enforcement of these rights is often problematical.³⁸ Obviously there is conflict and tensions between the constitutionalisation of the “new nation” ideal³⁹ within the context of a western individual human rights ideology and the different traditions and cultures that are part of South African society.

As one writer has explained,⁴⁰ those following a liberal approach in a diverse society, would argue for a constitution to be neutral. Such “neutrality” or “benign neglect” or “disinterested tolerance” would neither favor nor discriminate against any ideology, religion or group in the community. In a heterogeneous society neutrality is

³⁴ Act 108 (1996) s 9(3). See Bennett, “The equality clause and customary law” [1994] SAJHR 122.

³⁵ Act 200 (1993).

³⁶ Act 108 (1996).

³⁷ Section 15 read together with ss 30 31 181(1)(c) and 185. While the former sections provide for the entrenchment of religious, cultural and language rights, ss 181(c) and 185 make provision for the establishment and functions of a commission for the promotion and protection of these rights.

³⁸ It is not clear, for example, whether in terms of s 8, the Bill of Rights applies to religious practices currently unrecognized as “law” and which on the face of it discriminate against women. As one writer has pointed out there are problems posed between the apparent conflict between the equality provision in the constitution as well as its underlying constitutional values and the position with regard to religious and cultural values. This is exacerbated by the fact that such values might be regarded by the particular community as sacrosanct. An in-depth analysis of the problems will be necessary in the near future. See Rautenbach and Goolam “Constitutional analysis” in Rautenbach & Goolam (eds) *Introduction to Legal Pluralism in South Africa Part II* (2002) 113.

³⁹ As embodied in the preamble to the Constitution; in this regard see the excellent article by Sacks “Multiculturalism, constitutionalism and the South African Constitution” [1997] PL 673.

⁴⁰ *Ibid* at 675-676.

called for in order to reassure the different groups that they will not be disadvantaged. Moreover, neutrality would mean the state could not assume that any group is infallible and would have to respect all views equally. This would give stability to a constitution and promote effective government.

On the other hand, there are those who argue that this approach has not assisted the disadvantaged and that it has contributed to a colonial view of many cultures and that in the guise of neutrality majority preferences are imposed. They argue that some groups would *de facto* be disempowered unless given special treatment. Thus it may be that there are special circumstances when the collective goal is paramount and between the uniform application and individual human rights and cultural survival one might opt for the collective goal at times.⁴¹ There is also a valid argument for maintaining the rights of an individual or smaller group can harm the larger collective economically.⁴²

Against the historical background where African culture was recognized only insofar as it was subordinate to the western cultures, it is understandable in a new dispensation that the rights to language,⁴³ religion, and culture be given special protection in the Constitution both in the Bill of Rights and in other provisions which determine mechanisms for the promotion and protection of “cultural, religious and linguistic communities”. Thus as well as the proscription against state discrimination on the grounds of language, belief or culture,⁴⁴ the Bill of Rights determines that “everyone has the right to use the language and to participate in the cultural life of their choice” but may not exercise the right “in a manner inconsistent with any provision of the Bill of Rights”.⁴⁵ So too persons may join and maintain cultural, religious and linguistic communities subject to the proviso mentioned.⁴⁶ Furthermore, as with all the rights in the Bill of Rights they are subject to limitation.⁴⁷

⁴¹ This accords with the so-called philosophy of communitarianism that in the view of some writers includes a strong challenge to liberalism and focuses on the community rather than the individual. Church, *supra* note 3, 8 suggests that in developing an African jurisprudence, guidelines and useful comparisons may be drawn from the philosophies of what may be broadly termed post-modernism and which include aspects of deconstruction, feminism and communitarianism.

⁴² This for example, was one of the interesting arguments in a recently published article on the dilemmas of land reform, Barry, “Now another thing must happen: *Richtersveld* and the dilemmas of land reform in post-apartheid South Africa” [2004] SAJHR 355. By recognising the rights to the land of the Richtersvelders (a relatively small group) as against those of the state meant that the land’s economic resources could be utilised by that group only and not by the state in the interests of the larger poor in South Africa.

⁴³ As well as being included in the “equality” clause, s 9(3) of Act 108 (1996), language provisions form part of the founding provisions of the Constitution and underscore the need for respect for and equal recognition of indigenous languages suppressed in the past. Thus s 6(2) determines: “Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages”. Section 6(1) provides for 11 official languages: Sapedi, Sesotho, Setswana, SiSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele and isiZulu. Of these English is the only non-indigenous language. According to the 1991 census 98% of the people in South Africa speak one of these languages: some 16 million speak one or other of the Nguni languages; 10 million speak one of the Sotho languages. Of the 15 million remaining 6 million speak Afrikaans, 3.5 speak English and the rest speak different African and other languages. In a real sense then all languages in South Africa are minority languages. It may, however, be argued that English as an international language should be the language of record; see Sacks, *supra* note 9, 681.

⁴⁴ Act 108 (1996) s 9(3).

⁴⁵ Section 30.

⁴⁶ Section 31. The international “parent” of these provisions is Art 27 ICCPR.

⁴⁷ In terms of s 36.

Of the various areas of possible conflict regarding the protection of individual rights as opposed to rights to cultural diversity, those concerning women have raised concern more particularly in respect of polygyny and the status of married women in a patriarchal community.⁴⁸

There is no clear, simple ranking of rights whereby conflict between the rights to culture and the equality rights may be resolved. There are those who would argue that equality must prevail while others maintain that the ranking of rights must focus on the “one nation of equal citizens” ideal, and that cultural rights can only be permitted as long as they do not violate the rights of other individuals nor transgress the boundary of the equality norms. There are also other arguments that rights to culture should at times be preferred and a less uncompromising solution sought. They should not always be regarded as second order rights.⁴⁹

It is argued that there are practical and theoretical reasons for some accommodation to be achieved.⁵⁰ On the practical level the possible dislocation of custom and a way of life of a large portion of the population may be seen as a repetition of past colonial arrogance in which there was the notion of a delinquent culture to be “sorted out by a more advanced and superior one.”⁵¹ On the theoretical level the argument goes that one of the values that courts are required to address in terms of section 39, the constitutional interpretation provision, is that of community. One would need to ask what is required for a multi-cultural society “striving for unity but respecting difference”; democracy would demand protection of the “disadvantaged and less articulate.”

A practical issue in the case of *Moseneke*⁵⁴ was that striking down a provision under a proclamation issued in terms of Act 38 of 1927 as being discriminatory meant that magistrates were no longer competent to deal with intestate estates of black people as they did formerly and that this would cause hardship. In the event, the court determined that the order for invalidity be suspended for two years to allow for the administrative problems to be resolved. In the *Bhe* decision the court was to go further.

The conflict might even be more apparent than real. As already mentioned when dealing with cultural diversity, any decision either for legislative or judicial reform should be preceded by in-depth investigation. It may well be that the particular custom or institution is not understood or that there are what has been called underlying juristic postulates that are compatible. The institution of *uku lobola* (an essential incident in the customary marriage) and the concept of *ubuntu* may be cited as examples. For many years the *ilobolo* was regarded as a price paid for a wife and that thus she was “sold”. This has long been disproved. However, the institution – though probably corrupted in a modern commercial setting – could be developed to provide financial security for women and children.⁵² The African concept of *ubuntu* has been interpreted by the Constitutional court as analogous to the western concept of human dignity.

⁴⁸ See for example the discussions in Church, “Constitutional equality and the position of women in a multi-cultural society” [1995] CILSA 290, Sacks, *supra* note 36, Kaganas and Murray, “The contrast between culture and gender equality under South Africa’s Interim Constitution” [1994] Jnl Law & Soc 409.

⁴⁹ Sacks, *supra* note 36, 668.

⁵⁰ *Ibid.*

⁵¹ *Moseneke v Master of the High Court* 2001 2 BCLR 103 (CC).

⁵² See Church, *supra* note 48, 300.

VI THE CASES

The role that indigenous law is playing in a society in transformation may be illustrated by reference to recent cases. Here I will refer to some earlier cases as well as the most recent decisions of the constitutional court in *Bhe and others v Magistrate, Khaylitsha and Others*; *Shibi v Sithole and others*; *SA Human Rights Commission and another v President of the RSA and Another*⁵³ with regard to succession and *Alexor Ltd v another v Richtersveld Community and Others*⁵⁴ regarding land tenure.

The first case to be considered is the 1993 decision in *Kewana v Santam Insurance* decided in the then Transkei Appellate division.⁵⁵ Briefly the facts were as follows: an unmarried woman N had, following indigenous law procedures, adopted her deceased cousin's child, Andile, as her son. After N was killed in a bus accident, Andile (duly assisted) claimed against the third party insurer for loss of support. There were two questions before the Court. The first was whether in indigenous law an unmarried woman was competent to adopt the child of another. If so, the second was whether there was in terms of the adoption a legally enforceable right to support that would be recognized under the Transkei Compulsory Motor Vehicle Insurance Act. The court answered both questions in the affirmative. Clearly, here was a case of the convergence of the two systems.

Two interesting features of the judgment may be highlighted. Although there was conflicting evidence as to whether or not such an adoption was possible in terms of indigenous law, the court relied on the evidence of an expert in Xhosa law, Prof Mqeke of the University of Transkei, that indigenous law as developed in the last few decades allowed this. Secondly, the court recognized that there was a general familial right to support members within the same agnatic group at indigenous law and was prepared to equate this to the adoptive parent/child relationship of western law. The equation of western and indigenous institutions is interestingly explained by Professor Gardiol van Niekerk in her thesis.⁵⁶ With regard to the question of support she explains that in the indigenous law the support of family members is grounded in the underlying jural postulate that the extended family should be continued by its members. The family idea dictates that members support each other physically and emotionally. Thus while the decision is not in line with the ("official" or otherwise) rule of indigenous law it is in line with the underlying postulate.

The second instructive and by now famous decision to which I refer is that of the constitutional court in *Makwanyane*⁵⁷ in which the court struck down the death penalty as unconstitutional. The judgment is well known and much has been written about it. The court's approach is worth highlighting. In the interpretation of the provisions of the bill of rights embodied in the constitution,⁵⁸ courts are enjoined to promote "the values that under lie an open and democratic society based on human dignity equality and

⁵³ [2005] 1 BCLR 1 (CC).

⁵⁴ [2003] 12 BCLR 1301 (CC).

⁵⁵ [1993] 4 SA 771 (TkA) A similar case decided some two years later was that of *Thibela v Minister van Wet en Orde 1995 3 SA 147 T*. There the issue was the relationship between a husband in a customary marriage and the wife's child born of a previous relationship. Where the man died as a result of police brutality, the court held that the child had an action for loss of support.

⁵⁶ Van Niekerk, supra note 12

⁵⁷ *S v Makwanyane* [1995] 3 SA 391 (CC).

⁵⁸ Constitution of the Republic of South Africa Act 108 (1996) ch 2.

freedom”.⁵⁹ In this case the court related the protection of “human dignity” to the African concept of *ubuntu*. In the words of Justice Mahomed, later to become Chief Justice, the Constitution heralded a commitment to the ethos of egalitarianism, opening a new chapter in the history of the country and articulating the need for a culture of *ubuntu*. The theme was echoed in the judgments of the other judges and the words of Justice Mokgoro in this regard bear repeating. She said⁶⁰

It is a culture which places... emphasis on commonality and on the interdependence of the members of the community. It recognizes a person’s status as a human being, entitled to unconditional respect, dignity and acceptance from... the communityIt also entails the converse... The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

The notion of developing the indigenous law within the context of an African value system and jurisprudence is to be welcomed and will be referred to later.

In *Mthembu v Letsela and Another*,⁶¹ on the death of a man who died intestate, the estate was to devolve in terms of the provisions of the Administration Act, in accordance with the indigenous rule of male primogeniture to the exclusion of the woman with whom he had lived and their child. The mother asserted that they had been married according to customary law and now claimed the estate on behalf of their daughter. The father of the deceased denied the customary marriage and claimed the estate based on the indigenous laws of succession. In the three-stage adjudication of the case the court recognized that the rules of primogeniture were on the face of it, discriminatory but had to be measured against the entrenched right to culture which in the SCA hearing won the day. Any development of the indigenous law rules was to be left to the legislature. The claimant did not succeed. While it may be argued that here indigenous law was recognized, there was no attempt to consider the fact that indigenous is intrinsically living law capable of dynamic development.

The most recent decision on succession at indigenous law was that of *Bhe and others v Magistrate, Khaylitsha and Others; Shibi v Sithole and others; SA Human Rights Commission and another v President of the RSA and Another (Bhe)*. Here the Constitutional Court dealt simultaneously with two separate applications for the confirmation of orders of constitutional invalidity made by the Cape High Court and the Pretoria High Court, both of which had found the sections of the Administration Act and regulations as promoting the notion of male primogeniture in terms of indigenous law to be unconstitutional on the grounds of discriminating against widows and children.

The court referred to the *Richtersveld* case and agreed with that court’s dictum that “while in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law”. Having recognized this, is a pity, however, that the court in its majority judgment engaged in constitutionalism rather than determining whether or not there was a possibility of developing the indigenous law in order to “promote the spirit, purport and objects of the Bill of Rights” in accordance with the injunction in section 39 of the Constitution.

⁵⁹ Section 39(1).

⁶⁰ Report, 481.

⁶¹ [1997] 2 SA 675 T.

A different approach was followed in the minority judgment of Justice Ncobo. Here the approach was first to determine whether or not in terms of the living law as seen from an indigenous perspective could withstand constitutional scrutiny. As has been shown this was what was done in the *Kewana* and the *Makwanyane* cases.

VII CONCLUSION: *RICHTERSVELD*

The last case which I wish to consider concerns land tenure in which the doctrine of aboriginal title was considered for the first time in South Africa. The action was brought by the Richtersveld Community under the Restitution of Land Act⁶² and in order to succeed the community had to prove that they had been dispossessed of land after June 1913⁶³ as a result of racially discriminatory laws. The matter was heard by three tribunals: the Land Claims Court (LCC); the Supreme Court of Appeal (SCA) and the Constitutional Court (CC). There have been various comments made on the decisions in the three courts. I wish to highlight only one of the many aspects of the various judgments namely the recognition of indigenous law in determining land tenure.

Briefly the facts were as follows: The San and the Khoi had inhabited the Richtersveld from time immemorial respectively as hunter gatherers and pastoralists. During the 19th century other people moved into the area and joined them, including itinerant farmers (the so-called “basters”) and missionaries. As well as farming activities, their activities included mining in copper and iron and making copper, metal and bead adornments. From the comprehensive and well researched account given in the judgment of the SCA, it is clear that the community regarded the land as its own rooted in its laws and customs. Outsiders needed to obtain permission to graze their animals on it or to mine its resources. In 1847 the territory was annexed by the Crown and incorporated into the Cape Colony. After the discovery of diamonds in the mid 1920s, the Precious Stones Act 44 of 1927 was passed and diggings were established in the area by means of a proclamation which referred to the land concerned as “unalienated Crown land”. The right of the community was not recognized in the proclamation since no such right was registered. Thereafter these “rights” of the state to the land passed to the Alexander Bay Development Corporation⁶⁴ and to Alexkor Ltd⁶⁵ with the concomitant mineral rights being registered to the company.

As already indicated there were two essential elements to the claim. First there had to be dispossession. Secondly this had to have happened as a result of racially discriminatory law or practice. The LCA turned down the claim. Since the law or practice was not designed to bring about “spatial apartheid”⁶⁶ it was not dispossession in terms of the relevant Act; secondly in terms of the present provisions it would not qualify as racially discriminatory.

The appeal against this decision in the SCA was successful. In the first place the SCA rejected the argument that restitution was possible only in the case of “spatial

⁶² Act 22 (1994). Section 25(7) of the Constitution provides that a person dispossessed of land after 19 June 1913 as a result of racially discriminatory laws, is entitled to compensation or redress.

⁶³ This is the date of the enactment of the notorious Natives Land Act considered to have laid the foundation for apartheid land policies. See: Barry, *supra* note 42; van Wyk, “The rocky road to restitution for the Richtersvelders” [2004] THRHR 479.

⁶⁴ Founded in terms of Act 46 (1989).

⁶⁵ The corporation was converted to Alexkor in terms of Act 116 of 1992.

⁶⁶ Broadly speaking dispossession had not occurred as the implementation of the policy to divide the RSA into separate compartments for different racial groups.

apartheid” measures (in other words those which were intended for implementing the division of the RSA into separate compartments for different racial groups). More importantly the question it considered and answered in the affirmative was that the Richtersvelders had a right of which it had been dispossessed in the nineteen twenties; a right that was recognized as such under the Restitution Act. After a comprehensive historical account the court found that at the time of Annexation and subsequently, the Richtersvelders had a right of beneficial occupation and use akin to that of common law ownership, both to the land and its minerals and precious stones. This “customary-law interest”⁶⁷ in the land, the court found, survived annexation; it was only after 19 June 1913 that the community had been dispossessed of the land thus qualifying it for redress or compensation. The land was not *terra nullius* when it was annexed but was land belonging to the Richtersvelders. However, the court did not go as far as the CC was to do in circumscribing such right.

The Constitutional Court found that the right in question was a right of communal ownership under indigenous law, the content of which included the right to exclusive occupation and use by the members of the community. Annexation did not extinguish this indigenous right to communal land which remained intact until 19 June 1913. Thus the court recognized and stated that indigenous law was an integral part of South African law which like all law was subject to the Constitution and its protection; and like the common law it was subject to any legislation, consistent with Constitution, that dealt specifically with it. In the words of the court “indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.

With this recognition of indigenous law as an integral part of the South African mix, the third “grace” of South African law it seems might just have arrived!

⁶⁷ The doctrine of aboriginal title was also relied upon in the restitution claim and canvassed by the SCA in its judgment. The court referred to those countries including New Zealand where the common law was developed to protect the rights of indigenous people to land. This can perhaps be discussed in discussion time later.