

Africa: Co-existence of Customary and Received Law

Wayne Rumbles

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AFRICA: CO-EXISTENCE OF CUSTOMARY AND RECEIVED LAW

**Review of the South African Law Commission's Project 90
The Harmonisation of the Common Law and the Indigenous
Law: Report on Conflict of Laws**

Wayne Rumbles

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I wish to acknowledge the assistance of Professor Margaret Bedggood for her helpful comments and discussions with Professor Paul Havemann regarding the nature of customary law in Africa.

This paper is dedicated to my father David Rumbles whose strength in the face of serious illness is an inspiration for me.

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I. INTRODUCTION

This paper is in part a summary of the extensive South African Law Commission's *Project 90: The Harmonisation of the Common Law and the Indigenous Law: Report on Conflict of Laws*. This continuing project has been underway since 1996, and can offer many examples, which are useful in exploring the possibilities of a more culturally inclusive legal system for Aotearoa/New Zealand.

This paper highlights the African context in relation to the application of customary law and how conflicts of laws are dealt with in terms of the relationship between received and customary law. Many present African legal systems have applied customary law since the late nineteenth century. These legal systems, which incorporate received and customary law, are not descendants from or adaptations of traditional legal structures but rather products of a colonial past and the creation of recent nation- states.¹

Judges have long been required to apply 'customary law' in deciding certain categories of case. This paper is concerned with this intersection between received and customary law, and the way in which conflicts between the legal systems are dealt with.

The second section of the paper briefly outlines the difficulty of using customary law in modern legal systems. Once customary law is incorporated into a received law system – that law will be moulded to the requirements of the dominant system and the extent of such modification will depend on the resources available to the members of the legal system, both documented and personal in the form of expert advisers.

The next section of the paper summarises the work done by the South African Law Commission on Project 90. The paper does not extrapolate a model from the African experience for Aotearoa/New Zealand, rather it presents the work of the South African Law Commission to allow others to draw what examples they see fit. In this way it is hoped that

¹ Woodman, G *How State Courts Create Customary Law in Ghana and Nigeria* 1987 p.181

the paper may contribute to a national conversation which will inform the development of more culturally inclusive legal and social systems.

Finally the paper presents some thoughts contextualising the African example within the Aotearoa/New Zealand situation.

II. CONFLICTS OF LAWS: AN AFRICAN OVERVIEW

Much of Africa shares a history of legal and judicial segregation. There customary law was deemed applicable only to Africans in civil suits and normally only in particular courts.

Rules restricting the jurisdiction of the courts had the effect of precluding possible conflicts of law. Tribunals run by traditional rulers were responsible for African litigation; the higher courts adjudicated settlers' disputes. By confining African disputes to particular tribunals, conflicts between customary law and the received systems of law seldom arose.²

When conflicts did arise, choice of law was based primarily on the parties' racial status and to a lesser extent on the nature of the cause of action. In francophone colonies the only consideration for applying customary law was the litigants' *statut coutumier*, as opposed to a *statut civil français* (which Africans could achieve by an exemption procedure).³ In effect, race was the exclusive determinant of the applicable law, since no other choice of law rules were provided.⁴

In anglophone Africa, too, race was also the principal factor in choice of law, but customary law was not invariably applied to Africans. One approach was to give the courts a more or less

² Lewin, J, *Studies in Native African Law* (Cape town: African Bookman, 1947). In chapter 9 Lewin commented that British colonial policy regarded questions such as the provision of conflict rules and the equity of the substantive law as relatively less important than the courts and procedure.

³ Salacuse, J W *Introduction to Law in French-speaking Africa* 1969 p.449

⁴ It was generally left to the courts and academic writers to evolve the choice of law rules. See generally Salacuse, J W, *Introduction to Law in French-speaking Africa* (Charlottesville: Michie, 1969).

unfettered discretion as to when customary law should be applied.⁵ Another was to deem customary law applicable in certain prescribed causes of action. In the Gold Coast, for instance, customary law was presumed to apply in matters of marriage, land tenure, the transfer of real and personal property, wills and inheritance.⁶

Independence provided an obvious opportunity to reform the colonial regime. Some states decided against any major change to choice of law rules. Zambia, for example, kept the 'cause of action' approach it had inherited through colonial rule,⁷ and Lesotho the discretionary approach.⁸ Other states undertook a thorough review of their entire legal system. Not all were sympathetic to customary law. Ethiopia and Ivory Coast, for instance, saw it as an obstacle to socio-economic development and national unity, and they therefore eliminated customary law in favour of imported systems of civil law.⁹ These two countries were the exception, however, for most African governments were careful not to depart too far from their indigenous legal orders. Thus, when Senegal and Madagascar decided to reform their systems of family law, they integrated customary law with civil and other local laws into hybrid codes.

Whether the decision was to unify the national law completely (as in Ivory Coast and Ethiopia) or merely to integrate certain topics, such as marriage and succession, the result for conflicts of law was the same. Once legal differences were removed, and everyone in the nation was subject to a single code of rules, there could be no more conflicts, because the courts had only one law to apply. As it happened, few countries attempted more than a codification of succession.¹⁰ For the most part, customary and common law were retained as independent legal regimes.

⁵ This approach was adopted in the East African Protectorate (Kenya), Uganda, South Africa, Bechuanaland, Nyasaland, Somaliland and Tanganyika. See Allott, A N, *New Essays In African Law* (London: Butterworths, 1970)..

⁶ Section 19 of the Supreme Court Ordinance 4 of 1876. This approach was subsequently adopted in Nigeria, Sierra Leone and Northern Rhodesia. See generally Allott, A N, *New Essays In African Law* (London: Butterworths, 1970)..

⁷ Under s 16 of the Subordinate Courts Act Cap 45, customary law is applicable in civil cases between Africans, particularly in matters concerning customary marriage, the tenure and transfer of property, inheritance and testamentary dispositions.

⁸ Section 2 of the General Law Proclamation 1884.

⁹ South African Law Commission *Report on Conflict of Laws* 1999 p.16

¹⁰ For example, the Wills and Inheritance Act 25 of 1967 (Malawi), the Law of Succession Act 1972 (Kenya) and the Intestate Succession Act 91 of 1989 (Zambia). Tanzania ventured further into the codification of marriage by the Law of Marriage Act 5 of 1971.

Where different systems of personal law continued in operation, the question then arose whether customary law should still be confined to the lower courts. Swaziland made little change to the colonial regime: customary law may still be applied only in the Swazi courts and common law in the High Court and magistrates' courts.¹¹ Permitting transfer of cases solves possible injustices that might result from an action being brought in the wrong forum.¹² The Swazi arrangement is no longer the norm in Africa,¹³ however, nor is it in all respects desirable. Although disputes may be adjudicated in tribunals familiar with the litigants' personal law and its associated procedures, plaintiffs are encouraged to 'forum shop', to initiate their cases in the court more likely to give them a favourable decision, and transferring cases that were mistakenly initiated in the wrong forum entails unnecessary costs and delays.¹⁴

African governments usually sought to give customary law a greater prominence in their legal systems by giving all courts power to apply it. Once any court in the land may apply customary law, conflicts of law are bound to arise and choice of law rules become necessary. This need has not always been perceived. Namibia, for example, took no action to replace provisions inherited from the period of South African rule.¹⁵ Hence, although customary law has express recognition in the Constitution¹⁶, there are no rules governing its application. There does not appear to have been any complaints about this lacuna, but this situation should not be viewed as ideal, as both courts and litigants need some guidelines on what law to apply.

In any event, the situation in Namibia is unusual. Most countries in Africa have taken care to specify the circumstances in which customary law should be applied. While doing so, they took the opportunity to cleanse the statute book of the racism that had formerly determined application of customary law. This meant discarding the assumption that only Africans could be subject to customary law. Various new terms were introduced to designate an appropriate

¹¹ Although, the Constitution of 1968 obliges them to apply customary law in certain circumstances (to do mainly with traditional authority).

¹² Thus, s 16 of the Subordinate Courts Act 66 of 1938 allows a magistrate to transfer cases involving only Swazis in which the causes of action are suitable to be heard by customary law to a Swazi court.

¹³ What is more common is a restriction on the jurisdiction of traditional courts which entitles them to apply only customary law. In Zimbabwe, for instance, under s 16(1)(a) of the Customary Law and Local Courts Act Cap 7:05 local courts have no jurisdiction if common law is applicable to a case.

¹⁴ Bennett, *The application of customary law in southern Africa : the conflict of personal laws* 1985 p.92

¹⁵ Section 9(1) of the Native Administration Proc 15 of 1928 - a replica of s 11(1) of the South African Native Administration Act 38 of 1927 - was repealed when s 5 of Act 27 of 1985 abolished commissioners' courts in South West Africa.

¹⁶ Article 66(1) of the 1990 Constitution.

link between a litigant and his or her system of personal law. Sometimes the link was membership of a political or cultural community,¹⁷ sometimes an association with ‘a community in which rules of customary law ... are established’¹⁸ and sometimes simply being ‘subject to’ African customary law.¹⁹

Several states made special provision for application of customary law in situations where one party was not normally subject to it. Zambia, for instance, provided that in these circumstances the courts may apply customary law, provided that no one can claim its benefits if it appears from an express or implied agreement that some other law should apply.²⁰ According to the choice of law rule in Botswana, if a *plaintiff* who is subject to customary law asserts that system, and if the matter should be determined by customary law, then it should be applied.²¹ Tanzania, by contrast, favours the *defendant*: customary law may be applied in any case where ‘it is appropriate that the defendant be treated as a member of the community in which such right or obligation obtained.’²² Neither the Tanzanian nor the Botswana provisions are particularly apt, because allowing a litigant’s role as plaintiff or defendant to dictate the law to be applied is arbitrary²³ (RCL p.18).

In countries that decided to lay down new choice of law rules, two conflicting aims had to be met: giving more detailed guidance while at the same time allowing sufficient flexibility to cater for the peculiarities of individual cases. The Tanzanian solution was to provide a general deeming provision (similar to the earlier colonial legislation) that customary law would be applicable to members of a community governed by it, or in ‘any matter of status of, or succession to, a person who is or was a member of a community in which rules of customary law relevant to the matter are established’.²⁴ Kenya extended this ‘cause of action’ approach

¹⁷ Section 9(1) of the Native Administration Proc 15 of 1928 - a replica of s 11(1) of the South African Native Administration Act 38 of 1927 - was repealed when s 5 of Act 27 of 1985 abolished commissioners’ courts in South West Africa.

¹⁸ As in s 9(1)(a) of Tanzania’s Judicature and Application of Laws Ordinance Cap 537.

¹⁹ Or ‘affected by it’. See s 3(1) of Kenya’s Judicature Act Cap 8.

²⁰ Namely, from the nature of a transaction out of which a cause of action arose. Section 16 of the Subordinate Courts Act Cap 45.

²¹ Section 6(1) Rule 6 of the Common Law and Customary Law Act Cap 16:01.

²² ‘... and it is fitting and just that the matter be dealt with in accordance with customary law’ Section 9(1) of the Judicature and Application of Laws Ordinance Cap 537.

²³ South African Law Commission *Report on Conflict of Laws* 1999 p 18.

²⁴ Section 9(1) of the Judicature and Application of Laws Ordinance Cap 537.

even further.²⁵ Customary law is presumed to apply in cases about: land held under customary tenure; marriage, divorce, maintenance or dowry; seduction, enticement or adultery; matters affecting status, in particular the status of women, widows and children (including guardianship, custody, adoption and legitimacy); succession (both testate and intestate) and administration of estates (except property disposed of by a will made under a written law).²⁶

Rules promulgated in Zimbabwe introduced a significant change of emphasis:²⁷ the parties are free to choose the law they want applied. Hence, '[u]nless the justice of the case' otherwise requires, customary law may apply in civil cases where the parties expressly agreed that it should apply, or, from 'the nature of the case and the surrounding circumstances' it appears either that the parties had agreed or that it is just and proper that customary law should apply.²⁸ The terms 'surrounding circumstances' were defined to include: the parties' mode of life, the subject matter of the case, the parties' understanding of customary and common law or 'the relative closeness of the case and the parties to customary or common law.'²⁹

Post-independence legislation in Botswana was similar. Although customary law was deemed to apply to 'tribesmen' in certain causes of action, parties were allowed freedom to select the applicable law. Hence, the common law could apply in three situations: if the parties expressly agreed that it should (either inter se or with the court); from all relevant circumstances it objectively appeared that the parties intended common law to apply; or the transaction out of which the case arose was unknown to customary law.³⁰ These relatively straightforward provisions were later replaced by far more complex rules. Choice of law is still linked to the form and nature of transactions (or unilateral dispositions), but now special rules have been included to deal with property rights (especially rights to land).³¹

²⁵ Section 3(2) of the Judicature Act Cap 8 provides general authority for all the courts to 'be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as is applicable and is not repugnant to justice and morality or inconsistency with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay'.

²⁶ Magistrates Courts Act 17 of 1967.

²⁷ The post-independence Customary Law and Primary Courts Act 6 of 1981 has been revised and renamed the Customary Law and Local Courts Act Cap 7:05.

²⁸ s.3(1)

²⁹ s3(2)

³⁰ s4 of the Customary Law (Application and Ascertainment) Act 51 of 1969 Act.

³¹ The Common Law and Customary Law Act Cap 16:01 (in the 1987 consolidation).

1. Summary

In summary, it appears that reforms of the newly independent African governments have not always improved on, or indeed changed, the colonial regime. None the less, the following three points emerge from policies adopted in post-colonial Africa. First, conflicts of law become immaterial if a court's power to apply both common and customary law is removed or if legislation overrides personal law by imposing a single code of rules on everyone. Secondly, if race as the criterion for applying customary law is abolished, a problem then arises as to what assumption should govern the applicability of that law. The most viable solution seems to be a reference to a litigant's membership of a community observing customary law.

Thirdly, the 'cause of action' approach avoids any reference to race or culture, but it contains problems of its own. One problem is deciding which system of law should be used to characterise the cause of action, since common and customary law do not necessarily agree on this question. (They may differ, for instance, on whether a claim for breach of promise to marry should be treated as an issue of marriage or delict{breach of the law}).³² Another problem is the rigidity of deeming customary law applicable to a particular set of causes of action. Choice of law must be sufficiently flexible to cater for the great variety of cases that will arise.

The most progressive legislation to have appeared is from Botswana and Zimbabwe.

Statutes in these countries borrowed principles from the more developed discipline of private international law, notably the principle that parties should be free to choose whatever law they wanted.

III. SOME DIFFICULTIES WITH THE USE OF CUSTOMARY LAW IN MODERN LEGAL SYSTEMS

In complying with the requirement to apply customary law judges have frequently declared norms of customary law, which are then followed in subsequent cases. Woodman points out that this is what he calls lawyers' customary law, which is not the same as customary law in a

³² Bennett, 1985 p.103

sociological sense. This is not only the result lawyers misconception of the content of the existing social norms, but is the result of the nature of the legal system. The legal system cannot reproduce the circumstances or context in which the social norms operate and by which they are enforced. The legal system therefore has a creative function: when they appear to be applying customary law they are in reality creating a new a new type of ‘customary law’.³³

The transformation of customary law to lawyers’ customary law is focused by the procedures of the courts. By restricting the forms in which claims may be presented, the types of remedies which, may be awarded, and the modes of enforcing those remedies, the courts have debarred themselves from recognising those substantive rights, which cannot be asserted and enforced by the permitted process.

1. Form of claims, remedies and enforcement

The courts have required claims, remedies and enforcement to be expressed in the categories of the common law. The court cannot prevent an action such as a marriage or sale of land; rather only question the validity of the marriage or sale. Remedies are also generally only available at a late stage of the conflict. Damages for example, can be awarded only when a wrong has been committed and a loss suffered. If the court give a declaratory judgement and if this is disregarded then the plaintiff has to bring a fresh action for one of the other remedies. The mode of enforcement of remedies by the courts carries the power to compel which is likely in some cases to make the norms more absolute in practice than they otherwise would be. Whereas in traditional practice there may be subtle circumstances and norms that induce a successful party to show leniency in or to compromise over the strict adherence of the punishment.³⁴

2. Selection of Norms as legal

The courts cannot recognise all norms as legal, therefore the personnel of the legal system select some to be customary law while the others are relegated (usually tacitly) to the category

³³ Woodman, 1987 p.182

³⁴ Woodman, 1987 p. 184-88

of customary morality. This does not reflect a socially recognised distinction. It has been said that the gaps are so important that what emerges is in effect a newly created body of norms.³⁵

3. Development of New Norms peculiar to the state courts.

A number of rules are so directly concerned with the state court processes that they could not exist outside those processes, but are so related to lawyers' customary law that they are referred to as rules of customary law. An example of this occurs when it has been established that a group has legal personality and so could be a party to a suit. In the state courts it then becomes necessary to have rules determining which individuals might act on behalf of the corporate and the process of consultation between the representatives and the corporate.

4. Explicit Modification of Norms by the Court

In some classes of cases the courts have spoken as if they could have applied customary law, but have declined to do so on specific grounds usually based on statutory authority.

(i) Repugnancy Clause

The so called 'repugnancy clause' provides the court with the power to qualify any application of native law or custom if such an application is repugnant to justice, equality or good conscience.³⁶

³⁵ Woodman, 1987 p. 198

³⁶ See Daniels, W, *The Common Law in West Africa* (London: Butterworths, 1964), for the use of the Repugnancy clause in the Supreme Court Ordinance, 1867 of the Colony of the Gold Coast and Lagos. See also the Discussion of the Repugnancy proviso in the South African Law Commission, "The Harmonisation of the Common Law and Indigenous Law: Conflict of Laws" Discussion Paper 76, (Pretoria, South African Law Commission, April 1998). Section 1(1) of The Law of Evidence Act (SA) declares that customary law may be applied.

“ Provided that [it] shall not be opposed to the principles of public policy or natural justice”
See also Woodman, for various examples of the use of the repugnancy clause in the Courts of Ghana and Nigeria

(ii) The importation of common-law doctrines

Common law doctrines are sometimes introduced to customary law because justice is seen to require it. In Ghana and Nigeria the doctrines of Estoppel by Acquiescence and Estoppel by Judicial Decision have been applied and it has been assumed that they must be applied.³⁷

5. Summary

The use of customary law in modern legal systems will always modify the customary legal norms to what Woodman refers to as Lawyers' customary law. The extent of modification will be determined by the resources available to the state Courts, both documented and personal in the form of experts. It is areas of conflict between the systems (however customary law is constructed), which the South African Law Commission's Project 90 deals with.

IV. SOUTH AFRICAN LAW COMMISSION PROJECT 90: THE HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW

In 1996, South Africa's new Constitution formally acknowledged Roman -Dutch law and customary law as the major components of the state's legal system. Customary law comprises the various laws observed by communities indigenous to the country; hence the term 'indigenous law' is also often used in South Africa.

The courts now need to know when they must apply rules from customary or common law, because notwithstanding recognition of customary law as part of the general law of the land, the circumstances in which it is to be applied are still vague. The problem that the report of the South Africa Law Commission Project 90 addresses is known as a *conflict of laws*. Such conflicts arise whenever rules derived from two (or possibly even more) different legal systems are potentially applicable to the same set of facts. *Choice of law rules* are therefore needed to determine which rule to apply.

³⁷ Woodman, 1987 pp. 200-202

Although the conflict of laws may appear a rather academic discipline, it is an essential part of any legal order that is prepared to recognise and enforce two or more different systems of law. 'Choice of law' rules have to deal with everyday legal disputes. To take two examples from many: if a woman were seduced, in customary law her guardian would have an action for damages; in common law, she personally would have the action, but only if she were a virgin at the time of seduction. Under common law debts prescribe if they are not claimed in time; under customary law debts last indefinitely. In both these examples, the conflict of laws indicates which law to apply.

While problems like those above can arise in nearly any part of a legal system, South Africa has very few explicit choice of law rules to solve them. The Black Administration Act³⁸ contains some rules regulating questions of succession, but apart from these the legislature has been silent. The Law of Evidence Amendment Act³⁹ is the main instrument (together with the Constitution) dealing with customary law, but it does no more than oblige the courts to take judicial notice of customary law, which is a rule of recognition rather than of choice of law.

It follows that deciding when to apply customary law has generally been a matter of judicial discretion, with the result that judges have tended to decide each case on its merits. Although this approach may achieve justice in individual cases, it does so at the cost of legal certainty.

Clear and explicit choice of law rules are therefore needed, and they must be placed in a separate enactment devoted to recognition and application of customary law. It is necessary to create separate legislation in order to disentangle choice of law from the two statutes in which it is currently regulated: the Black Administration Act (which has unhappy associations with policies of segregation and apartheid) and the Law of Evidence Amendment Act (which, as the title suggests, is principally concerned with ways of proving foreign and customary systems of law).

³⁸ Section 23 of Act 38 of 1927

³⁹ Section 1 of Act 45 of 1988

1. The Past- Recognition of Customary law in South Africa during the Colonial Period

The current lack of rules governing recognition and application of customary law can be traced to the colonial and apartheid periods of South Africa's legal history. Existing laws have not in substance been changed since 1927, the date when the Black Administration Act was passed. That Act did little more than repeat preceding colonial enactments.⁴⁰

A distinctive policy towards customary law in southern Africa began with Britain's occupation of the Cape in 1806. The new colonial power confirmed the Roman-Dutch law already operating in the Cape as the general law of the land, for that system was deemed to be suitably 'civilised'.⁴¹ No account was taken of indigenous KhoiSan laws, primarily because the people concerned were thought too primitive to have a legal system worthy of respect. In addition, however, KhoiSan social and political institutions were, by the early nineteenth century, fast disintegrating. Without the vigour of a living society to sustain it, there was no system of law to recognise.

In 1828, Ordinance 50 was passed with the aim of 'improving the conditions of Hottentots and other free persons of colour at the Cape' (and ultimately, of course, freeing the slaves). Thereafter, in an argument remarkably similar to that proposed by modern human rights lawyers, the principle of equal treatment was used as a justification for applying only Roman-Dutch law. Application of indigenous law would have subjected a section of the population to an inferior brand of justice. In terms of the same thinking, the Cape administration took no account of existing indigenous laws when Kaffraria was annexed on the eastern borders of the Colony.⁴²

⁴⁰ A general overview of approaches towards recognition of customary law in South Africa can be found in Hahlo & Kahn *South Africa: the Development of its Laws and Constitution*: 1960 pp 319-34. Government policies are considered in Welsh *Roots of Segregation* 1971, Rogers *Native Administration in the Union of South Africa*: 1948, Brookes *The History of Native Policy in South Africa from 1830 to the Present Day* 1927: chs 9 and 10 and Suttner (1985) 11 *Social Dynamics* 49.

⁴¹ *Wi Parata v Bishop of Wellington* (1887) 3 NZ Jur 72 at 78.

⁴² When Sir George Grey became governor, the policy of non-recognition was given further justification in Britain's drive to convert Africans to Christianity and western notions of 'civilisation'. See Burman *Cape Policies towards African Law in Cape Tribal Territories 1872-1883* ch 2. Although local magistrates discovered

The Cape government had to rethink its approach, however, when it began annexing the Transkeian territories towards the end of the century. This area was geographically remote from centres of power, settler immigration was restricted, and the people of the Transkei had not been completely subjugated.⁴³ In the circumstances, it was simply not feasible to impose Roman-Dutch law on the entire population. Despite these considerations, the colonial conscience balked at unqualified recognition of customary law. Hence the annexation proclamations gave the courts authority to apply customary law only if it was ‘compatible with the general principles of humanity observed throughout the civilised world’.⁴⁴

The Cape’s more considered policy in Transkei owed much to what had been happening in Natal. When Britain annexed the territory in 1843, Roman-Dutch law was again declared the general law of the new colony, but shortly afterwards courts were also allowed to apply customary law in disputes between Africans. This break with established colonial policy was due mainly to Shepstone (the Diplomatic Agent to the Native Tribes and Secretary of Native Affairs). He succeeded in persuading the authorities to co-opt the service of African leaders to the colonial administration,⁴⁵ and with recognition of traditional rulers came recognition of customary law. Again, recognition was subject to the formula that was later to be adopted in Transkei (and throughout Africa, in fact): ‘so far as [customary law] was not repugnant to the general principles of humanity observed throughout the civilised world’.⁴⁶

British rule in Natal left its stamp on customary law in two other respects. The first was an exemption procedure, which originated in complaints that Shepstone’s policy was doing nothing to promote ‘civilisation’ of the Colony. Africans who were considered suitably ‘detrivalised’ could apply to be subject to the common law.⁴⁷ The second was the Code of Zulu law. In 1869, much of the customary law on marriage and divorce was reduced to

that this policy was untenable in practice, no concessions were made, apart from allowing customary law to be applied in cases of intestate succession under the Native Succession Act 10 (Kaffraria) and 18 (Cape) 1864

⁴³ The annexation decrees claimed that the inhabitants were ‘not sufficiently advanced in civilisation and social progress to be admitted to the full responsibility granted and imposed respectively by the ordinary laws of the Colony’. See Brookes (n5) 108 and Hailey *African Survey* 1938: p 350.

⁴⁴ Section 23 of Procs 110 and 112 of 1879. .

⁴⁵ Under Ord 3 of 1849, traditional rulers were to exercise unspecified judicial functions, subject to the general control of colonial magistrates.

⁴⁶ Ordinance 3 of 1849. See Bennett 1985: pp 79-80.

⁴⁷ Law 11 of 1864, as amended by Law 28 of 1865, allowed such individuals to petition the Governor for exemption, stating particulars of family, property, local chief and so on, and furnishing proof of an ability to read and write.

writing. Six years later, a complete code was drawn up for the guidance of the courts,⁴⁸ and in 1891 an amended version was made binding law.⁴⁹

While the Transvaal recognition formula was akin to Natal's, the Supreme Court of the Republic refused to give effect to customary marriages or bridewealth agreements. Both were regarded as inconsistent with the 'civilised' conscience, the one because it was potentially polygamous and the other because it amounted to the sale of a woman.⁵⁰ By implementing the repungancy proviso in this manner, the Court repudiated two of the most fundamental institutions of African culture. As the court in *Meesadoosa v Links*⁵¹ was eventually to concede,

If the decision of this Court not to recognise marriages contracted according to native custom is to be extended to its logical conclusion ... we might as well sweep overboard all the native customs ... insofar as they affect the status of members of that family ... and the ownership and disposal of property belonging to the different members of the family. The consequence would be that it would strike at the foundation of the custom which prevails among natives as to the family system.

Mention should finally be made of Bechuanaland. In 1885, the southern portion of this territory was constituted a Crown Colony of British Bechuanaland.⁵² Because the region was sparsely populated and had few attractions for white settlers, apart from its strategic importance as a trade route to the interior, Britain did very little to interfere with the Tswana leaders' rule over their peoples.⁵³ Hence, when British Bechuanaland was annexed to the Cape in 1895, no attempt was made to impose the Cape policy of non-recognition of customary law.

What emerges from [an] account of the legal history of southern Africa is that the settlers' grudging recognition of customary law had little to do with a concern for the well-being of the African people. Considered too barbarous and backward to function as a viable legal system, customary law was tolerated in areas of marginal significance to the colonial regime, namely, marriage, succession, delict and land tenure. At no time was recognition regarded as a right inhering in the people to whom it applied. Instead, it was considered a precarious favour bestowed by a conquering power.⁵⁴

⁴⁸ Initially, when published in 1878, the Code was not legally binding in Natal, but by Proc 2 of 1887 it was made law for Zululand.

⁴⁹ Law 19 of 1891

⁵⁰ *R v Mboko* 1910 TPD 445 at 447 and *Kaba v Ntela* 1910 TPD 964 at 969.

⁵¹ 1915 TPD 357 at 361.

⁵² Northern Bechuanaland (now Botswana) became a separate Protectorate.

⁵³ Policy was formally expressed by Proc 2 of 1885, in which traditional rulers were given wide powers of civil and criminal jurisdiction.

⁵⁴ South African Law Commission *Report on Conflict of Laws* 1999: p 9.

(i) *The 1927 Native Administration Act: segregation and apartheid*

When the union of South Africa was established in 1910, the position of customary law differed radically from one part of the country to the other. In the Cape, and for all intents and purposes in the Transvaal too, customary law had no official recognition. In British Bechuanaland, and to a lesser extent in Natal and the Transkeian territories, it was regularly applied subject to the supervision of the higher courts.

Not only were such extreme differences inappropriate to the legal system of a unified state, but also the rules on recognition and application were complex and confused.⁵⁵ The implementation of a new, uniform policy for the whole country was to complement the Union government's doctrine of segregation. At this time, it was apparent that social and political changes in the African population were posing a serious challenge to white rule. Traditional leaders, who formerly had been a constant threat to the colonial enterprise, were fast losing the support of their subjects. Africans now formed a sizeable urban proletariat and they had developed independent political and labour associations. In order to avert a growing threat to white hegemony, the government began to revive traditional institutions in the hope that the energies of an increasingly competitive class of people would be deflected towards a 'tribal' culture.⁵⁶

In 1913, the Natives Land Act laid down a territorial framework for segregation.⁵⁷ Africans were thereafter prohibited from buying or leasing land outside certain 'scheduled' areas.⁵⁸ This Act, the first so-called 'pillar of apartheid', drew a clear division between the white-owned urban areas and farmlands (the seat of all real economic and political power) and the rural reserves (where Africans were supposed to get on with their own destiny).

⁵⁵ The Supreme Court, for instance, called for legislative intervention to bring order to 'this chaotic state of affairs' and to the 'curious jumble' of proclamations and colonial acts. See *Roodt v Lake & others* (1906) 23 SC 561 at 564 and *Sekelini v Sekelini & others* (1904) 21 SC 118 at 124, respectively.

⁵⁶ Bennett, 1985: pp.46-47

⁵⁷ Act 27 of 1913.

⁵⁸ The Native Trust and Land Act 18 of 1936 later released more land for the settlement of Africans. From areas demarcated in the two land Acts, the bantustans (later called the 'homelands' and then 'national states' or 'self-governing territories') developed in the period after 1948.

In 1927, the Native Administration Act was passed.⁵⁹ Although the government's ostensible purpose was to rejuvenate African tradition,⁶⁰ its actual intention was to establish a separate system of justice to match segregation in land and society. Under the Act, a new system of courts was created to hear civil disputes between Africans. Henceforth, approved traditional rulers were given judicial powers with jurisdiction to apply customary law.⁶¹ They exercised civil jurisdiction concurrently with native commissioners' courts, which also heard appeals from courts of traditional leaders. At the top of this hierarchy was the Native Appeal Court. Section 11(1) of the Native Administration Act prescribed conditions under which the commissioners' courts (and their Appeal Court) could apply customary law:

Notwithstanding the provisions of any other law, it shall be in the discretion of commissioners' courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black law applying to such customs except in so far as it [had] been repealed or modified

The new Native Appeal Court construed this discretion as a judicial one, which, if exercised capriciously, arbitrarily or without substantial reason, could be upset on appeal.⁶²

At first, the obscure requirement that a suit or proceeding had to involve 'questions of customs followed by Natives' was taken to mean that customary law could be applied only if it contained a rule appropriate to the facts of the case⁶³ or offered a remedy.⁶⁴ Two Appellate Division decisions later reversed this approach by holding that the existence or absence of remedies was not critical to application of customary law.⁶⁵

With no specific choice of law rules to guide them, the Native Appeal Court inevitably deferred to practices that had been established in the colonial period. The Cape and Orange

⁵⁹ 38 of 1927.

⁶⁰ Thus, when the Minister of Native Affairs introduced the bill, he exhorted Parliament to accept customary marriage, polygamy and bridewealth (Hansard 28 April 1927 col 2918 and 2 May 1927 col 3047), and claimed that neglect of indigenous laws and customs had weakened traditional authority, thereby depriving rulers of their power to restrain the young (Hansard 28 April 1927 col 2907-8 and 2914-18).

⁶¹ Section 12(1) of the Native Administration Act.

⁶² *Umvovo* 1950 NAC 190 (S) and *Mtolo v Poswa* 1950 NAC 253 (S).

⁶³ See *Nzalo v Maseko* 1931 NAC (N&T) 41, *Magadla v Hams* 1936 NAC (C&O) 56 and *Mkize v Mnguni* 1952 NAC 242 (NE).

⁶⁴ See, for example: *Muguboya v Mutato* 1929 NAC (N&T) 73 at 76, *Ntsabelle v Poolo* 1930 NAC (N&T) 13, *Nqanoyi v Njombeni* 1930 NAC (C&O) 13, *Mtolo v Poswa* 1950 NAC 253 (S) and *Sibanda v Sitole* 1951 NAC 347 (NE).

⁶⁵ *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A) at 399 and *Umvovo* 1953 (1) SA 195 (A) at 201.

Free State division of the Appeal Court, for instance, construed its discretion in s 11(1) to mean that customary law was applicable only in matters ‘peculiar to Native Customs falling outside the principles of Roman-Dutch law’.⁶⁶ In other words, the courts’ general duty was to apply common law; they could take cognisance of customary law only by way of exception. The Natal and Transvaal division took the opposite view: that customary law was primarily applicable and common law could be applied only in exceptional cases.⁶⁷

This impasse was finally resolved in *ex parte Minister of Native Affairs: In re Yako v Beyi*.⁶⁸ In this case, the Appellate Division held that neither common nor customary law was prima facie applicable. Courts had to consider all the circumstances of a case, and, without any preconceived view about the applicability of one or other legal system, select the appropriate law on the basis of its inquiry.

The structures established in 1927 lasted until the 1980s, when, confronted with the imminent collapse of apartheid, the government was forced to initiate a series of reforms. Commissioners’ courts, which had become the main judicial agency of the apartheid regime, were abolished (together with the Appeal Court),⁶⁹ and their jurisdiction was transferred to the magistrates’ courts. In consequence, s 11(1) of the Black Administration Act was repealed and re-enacted as s 54A(1) of the Magistrates’ Courts Act.⁷⁰ This amendment involved few significant changes for customary law.⁷¹

(ii) The 1988 Law of Evidence Amendment Act

In 1988, the government undertook a more thorough-going, but this time less publicised reform of the terms of recognition of customary law. Section 1(1) of the Law of Evidence Amendment Act was passed to provide that:

⁶⁶ *Nqanoyi v Njombeni* 1930 NAC (C&O) 13.

⁶⁷ *Matsheng v Dhlamini & another* 1937 NAC (N&T) 89 at 92, *Kaula v Mtinkulu & another* 1938 NAC (N&T) 68 at 71 and *Yako v Beyi* 1944 NAC (C&O) 72 at 77.

⁶⁸ 1948 (1) SA 388 (A) at 397.

⁶⁹ Section 2 of Act 34 of 1986. This reform followed from recommendations of the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts *Fifth Report* Part V para 6.1.

⁷⁰ 32 of 1944.

⁷¹ The scope of its application was broadened somewhat to include criminal matters, but it remained limited to ‘Blacks’.

Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles

This section introduced two important changes. The first was removal of the stipulation that parties to a suit had to be 'Black'.⁷² By implication, whites too could be subject to customary law. The second was to extend the sphere of application of customary law to all courts in the country. Less important amendments were omission of the confusing qualification that a case should involve 'questions of customs followed by Blacks' as well as the proviso that customary law might be applied only in so far as it had not been repealed or modified.

The courts' power to take judicial notice of customary law was still subject to three provisos, two of which were carried over from s 11(1) of the Black Administration Act. The first was a general reservation in favour of public policy and natural justice, the so-called 'repugnancy proviso' inherited from the colonial period. The second proviso excepted bridewealth from the purview of the first. This exception was a special dispensation that had been included in s 11(1) of the 1927 Act to safeguard against repetition of the decisions of the Transvaal Supreme Court. The third proviso, however, was an innovation: the courts could take judicial notice of customary law only if the law could be 'ascertained readily and with sufficient certainty'.⁷³

There is little judicial interpretation of s 1(1) the Law of Evidence Amendment Act. The main reason for this dearth of precedent is the disappearance of commissioners' courts and their courts of appeal two years before the Act was promulgated. They had been a fruitful source of authority on the application of customary law.⁷⁴ Because the legislature did not enact specific choice of law rules to replace the previous discretionary power to apply customary law (under

⁷² As defined in s 35 of the Black Administration Act 38 of 1927.

⁷³ Otherwise customary law must be proved according to the rules specified for custom. For this purpose s 1(2) of the Act allows the parties to lead evidence of the substance of any legal rule in contention

⁷⁴ *Thibela v Minister van Wet en Orde* 1995 (3) SA 147 (T) is the only case to have been reported in which choice of law was specifically considered. The court interpreted s 1(1) of the Law of Evidence Amendment Act to be mandatory rather than permissive. Arguably, the decision in this case is incorrect, notwithstanding s 211(3) of the Constitution (which will be considered below para 1.59). As Professor Kerr pointed out in his response to the Issue Paper, s 1(1) means *must* as regards judicial notice but *may* as regards application of customary law. See further Kerr (1994) 111 *SALJ* 577 ar 580-1.

s 11(1) of the Black Administration Act), we must conclude that application of customary law is still a matter of judicial discretion - with all the vagueness and uncertainty that such discretion entails.

2. Implications of the Constitution for application of customary law

The history of customary law in South Africa has been closely bound up with the political fate of the African people. Even at the height of segregation and apartheid, when the South African government was at pains to assert an African cultural tradition, customary law was considered a second-rate system. Roman-Dutch common law has always been treated as the general law of the land and the model to which customary law should conform.⁷⁵

South Africa's new constitutional dispensation has done much to improve the overall status of customary law. From several clauses in the Constitution,⁷⁶ not to mention comments made in the Constitutional Court,⁷⁷ it is evident that customary law is at last achieving recognition as a foundation of the South African legal system.

The question that must now be asked is whether customary law should be retained as a separate legal system - which is what the conflict of laws implies. Several respondents to the Issue and Discussion papers felt that South Africa should be working towards unified laws.⁷⁸ Blending two very different legal systems in a synthetic code is an immense undertaking, however, which has been accomplished in very few African countries (in fact only Ivory Coast and Ethiopia) and then largely at the expense of customary law. At a technical level, it may be questioned whether all legal differences can be reconciled. For instance, how are common-law rules on the prescription of actions and charging interest on overdue debts to be adjusted to customary-law principles, which would permit neither of these claims? At a social level, it may be questioned whether everyone in the country either wants or is prepared for a single law. Are the peoples of South Africa willing to compromise their cultural traditions in a

⁷⁵ See generally Lazar (1970) 19 *International & Comparative Law Quarterly* 492 and Burman (1976) 3 *British J of Law & Soc* 204.

⁷⁶ Notably s 211(3).

⁷⁷ In *S v Makwanyane* 1995 (3) SA 391 (CC) at 515-17.

homogenised legal system? In any event, it must be appreciated that, for the immediate future at least, social and legal differences will remain, and, if that is the case, the conflict of laws will have an important role to play in selecting appropriate laws in particular cases.

It also needs to be noted that the South African Constitution now provides an entitlement for invoking customary law in legal suits. Because sections 30 and 31 specifically guarantee an individual and a group's right to pursue a culture of choice,⁷⁹ it could be argued that application of customary law has become a constitutional right.⁸⁰ Previously, the state had assumed complete discretion in deciding whether and to what extent customary law should be recognised, an attitude typical of colonial thinking, for Africans were subject to whatever policies the conquering state chose to impose on them. Now, however, the state has a duty to allow people to participate in the culture they choose, and implicit in this duty is a responsibility to uphold the institutions on which that culture is based.⁸¹

This argument finds adventitious support in two sections of the Constitution. Section 15(3)(a)(ii) provides that legislation may be passed to recognise 'systems of personal and family law under any tradition, or adhered to by persons professing a particular religion'⁸² and s 211(3) obliges the courts to apply customary law in appropriate circumstances.

The courts' duty to apply customary law under s 211(3) is subject to three important qualifications: that customary law is 'applicable', that it is compatible with the Constitution

⁷⁸ See chapter 1, South African Law Commission, *Discussion Paper 76: The Harmonisation of the Common Law and Indigenous Law* 1998

⁷⁹ Section 30 of the Constitution states that all persons have the right to 'participate in the cultural life of their choice' and s 31(1) provides that: 'Persons belonging to a cultural ... community may not be denied the right, with other members of that community - (a) to enjoy their culture ... and (b) to form, join and maintain cultural ... associations and other organs of civil society.'

⁸⁰ This idea finds support in international law, especially in art 27 of the International Covenant on Civil and Political Rights (1966), the more general right to self-determination and the emerging body of 'aboriginal' rights.

⁸¹ A broad interpretation of the word 'culture' would denote a people's entire store of knowledge and artefacts, especially the laws and values that give social groups their unique characters. See Kaganas & Murray (1994) 21 *J of Law & Society* 412.

Culture has been defined broadly as a system of shared symbols and values- a structure of meanings through which human beings shape their experience. Politics in its widest sense is one of the main public arenas in which structures unfold, interact and confront each other.

Cultural systems are not static, frozen in time, but dynamic processes that, ideally speaking, draw on other systems and in turn influence them. The sustainability and dynamism of [cultural] pluralism is then dependent on whether in a given culture, memory, myths, symbols, and rituals can provide the sources to manage existential and societal problems

Smitu Kothari, "Cultural Pluralism and Development" CCD/Cont/95/INF.16, (1995). 2.

and that it has not been superseded by 'any legislation that specifically deals with customary law'. The first qualification might suggest that courts have an unrestricted discretion in deciding when to apply customary law, which could imply that application of customary law is again dependent on the vagaries of state policy. A preferable reading of 'applicable', however, and one that is more in keeping with the general tenor of the Constitution, is to say that this discretion must be exercised in accordance with general principles governing choice of law.

The third qualification - that customary law must be deemed repealed to the extent that it is inconsistent with legislation - clarifies a previously nebulous issue. While general legal doctrine would decree that statutes always override precedent, custom and the writings of jurists, customary law might none the less have been exempt if Parliament had intended an act to change only the common law. (It has long been uncertain, for example, whether the Age of Majority Act applied to persons who were subject to customary law.) Section 211(3) now makes it clear that statutes will prevail only if they are aimed at amending customary law.

The second qualification is the most complex, since it implies that any legal relationship governed by customary law is subject to the Bill of Rights. That human rights should be imported into personal relationships - should in other words be horizontally applicable - is reinforced by s8 (2) of the Constitution. This subsection declares that a provision in the Bill of Rights will bind natural persons 'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.⁸³

Many rules of customary law reflect, directly or indirectly, the patriarchal traditions of African culture, so that large parts of the law could be declared invalid for infringing the right to equal treatment. If that were allowed, the constitutional recognition given to customary law in 1996 would be an empty gesture. No one in South Africa today would wish customary law to be relegated to its former position; and, if courts and Parliament are sincere in their respect for

⁸² In addition, s 15(3)(a)(i) provides that legislation may be passed to recognise 'marriages concluded under any tradition, or a system of religious personal or family law'.

⁸³ Section 8(1) provides that the Bill of Rights applies 'to all law, and binds the legislature, the executive, the judiciary and all organs of state'.

African cultural traditions, they must construe application of the Bill of Rights in such a way that the common law does not again emerge as the dominant regime.⁸⁴

The word ‘applicable’ in s 8(2) could, of course, be interpreted to mean that the Bill of Rights applies only when organs of state are involved, which is the traditional approach to the application of human rights. But such a reading would defeat a clear intention of the drafters of the Constitution. A sensible construction of a word as vague as ‘applicable’ would be to follow jurisprudence abroad, where constitutional norms have been extended from their usual sphere of ‘vertical’ operation only by way of exception. Courts have had to consider the nature of the constitutional right concerned and the offending rule of private law⁸⁵ matters already provided for in s 8(2) - together with the social context. This more circumspect approach to horizontal application requires both a policy assessment of the extent to which the state should intervene in private relations and a legal assessment of how constitutional rights should relate to one another. In summary, the overall effect of the Constitution is to require, on the one hand, greater respect for customary law and, on the other, a filter through which its rules must now be interpreted.

The application of customary law has become a constitutional issue, and for that reason the conflict of laws must also be reconsidered in view of the Bill of Rights. Previous courts did very little to acknowledge or support social and legal changes in South Africa’s plural society. Although the common law should have been applied to those individuals who no longer considered themselves part of an African cultural tradition, the courts refused to allow individuals, women in particular, to escape the strictures of customary law without going through the formal exemption procedure.⁸⁶ It should now be acknowledged that freedom to pursue a culture of choice means that people are free to change their personal law through

⁸⁴ Bennett 1985.

⁸⁵ See *Mthembu v Letsela & another* 1997 (2) SA 936 (T), for example, which considered the extent to which customary law actually prejudices women and children. In deciding which aspects of customary law are to be deemed unconstitutional, obvious targets would be rules of the ‘official’ version, that owe little to an authentic African tradition or to contemporary social practice. See Bennett *Human Rights and African Customary Law* 1995: 38-40.

⁸⁶ Following from the judgements of McLoughlin P in *Ngwane v Nzimande* 1936 NAC (N&T) 70, *Yako v Beyi* 1944 NAC (C&O) 72 at 76 and *Mashego v Ntombela* 1945 NAC (N&T) 117 at 121. He reasoned that if one party were given the benefit of a change in personal law, the other would be put at a disadvantage. Underlying this thinking, however, was a desire to maintain the policy of segregation: Bennett *Application of Customary Law* 66-7.

integrating themselves into whichever culture suits their needs. On this basis, it can be argued that parties are free to choose the law that best suits their needs.

3. Principles governing choice of law

Customary law continues to be recognised in South Africa as a separate legal system, not in order to perpetuate apartheid ideology, but rather as the expression of an individual or group's constitutional right to maintain the African cultural tradition.

Reformulating choice of law rules is obviously not a way of removing contradictions between customary law and the Constitution, since separate legislative and judicial processes must perform that task. It would be wrong, however, to assume that, once constitutional reforms have been implemented, common and customary law will be the same and that legal dualism will vanish. Differences in culture are always likely to generate differences in law, with consequent conflicts of law.

Common and customary law may, of course, be legislatively integrated into a single code of rules, as happened in Ivory Coast and Senegal. Indeed, the Law Commission is currently engaged in projects to achieve this aim in the areas of marriage and succession. Nevertheless, where differences between the two legal systems persist, legal dualism and the need for choice of law rules will also persist.

The purpose of choice of law rules is to select the law that will do justice in the case. It is the court's power (and responsibility) to decide which law to apply, paying due regard to the parties' interests and their choice of legal system. Hence, although the courts must respect the individual's freedom to choose a particular law, they must not do so at the expense of the other party. If a plaintiff were to sue under the common law, for instance, and if the defendant were to acquiesce, the court need have no hesitation in applying common law to the claim. But if the defendant were to argue for customary law, the court would be obliged to investigate the parties' relationship more deeply to discover another basis for deciding what law to apply.

In the second place, a court's decision to apply customary or common law must be in harmony with the supervening value system of the country, the Bill of Rights. Indeed, it can be argued that constitutional norms should now directly enter the choice of law process to determine the selection of an applicable law. For instance, where a plaintiff and defendant's interests diverge on account of an underlying conflict of laws, the court's choice of one or other legal system should be determined by selecting the law that gives best expression to the Bill of Rights. This would be a novel approach in South Africa, where choice of law rules have generally been mechanically applied, without regard to the ultimate result. Because a bill of rights is a transcendent code of norms, however, the conflict of laws should no longer remain value-neutral. Until rules of customary or common law have been amended by court or Parliament to bring them into line with the Bill of Rights, if application of customary law results in unfair discrimination, the common law may (as a temporary measure) be applied in its place.

(i) The nature of the conflict

The conflict problems considered below are conflicts between different systems of *personal law*. This phrase means that the common law and customary law are associated with different cultural traditions, which are applicable to people rather than places. In other words, no matter where litigants happen to be, they remain subject to either customary or common law.

Given South Africa's political history, the criterion for deeming a person subject to customary law was race. Hence, it was usually assumed that common law should be ascribed to whites and customary law to blacks. Latterly, however, this assumption was corrected, and, consonant with developments elsewhere in Africa, an individual's personal law came to be regarded as a matter of cultural affiliation. No community is so culturally homogeneous that only one system of law can express the attitudes and life styles of all its members. None the less, once the separate identity of customary and common law is recognised, it follows logically that they must be attributable to separate communities - a heavy-handed but inevitable solution to an infinitely complex social phenomenon.

A conflict of personal laws may arise in two situations: if parties to the case are normally subject to different personal laws, one to common law and the other to customary law, or, if the nature of their relationship requires application of a law other than their personal law.

(ii) *Parties may select the law to be applied*

Previous courts had little to guide them in choice of law. As we have seen, s 11(1) of the Black Administration Act simply gave the commissioners' courts a discretion to apply customary law. None the less, during the sixty years of their existence, these courts developed a set of principles that provide a useful foundation on which to develop more precise choice of law rules.

The major principle, although one that was usually only implicit in the courts' judgements, was a sense of appropriateness or reasonableness.⁸⁷ What determined that sense of appropriateness was the court's objective assessment of all the circumstances of a particular case.⁸⁸ What would a reasonable person, given these circumstances, have deemed the most suitable law?

The courts also took a more subjective approach, which entailed deference to the expectations of the parties themselves; and a sense of reasonableness would dictate that the parties' views should direct a court's decision. If they had concluded an express agreement that a particular law should apply to their relationship, then the court need only enforce the agreement. Such forms of 'conflict planning' are usually welcomed, because they remove much of the uncertainty about what law will govern an action, and, as indicated above, statutory choice of law rules in at least two African countries feature agreements between the parties.⁸⁹

⁸⁷ Bennett, T. 1985: pp 105-6

⁸⁸ Which is apparent in the Appellate Division's decision in *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A).

⁸⁹ See s 6(1) Rule 2 of Botswana's Common Law and Customary Law Act Cap 16:01 and s 3(1)(a)(i) of Zimbabwe's Customary Law and Local Courts Act Cap 7:05.

Parties should obviously not be free to adopt a law that might defeat rights acquired by a third person⁹⁰ or might in any way prejudice the broader interests of justice. Moreover, if the Bill of Rights is applied horizontally, then any rule of customary law that is inconsistent with the Bill will no longer be valid, and so cannot be chosen by the parties. Apart from these caveats, however, there seems to be no convincing reason why litigants should not be free to select a law, which happens to be convenient for their purposes.

After all, persons subject to customary law may apply for exemption from it and they have always been free to use the forms and institutions of the common law, such as wills and contracts. An even more important justification for party autonomy is the constitutional rule that individuals are free to participate in a culture of choice.⁹¹

Reference to an implied intent may account for a large number of cases (probably the majority), where no one questions choice of law. In practice, it may be apparent from the face of a plaintiff's summons (namely, the nature of a remedy or the type or quantum of damages sought) that a particular legal system had been contemplated as the basis of a claim⁹². If the defendant does nothing to contest this choice of law, the court may infer acquiescence in the plaintiff's selection.⁹³ If the defendant contests the plaintiff's choice of law, as it appears in the pleadings, the court may determine whether the parties had considered application of a particular law at an earlier stage of their dealings. This inquiry will entail an assessment of the words and deeds out of which the claim arose.

In cases heard by the former Black Appeal Courts and in statutory choice of law rules prescribed elsewhere in Africa, choice of law was often inferred from the nature of a transaction on which a suit was based. Transactions associated with African customary law,

⁹⁰ In Botswana s 6(1) Rule 1 of the Common Law and Customary Law Act Cap 16:01 provides that: 'Where two persons have the same personal law one of them cannot, by dealing in a manner regulated by some other law with property in which the other has a present or expectant interest, alter or affect that interest to an extent which would not in the circumstances be open to him under his personal law.'

⁹¹ Sections 30 and 31 of the Constitution.

⁹² See, for instance, *Mbaza v Tshewula NO* 1947 NAC (C&O) 72.

⁹³ That the courts have consciously inferred consent is evident in cases where the principle of estoppel was invoked. Where plaintiffs had relied on a particular system of law to bring a claim, they were precluded from objecting to the defendants' use of defences under the same system: *Warosi v Zotimba* 1942 NAC (C&O) 55 at 57. Conversely, where a defendant had raised a defence known to only one system of law, he was estopped from objecting to the plaintiff relying on the same system: *Goba v Mtwalo* 1932 NAC (N&T) 58.

such as bridewealth and loans of cattle, were deemed to point to application of customary law. Conversely, the commercial contracts typical of the common law suggested application of common law.⁹⁴

Where a transaction was known to both systems of law, the parties' use of a form peculiar to one was sometimes taken as an implicit intention to abide by that law. In the case of marriage and wills, for instance, reference to culturally marked forms has been especially important.⁹⁵ Where the parties had married in church or in a civil registry office, the form of the ceremony was taken to imply the applicability of common law to issues associated with the marriage. Similarly, if someone wanting to dispose of property on death were to draw up a document and have it duly signed and witnessed, the document would be treated as a will, with the result that its validity, terms and interpretation could be governed by the common law.

(iii) *Subject matter and environment of a transaction*

Where a transaction (or juristic act) was not culturally marked in any way, courts have delved deeper into the circumstances in which it occurred in order to discover a general cultural orientation. Thus the purpose of a transaction, the place where it was entered into and its subject matter have all been used as indications of the law to be applied.⁹⁶

(iv) *The litigants' cultural orientation*

Many suits, notably those arising out of delicts or family relationships, do not involve transactions. In these cases, the parties' adherence to a particular cultural tradition has provided the basis for choosing an applicable law. People who observed the habits and customs of an African tradition were deemed subject to customary law, while those who had become acculturated to the 'western' tradition were deemed subject to the common law.⁹⁷

⁹⁴ *Dhlamini v Nhlapo* 1942 NAC (N&T) 62 and *Maholo v Mate* 1945 NAC (C&O) 63.

⁹⁵ Section 6(1) Rule 2 of Botswana's Common Law and Customary Law Act Cap 16:01 makes express provision for the form of marriage.

⁹⁶ See *Mhlongo* 1937 NAC (N&T) 125 and *Sawintshi v Magidela* 1944 NAC (C&O) 47, and, further, *Mpikakane v Kunene* 1940 NAC (N&T) 10 and *Warosi v Zotimba* 1942 NAC (C&O) 55.

⁹⁷ See *Tumana v Smayile & another* 1 NAC 207 (1908), *Mboniswa v Gasa & another* 1 NAC 264 (1909), *Ntsabelle v Poolo* 1930 NAC (N&T) 13, *Monaheng v Konupi* 1930 NAC (N&T) 89, *Nzalo v Maseko* 1931 NAC (N&T) 41, *Ramothata v Makhothe* 1934 NAC (N&T) 74 at 76-7, *Magadla v Hams* 1936 NAC

In most of the cases heard in South Africa, it so happened that both litigants adhered to the same culture. By and large, the courts were spared the classic conflict of laws situation - where a plaintiff followed one cultural tradition and the defendant another - because South Africa's policy of segregation ensured that whites had minimal contact with blacks. Since the removal of apartheid, however, it is far more likely that people from different cultural backgrounds will interact and litigate. The only viable approach to solving such conflicts would be to refer to the parties' expectations, which could be deduced from underlying transactions, and to such other factors as the general environment of the claim. From a grouping of these factors a prevailing law must be determined.⁹⁸

(v) Exemption from customary law

Under s 31 of the Black Administration Act, Africans who were deemed to be sufficiently acculturated to a 'western' culture could apply for exemption from customary law. The power to grant exemption was vested in the State President.

This procedure originated in the Natal policy of encouraging Africans to co-operate with the colonial mission to 'civilise' subject peoples. In the context of the 1996 Constitution, exemption finds a more acceptable justification in the principle that every person should be free to pursue a culture of choice, which implies that people may not be involuntarily bound by a system of personal law. Another purely technical justification can be found in the certainty exemption brings to status: an individual can unequivocally declare in advance of any litigation a change in personal law.

The effect of exemption, however, was never entirely clear. Although the courts were prepared to apply common law to an exempted person in matters of personal status, they would not grant immunity from racist legislation.⁹⁹ The courts also held that exempted persons remained

(C&O) 56, *Lebona v Ramokone* 1946 NAC (C&O) 14, *Sibanda v Sitole* 1951 NAC 347 (NE), *Mbuli v Mehlomakulu* 1961 NAC 68 (S) and *Mvubu v Chiliza* 1972 BAC 66 (NE) at 69.

⁹⁸ Bennett, 1985 p.110

⁹⁹ Hence, *Mahludi v Rex* (1905) 26 NLR 298 at 315 and *Mdhlalose v Mabaso* 1931 NAC (N&T) 24 held that Africans remained subject to the jurisdiction of commissioners' courts.

bound by customary obligations incurred before being released from customary law.¹⁰⁰ From these decisions it is apparent that exemption did not function as a complete change of legal regime. Rather, it seemed to indicate an express choice of law, and hence only one factor that could be taken into account in deciding the applicable law.

In any event, very few people ever applied for exemption. This is hardly surprising, for the procedure has strong connotations of racism and paternalism. (Whites, for instance, could not exempt themselves from common law, indicating the clear bias against customary law.)

(vi) *Unifying choice of law*

Once a court had decided which law to apply to a claim, the tendency was to subject all aspects of the action to the same legal system. The largely unconscious assumption that subsidiary questions, such as defences, quantification of damages and capacity, should be governed by the law applicable to the main claim had the positive effect of unifying, and thereby simplifying, choice of law.

Special rules were promulgated in the Black Administration Act to unify choice of law with regard to locus standi in judicio and contractual capacity. Section 11(3) provides that:

The capacity of a Black person to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Black, be determined as if he were a European; Provided that -

- (a) If the existence or extent of any right held or alleged to be held by a Black or of any obligation resting or alleged to be resting upon a Black depends upon or is governed by any Black law (whether codified or uncodified) the capacity of the Black concerned in relation to any matter affecting that right or obligation shall be determined according to the said Black law;
- (b) A Black woman (excluding a Black woman who permanently resides in the province of Natal) who is a partner in a customary union and who is living with her husband shall be deemed to be a minor and her husband shall be deemed to be her guardian.

This section provides that, if a right or obligation arises out of a common-law transaction, then the capacity to enter that transaction and the capacity to sue or be sued upon it must be tested by the same law. Before questions of capacity can be considered, however, a court must decide whether the main claim is subject to customary or common law. This determination involves a

¹⁰⁰ *Kaula v Mtimkulu & another* 1938 NAC (N&T) 68 and *Ngcobo v Dhlamini* 1943 NAC (N&T) 13. Cf *Miya v Nene* 1947 NAC (N&T) 3.

somewhat illogical procedure of hearing all the evidence and arguments about the main claim before settling preliminary issues.

4. Recommendations of the South African Law Commission with Regard to the Application of Customary Law

Application of customary law should remain a matter of judicial discretion, but more exact guides to choice of law are needed to bring certainty to an issue that is currently vague and confused.¹⁰¹ These guides have to be both precise and flexible enough to accommodate the great variety of factual problems likely to arise. They should also be simple and in keeping with the way in which courts have been used to solving conflict of laws problems.

In the first instance, it should be made clear that the residual power to decide which law to apply lies with the court, not with the parties. In the second place, parties should be free to choose the applicable law, provided that their choice does not infringe rights acquired by others. If no express choice is made (and it must be appreciated that in practice litigants seldom make an express choice of law), then, the court should be free to infer a choice, which suggests that an implied agreement may be attributed to the parties. (The notion of implied agreement is already an established principle in private international law rules governing choice of law for contracts both in South Africa and New Zealand). Any sense of unease about allowing parties freedom to apply customary law to their relationship and thereby evade the Bill of Rights or principles of public policy may be laid to rest, since the courts have always had a residual power to refuse to give effect to contracts infringing public policy and the Bill of Rights. In any event, the discretion to apply customary law rests ultimately with the courts, not with the parties.

Through either the subjective concept of implied choice or the objective concept of reasonable expectation, courts are given appropriate grounds for delving deeper into the parties' relationship in order to discover a prevailing law. A list should be provided of typical factors that could assist in what may be a complex inquiry. This list could include: the nature, form

and purpose of a prior transaction, the place where a cause of action arose, the parties' life styles (and hence cultural orientation) and their understanding of the relevant laws. While the nature and form of a particular transaction might prove especially significant, no one factor on its own should be regarded as decisive in indicating the applicable law. Rather, all of them should be considered in combination, so that the legal system with which the case has its closest connection may be ascertained.¹⁰²

Further choice of law rules about issues ancillary to the main claim (ie, damages, defences, capacity, etc) need not be specified. The courts have evolved a consistent, and evidently satisfactory way of dealing with these questions. Similarly, no mention need be made of the role of the Constitution in choice of law, for this is a matter where exercise of judicial discretion is required.

Once a uniform age of majority becomes applicable to all persons in South Africa, the reason for s 11(3) of the Black Administration Act will disappear and the section may be repealed.

Although the exemption procedure contained in the Black Administration Act could perform a useful function by circumventing the need to discover a litigant's personal law, it seems to have played no useful role in the past. Moreover, because the procedure is so closely identified with colonialism and apartheid, it can have no place in a reformed South African legal system.

5. Specific Recommendation of the Report on Conflict of Laws

The RCL focused on specific areas of the conflict between received and customary law and had the following is summary of their recommendations.

¹⁰¹ Principles elaborated by previous courts and statutory choice of law rules from certain African states (notably s 3 of Zimbabwe's Customary Law and Local Courts Act Cap 7:05 and s 6 of Botswana's Common Law and Customary Law Act Cap 16:01) provide useful models.

¹⁰² Bennett, 1985 p.108

(i) *Repugnancy Proviso*

Problems:

[The repugnancy proviso is] a clear reflection of the ethnocentric bias in South Africa's legal system. [It] is unsatisfactory for other, technical reasons. In the first place, its scope of application is vague, for it is uncertain whether customary rules should be considered in abstract or in the context of particular facts or whether the clause should be used as a choice of law rule to avoid hard cases. In the second place, the clause can be used to subject customary law to the Constitution.¹⁰³

Since the colonial administration of Natal first took cognisance of customary law in the mid-nineteenth century, recognition formulae have always contained a so-called 'repugnancy proviso'. Although colonial authorities both here and elsewhere in Africa were prepared to tolerate customary law, they would not enforce rules that might offend European standards of morality and justice. South Africa's current statute on recognition continued this tradition. Section 1(1) of the Law of Evidence Amendment Act declared that courts may take judicial notice of customary law, 'Provided that [it] shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles ...'..

It is somewhat surprising to find that, even in the colonial period, courts have seldom invoked this clause; and for the last thirty years they have scarcely mentioned it. On the face of it, then, the repugnancy proviso appears to be an anachronism. Nevertheless, it could gain a new lease of life in the hands of a judiciary determined to promote human rights, for the terms 'natural justice' and 'public policy' could be read as co-extensive with the Bill of Rights. The courts would then have a pretext for subordinating customary law to the Constitution without having to engage in the difficult debate about whether to extend the Bill of Rights to private relationships or whether to allow rights to be limited by rules of customary law.

Recommendations

The repugnancy proviso is an unwelcome reminder of the superior role enjoyed by the common law in South Africa's legal system. The proviso no longer has a useful role to play, and it should therefore be repealed.

¹⁰³ South African Law Commission *Report on Conflict of Laws* (Pretoria: SA Law Commission, 1999) p.39

(ii) *Competence of the Courts to Apply Customary and Common Law*

Problem

All courts in South Africa are competent to apply customary law. Under s 12(1) of the Black Administration Act, however, courts of traditional authorities only have jurisdiction 'to hear and determine *civil* claims arising out of Black law and custom' brought before them 'by Blacks against Blacks resident within [their] area of jurisdiction'. Thus, in civil suits, these courts have no competence to apply common law. Under s 20(1)(a) of the Act, on the other hand, traditional leaders may try certain offences at either common or customary law, provided the accused was Black or the offence was suffered by a Black.

Under s 1(1) of the Law of Evidence Amendment Act and s 211(3) of the Constitution, all courts in South Africa are competent to apply customary law. Section 12(1) of the Black Administration Act, however, continues a restriction that was imposed on courts of traditional authorities in colonial times: in civil suits they could not apply common law. In criminal cases, on the other hand, traditional courts are competent to apply both common and customary law.

Three questions arise here: first, whether traditional courts should be entitled to apply common law in civil cases; secondly, whether traditional leaders should continue to apply customary criminal law; and, thirdly, whether customary criminal law should be given wider recognition in other courts.

Recommendation

Not only should race be irrelevant as a criterion for applying customary law but it should also be irrelevant for determining the jurisdiction of traditional courts. Hence, s 12(1) of the Black Administration Act must be amended to delete any reference to 'Blacks'. For the same reasons, it would seem advisable to amend s 20 of the Act. For purposes of trying criminal cases, therefore, residence of an offender or commission of an offence within a court's area of jurisdiction would be a more acceptable ground of jurisdiction (for the sovereignty implicit in traditional rule would entail the power to sanction wrongdoing).

The current limitation on the traditional courts' powers of jurisdiction to apply only customary law in civil matters should be retained. This restriction helps to preserve the special character

of the courts as informal tribunals dispensing justice according to the precepts of customary law.

No attempt should be made to extend the application of customary criminal law to other courts. Criminal justice is an area where the country needs a unified system of law. On the other hand, because no objections have been raised to the competence of traditional courts to apply both common and customary law in criminal suits, their jurisdiction in this regard should be preserved.

(iii) Marriage

Problem:

Since colonial times, Christian marriage has been taken as a sign not only of religious commitment but also as an indication that the spouses decided to follow a westernised way of life. This assumption had a direct bearing on what law was chosen to govern the marital relationship: the form of marriage was deemed to indicate the spouses' intention that their rights and duties *inter se* and their relations with their children should be governed by common law.

In South Africa, if an African couple contracted a marriage according to civil or Christian rites, the form of the marriage would dictate application of the common law to most of the consequences of their union. Nevertheless, because the spouses' personal law was customary, certain aspects of their relationship, such as the devolution of an estate on the death of one of the parties, continued to be governed by that system.

Many difficult conflict of laws problems were generated by the possibility of both customary and common law being applied to civil/Christian marriages. These conflicts presupposed the co-existence of different laws. If the South African Law Commission's proposals in its *Report on Customary Marriages* for a common code of marriage law are accepted, however, the conflicts will disappear, because whatever form of marriage a couple may contract the consequences will be the same.

Certain differences may none the less persist. The potentially polygamous nature of customary marriages (as opposed to the monogamous nature of civil or Christian marriages) is the most notable instance. Differences will also feature in matters ancillary to the marriage, namely, lobolo and engagement agreements and actions involving third parties.

According to the *Report on Customary Marriages*, although a lobolo agreement may no longer be an essential requirement for a valid marriage, it is still a legally enforceable contract. When promised in conjunction with customary marriages, customary principles would obviously govern the terms and conditions of the agreement. When lobolo is linked to a civil or Christian marriage, however, the choice of law is not as obvious. Should the common law govern it?

Furthermore, the Law Commission's proposals to integrate customary and common law make no mention of engagement agreements and only passing mention of delicts involving third parties. Because rules from the two legal systems on these issues differ markedly, conflicts of law are bound to arise, and again the question is whether common or customary law should apply.

As will become apparent below, there is now an established body of precedent to govern most of these questions. Hence the main issue to be considered here is whether choice of law for lobolo agreements and other issues associated with marriage should now be legislatively regulated or whether matters should be left to the courts' discretion.

Recommendation

Wherever marriage law permits differences between customary and common law, conflict problems will arise. Special statutory choice of law rules to regulate these conflicts would be undesirable, however, since existing case law indicates that the issues are too complex to permit legislative solutions. Accordingly, the topic is best left to the courts to deal with on a case-by-case basis. Although the courts' decisions have tended to be unduly influenced by the form of marriage, choice of law should in principle be directed by the general principles described above for solving conflicts between common and customary law.

(iv) *Wills*

Problem

The first issue to consider in matters of succession is whether people subject to customary law may disregard their personal law by making wills. In view of the destructive effect that freedom of testation may have on a family's material security and social cohesion, many African countries restricted this power to persons subject to common law. The question has never been seriously debated in South Africa, where it has always been assumed that anyone may make a will.

The common law used to allow all people complete freedom of testation, ie the power to transmit their property by will to whomever they chose. This unrestricted freedom was based on an 'absolute' notion of ownership: that owners of property had a full and exclusive power to dispose of their possessions in any way they wanted. Although a will disinheriting the testator's spouse and other intestate heirs could seriously prejudice the material security of surviving members of the family, complete freedom of testation persisted until legislative intervention in 1990. Customary law, by contrast, allowed only intestate succession. According to predetermined rules certain members of the family succeeded to a deceased's property and status on the holder's death. That people were not at liberty to ignore these rules was due in part to the absence of any concept of individual ownership in productive resources (mainly land and cattle).

In such property personal interests were subordinate to those of the family.

An issue fundamental to choice of law in succession is whether individuals subject to customary law may disregard their personal law by making wills. In South Africa, it has always been assumed that people are free to make use of any of the institutions of common law, in particular, of course, commercial contracts. Unlike a contract, however, which creates a new legal relationship, a will has the potential of violating existing relationships, namely, the interests of intestate heirs. In fact, wills may seriously upset the integrity of a surviving family.

Section 23 of the Black Administration Act restricted freedom of testation for Africans in two respects. It provided that movable house property and land held under quitrent tenure was to

devolve under the customary law of intestate succession. The question now posed is whether these provisions serve any useful social purpose and whether they rest on a sound legal basis.

Recommendations

The general question of freedom of testation was not comprehensively answered in the RCL, because the issues must be more fully canvassed with reference to broader policies governing succession and land tenure.

If freedom of testation is to be supported, however, there seems no sense in continuing to exempt the category of house property. Section 23(1) of the Black Administration Act should be amended to provide that only the testator's *personal* interests in property may be disposed of by will. Such a provision would solve the confusion inherent in permitting bequests of family property.

While more specific regulations may be necessary to govern the disposition of land by will, any reforms in this regard must defer to policies adopted by the Department of Land Affairs. In the interim, the current regulations on land held under quitrent tenure should be amended to remove elements of gender discrimination.

An express legislative provision to permit guardianship clauses in wills is unnecessary, if recommendations made by the Law Commission in its *Report on Customary Marriage* are accepted.

(v) Intestate Succession

Problem

Specific rules regarding application of customary law in cases of succession and civil or Christian marriages are contained in the Black Administration Act 38 of 1927 and in obscure and confusingly worded regulations passed under it. These provisions (most dating from 1927) did little more than repeat nineteenth and early twentieth-century enactments from Transkei and Natal, and nearly all are now obsolete. What is more, because the only criterion for applying customary law is race, they are unacceptably discriminatory.

A general code of succession law would obviously be desirable in South Africa, not only in order to update and reform the customary law of succession but also to bring it into line with the Bill of Rights. The Law Commission has in fact published an Issue Paper on this subject.

Compiling such a code obviously involves difficult policy decisions regarding the present rules of both customary and common law on intestate succession, how these rules are to be reconciled and to what extent they comply with the Bill of Rights. Until a new and integrated law is achieved, conflicts between common and customary law will persist and the need will remain for suitable choice of law rules.

As in other cases of conflicts between customary and common law, what law to be applied to a matter of intestate succession must in the final analysis depend upon the deceased's cultural affiliation. The current statutory choice of law rules take the form of a deceased's marriage together with his or her matrimonial property regime as invariable indicators of cultural affiliation. Hence, if someone had married by civil or Christian rites and in addition had entered into a prenuptial contract (or had otherwise ensured that the marriage was in community of property), the common law will apply to devolution of his or her estate.

The assumption underlying these indicators was that the form of the marriage and the property regime were culturally marked. Thus, by using these forms, an individual was presumed to have tacitly intended to be bound by the law with which they are associated. While reliance on form injects a high degree of certainty into the choice of law process, it has the disadvantage of oversimplifying issues. In other words, the form of a juristic act is not an infallible guide to an individual's actual expectations. Many people who marry by Christian rites have no intention of living according to the common law. Furthermore, whatever justification the choice of law rule may find in a deceased's presumed intention, it seems arbitrary in relation to the spouses' children and family, who had nothing to do with the decision to marry according to particular rites.

Recommendations

As indicated earlier, if a common code of succession is to be adopted, conflict problems will disappear. In fact, a good reason for embarking on a reform of the law would be to clear up the many contradictions, unresolved problems and ambiguities which bedevil the present medley of choice of law rules contained in the Black Administration Act and the regulations issued under it.

It should be noted that improvements in choice of law will do nothing to alleviate social problems unless attention is also given to the substantive law in both succession and marriage. The position of widows under customary law needs urgent attention. But, if widows are to benefit from a new rule entitling them to inherit from their husbands, women must be given full proprietary capacity. Similarly, if persons subject to customary law are to benefit from a statutory reform such as the Maintenance of Surviving Spouses Act, customary marriages must be given full recognition on a par with civil and Christian marriages.

The following changes are recommended for the current choice of law rules. The special rule for foreigners in reg 2(a) should be deleted. Its removal from the statute book will have the effect of subjecting the devolution of estates owned by foreign domiciliaries to the ordinary rules of private international law.

If the proposal to abolish the exemption procedure is accepted, then reg 2(b) should also be deleted. If the exemption procedure is to be retained, the regulation should be amended by replacing the term 'Code of Zulu Law' with 'customary law' and by replacing the phrase 'as if he had been a European' with 'according to the common law'.

If a common code of succession law is not accepted within the foreseeable future, then choice of law rules must be provided to regulate application of customary law to intestate estates. The form of marriage is a useful indication of the appropriate law, but it must be subject to a qualification aimed at discovering the deceased's actual cultural orientation.

Once exceptions to the basic choice of law (based on the form of marriage) have been admitted, the present regulation allowing an appeal to the Minister must be repealed, since the courts, not the executive should control the choice of law process.

The legislature's laudable attempt to protect so-called 'discarded' wives of marriages contracted before 1988 is more likely to do harm than good. If a customary widow's rights are to be protected, innocent parties, namely, the civil-law wife and children are inevitably prejudiced. To make the best of a bad situation - and it should be noted that a minimal number of women are now affected by this provision - it is preferable to abandon the customary marriage. For all legal purposes the union was extinguished (and may in reality have been terminated many years previously) in favour of the second marriage. This approach would involve repealing 22(7) of the Black Administration Act.

The position of people who die partially testate and partially intestate should be clarified. The ambiguously worded s 23(9) of the Black Administration Act should be amended to provide that devolution of the intestate portion of the testator's estate should be governed by customary law, unless the testator intended the common law to apply

(vi) *Conflict between Different Systems of Customary Law.*

Problem: Because South Africa does not have a single, unified system of customary law, the courts may have to decide which of two or more different systems of customary law apply to the facts of any given case.

Section 1(3) of the Law of Evidence Amendment Act lays down choice of law rules for courts presented with conflicts between different systems of customary law.

In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.

Although not clearly stated, this section suggests a hierarchy of choice of law rules. In the first instance, courts are directed to apply whatever law was agreed upon by the parties. Because the section does not stipulate an express agreement, courts would be free to impute a tacit or implied agreement, and to do so they might refer to the parties' prior conduct, the nature or form of a transaction and the parties' cultural orientation.

Recommendations:

The many problems associated with s 1(3) of the Law of Evidence Amendment Act can be resolved only by repealing and replacing it with a new section. For conflicts between domestic systems of customary law, the choice of law rules need to be simplified, preference for the defendant's law removed and reference to 'tribal' law deleted.

New legislation should recognise the litigants' freedom to choose the law that best suits their purposes. Hence, they should be entitled to agree expressly on the applicable law, or, failing an express agreement, the courts should be directed to impute an implicit agreement to the parties based on their previous dealings with one another.

In the absence of any form of agreement, the courts should apply the law with which the case has its closest connection. (The criteria for determining 'close connection' will in fact be similar to those used for selecting domestic systems of common or customary law.) Causes of action involving land and succession may conveniently be referred to the law of the place where the land is situated and the deceased's personal law, respectively.

(vii) *Proof and Ascertainment of Customary Law*

Problem:

Rules of customary law are subject to constant and (from the point of view of most courts) imperceptible change, a characteristic inherent in any law derived from social practice. It follows that, if the courts are to administer an authentic version of customary law, they must be prepared to take account of shifts in behaviour and attitude. However, a court's knowledge of customary law is bound to be second-hand, a consequence of the fact that, apart from tribunals of traditional authorities, courts are socially distanced from the communities they serve.

All courts are presumed to know the law they apply. This presumption derives from the nature of western systems of law, for the sources of those systems are written and are dependent for their validity on formal legal tests. Customary law is different. Not only was it originally unwritten but also its validity must always be tested against actual observance in society.

Given its source in social practice, courts cannot reasonably be presumed to know customary law. It bears a close resemblance to the common-law custom, and for judicial purposes custom is treated as fact rather than law. The Law of Evidence Amendment Act, however, allows the courts to take judicial notice of customary law, which implies that customary law is either law (and thus ascertainable in authoritative texts) or a fact so notorious that everyone is aware of it.

As far as courts of traditional rulers are concerned, the rule of judicial notice is a sound one, because the presiding officers have a constant and immediate involvement in the affairs of their communities. Tribunals of the western type, however, such as magistrates' courts and the High Court, are socially detached from the society they serve. They cannot possibly be aware of the customary rules being observed in all the communities of South Africa at any particular time. Admittedly, texts are available on customary law, but, as we shall see below, their accuracy and authority has on several grounds been contested by modern scholars.

The following questions therefore arise: how can courts ascertain customary law when the system is not reliably documented (if it is documented at all) and how are courts to keep abreast of changes in the law?

Recommendations: Since customary law has constitutional recognition on a par with Roman-Dutch law, it is correct that all courts in the country may take judicial notice of it. Because customary law rests on social practice, however, the courts (especially magistrates' courts and the High Court) cannot assume that current written versions of the law are a reliable expression of valid rules. It is not feasible, however, to restate South Africa's customary legal systems, and so existing methods of ascertaining custom must remain. In light of the courts' general lack of expertise in customary law and the difficulty of proving new rules, the practice of calling assessors should be re-introduced. While a court should have the power to call for the assistance of any expert in customary law, care should be taken that assessors are selected from a more representative sample of people in affected communities.

V. CONCLUDING THOUGHTS

In order to realise the vision of socially inclusive laws and political and legal institutions in Aotearoa/ New Zealand, which actualise the relationship explicit and implicit in the Treaty of Waitangi, Maori customary law needs to play a more significant role.

1. Hybrid Codes

In order to achieve a more significant role for Maori customary law Aotearoa/New Zealand may unify customary and common law to form hybrid codes or merely to integrate certain topics, such as succession. This results in a single code of rules, and therefore the court has only one law to apply. However appealing this option may seem, it has proven to be difficult to implement. Although it is tempting to look for a direct relationship between Customary and western legal concepts, Metge points out that customary concepts hardly ever correspond exactly to those western concepts, which they may appear to resemble on the surface. While there is a degree of overlap there are usually divergences as well.¹⁰⁴ These divergences are in some areas so great that reconciliation is at times impossible. It appears from this and other case studies undertaken for the Laws and Institutions for Aotearoa/New Zealand project, that hybrid codes may be a workable solution in certain areas of law but that complete hybridisation of the law results in the subordination of one of the codes. For example Ivory Coast and Ethiopia have blended two very different legal systems into a synthetic code; however this has been largely at the expense of customary law, in favour of received civil law.¹⁰⁵

2. Dual/Plural Systems

In most of Africa, customary law of the indigenous people was retained in some form especially in terms of civil law. Customary and common law operate as independent legal regimes.

¹⁰⁴ Joan Metge, "Commentary on Judge Durie's Custom Law," (1995) . Part1, 2.

¹⁰⁵ South African Law Commission *Report on Conflict of Laws* 1999 p 16.

In the South African model of a pluralist legal system serious criminal offences are dealt with under one legal code. It appears criminal justice is an area where the country needs a unified system of law, while application of sentence may differ according to culture. Customary criminal law may be able to be applied in community based traditional courts/tribunals, but this would be only in minor matters, as once the case enters the formal court system the unified system (which in the case of Aotearoa/New Zealand may contain kaupapa Maori aspects) would apply to all equally, regardless of cultural affiliation.

3. Constitutional Recognition

The recognition of customary law as part of the law of the country on par with received law has been constitutionally recognised in the 1996 South African Constitution. While South Africa has made great progress, they are still attempting to realise the reality of such a pluralist relationship. It needs to be noted that the progress made to date has not solved all the social and institutional inequities in the country. Constitutional and legislative developments need to go hand and hand with other social and institutional improvements.

While New Zealand does not at present have a single written constitution, this type of recognition could be incorporated into the Constitution Act or the Bill of Rights Act. A similar process to ss 6,7 of the Bill of Rights Act could be included to protect customary law. For example where possible, enactments would be given a meaning consistent with customary law, and any bill introduced to the House of Representatives that appears to be inconsistent with customary law, could be reported on to Parliament by the Attorney General. Aotearoa/New Zealand could of course entrench the statute recognising customary law, but, as the discussion surrounding the Bill of Rights Act shows, this is unlikely to be an option that would be embraced by Parliament or the public.

4. Choice of Laws

In nations where customary law systems are recognised in conjunction with received law these systems should be viewed as overlapping systems. It is in the overlap where these systems share jurisdiction, choice of law becomes an issue. Where differences between the two legal systems persist, legal dualism and the need for choice of law rules will also persist.

The purpose of choice of law rules is to select the law that will do justice in the case. It is the court's power (and responsibility) to decide which law to apply, paying due regard to the parties' interests and their choice of legal system. Hence, although the courts must respect the parties' interest and their choice of legal system, they must not do so at the expense of the other party, or public policy considerations.

Where the system has a choice of laws the Court's decision to apply customary or common law must be in harmony with the supervening value system of the country- in South Africa the Bill of Rights. It is these areas of shared values that can be expanded to emphasise the similarities (or common ground) between cultures rather than the differences.

In the light of the courts' general lack of expertise in customary law and the difficulty of proving new rules, the court should have the power to call for the assistance of any expert in customary law. Care should be taken that assessors are selected from a representative sample of people in affected communities. Reliable texts should be seen as assistance but not definitive. It is in this area of background texts which the Laws and Institutions for Aotearoa/New Zealand project could make a considerable contribution.

VI. HOW DO WE CHOOSE WHICH LAW TO APPLY?

In areas where two laws apply the criterion for which law is to apply should **not be race**, but rather a matter of cultural affiliation.

The South African Law Commission has suggested that it should be made clear that the residual power to decide which law to apply lies with the court, not with the parties. However parties should be free to choose the applicable law, provided that their choice does not interfere with the rights acquired by others. If no express choice is made (and in practice litigants seldom make an express choice of law), then the court should be free to infer a choice, which uses the notion of implied agreement between the parties. It needs to be remembered that the courts will not allow parties the freedom to choose customary law to evade principles of public policy, or obligations under the Bill of Rights Act, and that the ultimate choice remains with the courts.

Through either the subjective concept of parties' choice or the objective concept of implied reasonable expectation, the courts should be given grounds for delving deeper into the parties' relationship in order to discover a prevailing law. Such inquiries could include: the nature, forms and purpose of a prior transaction, the place where a cause of action arose, the parties' life style (and hence cultural orientation) and their understandings of the relevant laws. While the nature and form of the transaction may prove to be especially relevant, no one factor should be regarded as decisive in indicating the applicable law.

In the context of Aotearoa/New Zealand, if we adopted a system of pluralist laws or processes, and there was a choice of laws in a particular instance, it does not mean that Maori customary law would automatically apply to Maori. For some urban Maori the imposition of Maori customary law or processes could be equally as culturally foreign as imposing Maori customary law on all Pakeha. Conversely there may be circumstances where Maori customary law could be applied to certain Pakeha in order to do justice in the case.

(i) End Word but Not the Last Word

As with other comparative studies undertaken for the Laws and Institutions for Aotearoa/ New Zealand project, South Africa has many interesting and useful lessons for the development of a culturally inclusive legal system. However it needs to be kept in mind that the South African legal system is a product of the country's unique history. While we can incorporate aspects which have worked in other jurisdictions these must be firmly placed in the context of the relationship between Maori and Non-Maori within Aotearoa/New Zealand. The African experience is rich in examples, which will add to and inform the national conversation, which is vital for the evolution of a sustainable culturally inclusive legal and social system, to reflect the creative relationship envisaged by the Treaty of Waitangi. One of the exciting aspects, which the South African example shows, is that a pluralistic legal system or a pluralistic application of a legal system does not entail a dismantling of that legal system, nor segregation, division, or secession.

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AFRICA: CO-EXISTENCE OF CUSTOMARY AND RECEIVED LAW

**Review of the South African Law Commission's Project 90
The Harmonisation of the Common Law and the Indigenous
Law: Report on Conflict of Laws**

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I wish to acknowledge the assistance of Professor Margaret Bedggood for her helpful comments and discussions with Professor Paul Havemann regarding the nature of customary law in Africa.

This paper is dedicated to my father David Rumbles whose strength in the face of serious illness is an inspiration for me.

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I. INTRODUCTION

This paper is in part a summary of the extensive South African Law Commission's *Project 90: The Harmonisation of the Common Law and the Indigenous Law: Report on Conflict of Laws*. This continuing project has been underway since 1996, and can offer many examples, which are useful in exploring the possibilities of a more culturally inclusive legal system for Aotearoa/New Zealand.

This paper highlights the African context in relation to the application of customary law and how conflicts of laws are dealt with in terms of the relationship between received and customary law. Many present African legal systems have applied customary law since the late nineteenth century. These legal systems, which incorporate received and customary law, are not descendants from or adaptations of traditional legal structures but rather products of a colonial past and the creation of recent nation- states.¹

Judges have long been required to apply 'customary law' in deciding certain categories of case. This paper is concerned with this intersection between received and customary law, and the way in which conflicts between the legal systems are dealt with.

The second section of the paper briefly outlines the difficulty of using customary law in modern legal systems. Once customary law is incorporated into a received law system – that law will be moulded to the requirements of the dominant system and the extent of such modification will depend on the resources available to the members of the legal system, both documented and personal in the form of expert advisers.

The next section of the paper summarises the work done by the South African Law Commission on Project 90. The paper does not extrapolate a model from the African experience for Aotearoa/New Zealand, rather it presents the work of the South African Law Commission to allow others to draw what examples they see fit. In this way it is hoped that

¹ Woodman, G *How State Courts Create Customary Law in Ghana and Nigeria* 1987 p.181

the paper may contribute to a national conversation which will inform the development of more culturally inclusive legal and social systems.

Finally the paper presents some thoughts contextualising the African example within the Aotearoa/New Zealand situation.

II. CONFLICTS OF LAWS: AN AFRICAN OVERVIEW

Much of Africa shares a history of legal and judicial segregation. There customary law was deemed applicable only to Africans in civil suits and normally only in particular courts.

Rules restricting the jurisdiction of the courts had the effect of precluding possible conflicts of law. Tribunals run by traditional rulers were responsible for African litigation; the higher courts adjudicated settlers' disputes. By confining African disputes to particular tribunals, conflicts between customary law and the received systems of law seldom arose.²

When conflicts did arise, choice of law was based primarily on the parties' racial status and to a lesser extent on the nature of the cause of action. In francophone colonies the only consideration for applying customary law was the litigants' *statut coutumier*, as opposed to a *statut civil français* (which Africans could achieve by an exemption procedure).³ In effect, race was the exclusive determinant of the applicable law, since no other choice of law rules were provided.⁴

In anglophone Africa, too, race was also the principal factor in choice of law, but customary law was not invariably applied to Africans. One approach was to give the courts a more or less

² Lewin, J, *Studies in Native African Law* (Cape town: African Bookman, 1947). In chapter 9 Lewin commented that British colonial policy regarded questions such as the provision of conflict rules and the equity of the substantive law as relatively less important than the courts and procedure.

³ Salacuse, J W *Introduction to Law in French-speaking Africa* 1969 p.449

⁴ It was generally left to the courts and academic writers to evolve the choice of law rules. See generally Salacuse, J W, *Introduction to Law in French-speaking Africa* (Charlottesville: Michie, 1969).

unfettered discretion as to when customary law should be applied.⁵ Another was to deem customary law applicable in certain prescribed causes of action. In the Gold Coast, for instance, customary law was presumed to apply in matters of marriage, land tenure, the transfer of real and personal property, wills and inheritance.⁶

Independence provided an obvious opportunity to reform the colonial regime. Some states decided against any major change to choice of law rules. Zambia, for example, kept the 'cause of action' approach it had inherited through colonial rule,⁷ and Lesotho the discretionary approach.⁸ Other states undertook a thorough review of their entire legal system. Not all were sympathetic to customary law. Ethiopia and Ivory Coast, for instance, saw it as an obstacle to socio-economic development and national unity, and they therefore eliminated customary law in favour of imported systems of civil law.⁹ These two countries were the exception, however, for most African governments were careful not to depart too far from their indigenous legal orders. Thus, when Senegal and Madagascar decided to reform their systems of family law, they integrated customary law with civil and other local laws into hybrid codes.

Whether the decision was to unify the national law completely (as in Ivory Coast and Ethiopia) or merely to integrate certain topics, such as marriage and succession, the result for conflicts of law was the same. Once legal differences were removed, and everyone in the nation was subject to a single code of rules, there could be no more conflicts, because the courts had only one law to apply. As it happened, few countries attempted more than a codification of succession.¹⁰ For the most part, customary and common law were retained as independent legal regimes.

⁵ This approach was adopted in the East African Protectorate (Kenya), Uganda, South Africa, Bechuanaland, Nyasaland, Somaliland and Tanganyika. See Allott, A N, *New Essays In African Law* (London: Butterworths, 1970)..

⁶ Section 19 of the Supreme Court Ordinance 4 of 1876. This approach was subsequently adopted in Nigeria, Sierra Leone and Northern Rhodesia. See generally Allott, A N, *New Essays In African Law* (London: Butterworths, 1970)..

⁷ Under s 16 of the Subordinate Courts Act Cap 45, customary law is applicable in civil cases between Africans, particularly in matters concerning customary marriage, the tenure and transfer of property, inheritance and testamentary dispositions.

⁸ Section 2 of the General Law Proclamation 1884.

⁹ South African Law Commission *Report on Conflict of Laws* 1999 p.16

¹⁰ For example, the Wills and Inheritance Act 25 of 1967 (Malawi), the Law of Succession Act 1972 (Kenya) and the Intestate Succession Act 91 of 1989 (Zambia). Tanzania ventured further into the codification of marriage by the Law of Marriage Act 5 of 1971.

Where different systems of personal law continued in operation, the question then arose whether customary law should still be confined to the lower courts. Swaziland made little change to the colonial regime: customary law may still be applied only in the Swazi courts and common law in the High Court and magistrates' courts.¹¹ Permitting transfer of cases solves possible injustices that might result from an action being brought in the wrong forum.¹² The Swazi arrangement is no longer the norm in Africa,¹³ however, nor is it in all respects desirable. Although disputes may be adjudicated in tribunals familiar with the litigants' personal law and its associated procedures, plaintiffs are encouraged to 'forum shop', to initiate their cases in the court more likely to give them a favourable decision, and transferring cases that were mistakenly initiated in the wrong forum entails unnecessary costs and delays.¹⁴

African governments usually sought to give customary law a greater prominence in their legal systems by giving all courts power to apply it. Once any court in the land may apply customary law, conflicts of law are bound to arise and choice of law rules become necessary. This need has not always been perceived. Namibia, for example, took no action to replace provisions inherited from the period of South African rule.¹⁵ Hence, although customary law has express recognition in the Constitution¹⁶, there are no rules governing its application. There does not appear to have been any complaints about this lacuna, but this situation should not be viewed as ideal, as both courts and litigants need some guidelines on what law to apply.

In any event, the situation in Namibia is unusual. Most countries in Africa have taken care to specify the circumstances in which customary law should be applied. While doing so, they took the opportunity to cleanse the statute book of the racism that had formerly determined application of customary law. This meant discarding the assumption that only Africans could be subject to customary law. Various new terms were introduced to designate an appropriate

¹¹ Although, the Constitution of 1968 obliges them to apply customary law in certain circumstances (to do mainly with traditional authority).

¹² Thus, s 16 of the Subordinate Courts Act 66 of 1938 allows a magistrate to transfer cases involving only Swazis in which the causes of action are suitable to be heard by customary law to a Swazi court.

¹³ What is more common is a restriction on the jurisdiction of traditional courts which entitles them to apply only customary law. In Zimbabwe, for instance, under s 16(1)(a) of the Customary Law and Local Courts Act Cap 7:05 local courts have no jurisdiction if common law is applicable to a case.

¹⁴ Bennett, *The application of customary law in southern Africa : the conflict of personal laws* 1985 p.92

¹⁵ Section 9(1) of the Native Administration Proc 15 of 1928 - a replica of s 11(1) of the South African Native Administration Act 38 of 1927 - was repealed when s 5 of Act 27 of 1985 abolished commissioners' courts in South West Africa.

¹⁶ Article 66(1) of the 1990 Constitution.

link between a litigant and his or her system of personal law. Sometimes the link was membership of a political or cultural community,¹⁷ sometimes an association with ‘a community in which rules of customary law ... are established’¹⁸ and sometimes simply being ‘subject to’ African customary law.¹⁹

Several states made special provision for application of customary law in situations where one party was not normally subject to it. Zambia, for instance, provided that in these circumstances the courts may apply customary law, provided that no one can claim its benefits if it appears from an express or implied agreement that some other law should apply.²⁰ According to the choice of law rule in Botswana, if a *plaintiff* who is subject to customary law asserts that system, and if the matter should be determined by customary law, then it should be applied.²¹ Tanzania, by contrast, favours the *defendant*: customary law may be applied in any case where ‘it is appropriate that the defendant be treated as a member of the community in which such right or obligation obtained.’²² Neither the Tanzanian nor the Botswana provisions are particularly apt, because allowing a litigant’s role as plaintiff or defendant to dictate the law to be applied is arbitrary²³ (RCL p.18).

In countries that decided to lay down new choice of law rules, two conflicting aims had to be met: giving more detailed guidance while at the same time allowing sufficient flexibility to cater for the peculiarities of individual cases. The Tanzanian solution was to provide a general deeming provision (similar to the earlier colonial legislation) that customary law would be applicable to members of a community governed by it, or in ‘any matter of status of, or succession to, a person who is or was a member of a community in which rules of customary law relevant to the matter are established’.²⁴ Kenya extended this ‘cause of action’ approach

¹⁷ Section 9(1) of the Native Administration Proc 15 of 1928 - a replica of s 11(1) of the South African Native Administration Act 38 of 1927 - was repealed when s 5 of Act 27 of 1985 abolished commissioners’ courts in South West Africa.

¹⁸ As in s 9(1)(a) of Tanzania’s Judicature and Application of Laws Ordinance Cap 537.

¹⁹ Or ‘affected by it’. See s 3(1) of Kenya’s Judicature Act Cap 8.

²⁰ Namely, from the nature of a transaction out of which a cause of action arose. Section 16 of the Subordinate Courts Act Cap 45.

²¹ Section 6(1) Rule 6 of the Common Law and Customary Law Act Cap 16:01.

²² ‘... and it is fitting and just that the matter be dealt with in accordance with customary law’ Section 9(1) of the Judicature and Application of Laws Ordinance Cap 537.

²³ South African Law Commission *Report on Conflict of Laws* 1999 p 18.

²⁴ Section 9(1) of the Judicature and Application of Laws Ordinance Cap 537.

even further.²⁵ Customary law is presumed to apply in cases about: land held under customary tenure; marriage, divorce, maintenance or dowry; seduction, enticement or adultery; matters affecting status, in particular the status of women, widows and children (including guardianship, custody, adoption and legitimacy); succession (both testate and intestate) and administration of estates (except property disposed of by a will made under a written law).²⁶

Rules promulgated in Zimbabwe introduced a significant change of emphasis:²⁷ the parties are free to choose the law they want applied. Hence, '[u]nless the justice of the case' otherwise requires, customary law may apply in civil cases where the parties expressly agreed that it should apply, or, from 'the nature of the case and the surrounding circumstances' it appears either that the parties had agreed or that it is just and proper that customary law should apply.²⁸ The terms 'surrounding circumstances' were defined to include: the parties' mode of life, the subject matter of the case, the parties' understanding of customary and common law or 'the relative closeness of the case and the parties to customary or common law.'²⁹

Post-independence legislation in Botswana was similar. Although customary law was deemed to apply to 'tribesmen' in certain causes of action, parties were allowed freedom to select the applicable law. Hence, the common law could apply in three situations: if the parties expressly agreed that it should (either inter se or with the court); from all relevant circumstances it objectively appeared that the parties intended common law to apply; or the transaction out of which the case arose was unknown to customary law.³⁰ These relatively straightforward provisions were later replaced by far more complex rules. Choice of law is still linked to the form and nature of transactions (or unilateral dispositions), but now special rules have been included to deal with property rights (especially rights to land).³¹

²⁵ Section 3(2) of the Judicature Act Cap 8 provides general authority for all the courts to 'be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as is applicable and is not repugnant to justice and morality or inconsistency with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay'.

²⁶ Magistrates Courts Act 17 of 1967.

²⁷ The post-independence Customary Law and Primary Courts Act 6 of 1981 has been revised and renamed the Customary Law and Local Courts Act Cap 7:05.

²⁸ s.3(1)

²⁹ s3(2)

³⁰ s4 of the Customary Law (Application and Ascertainment) Act 51 of 1969 Act.

³¹ The Common Law and Customary Law Act Cap 16:01 (in the 1987 consolidation).

1. Summary

In summary, it appears that reforms of the newly independent African governments have not always improved on, or indeed changed, the colonial regime. None the less, the following three points emerge from policies adopted in post-colonial Africa. First, conflicts of law become immaterial if a court's power to apply both common and customary law is removed or if legislation overrides personal law by imposing a single code of rules on everyone. Secondly, if race as the criterion for applying customary law is abolished, a problem then arises as to what assumption should govern the applicability of that law. The most viable solution seems to be a reference to a litigant's membership of a community observing customary law.

Thirdly, the 'cause of action' approach avoids any reference to race or culture, but it contains problems of its own. One problem is deciding which system of law should be used to characterise the cause of action, since common and customary law do not necessarily agree on this question. (They may differ, for instance, on whether a claim for breach of promise to marry should be treated as an issue of marriage or delict{breach of the law}).³² Another problem is the rigidity of deeming customary law applicable to a particular set of causes of action. Choice of law must be sufficiently flexible to cater for the great variety of cases that will arise.

The most progressive legislation to have appeared is from Botswana and Zimbabwe.

Statutes in these countries borrowed principles from the more developed discipline of private international law, notably the principle that parties should be free to choose whatever law they wanted.

III. SOME DIFFICULTIES WITH THE USE OF CUSTOMARY LAW IN MODERN LEGAL SYSTEMS

In complying with the requirement to apply customary law judges have frequently declared norms of customary law, which are then followed in subsequent cases. Woodman points out that this is what he calls lawyers' customary law, which is not the same as customary law in a

³² Bennett, 1985 p.103

sociological sense. This is not only the result lawyers misconception of the content of the existing social norms, but is the result of the nature of the legal system. The legal system cannot reproduce the circumstances or context in which the social norms operate and by which they are enforced. The legal system therefore has a creative function: when they appear to be applying customary law they are in reality creating a new a new type of ‘customary law’.³³

The transformation of customary law to lawyers’ customary law is focused by the procedures of the courts. By restricting the forms in which claims may be presented, the types of remedies which, may be awarded, and the modes of enforcing those remedies, the courts have debarred themselves from recognising those substantive rights, which cannot be asserted and enforced by the permitted process.

1. Form of claims, remedies and enforcement

The courts have required claims, remedies and enforcement to be expressed in the categories of the common law. The court cannot prevent an action such as a marriage or sale of land; rather only question the validity of the marriage or sale. Remedies are also generally only available at a late stage of the conflict. Damages for example, can be awarded only when a wrong has been committed and a loss suffered. If the court give a declaratory judgement and if this is disregarded then the plaintiff has to bring a fresh action for one of the other remedies. The mode of enforcement of remedies by the courts carries the power to compel which is likely in some cases to make the norms more absolute in practice than they otherwise would be. Whereas in traditional practice there may be subtle circumstances and norms that induce a successful party to show leniency in or to compromise over the strict adherence of the punishment.³⁴

2. Selection of Norms as legal

The courts cannot recognise all norms as legal, therefore the personnel of the legal system select some to be customary law while the others are relegated (usually tacitly) to the category

³³ Woodman, 1987 p.182

³⁴ Woodman, 1987 p. 184-88

of customary morality. This does not reflect a socially recognised distinction. It has been said that the gaps are so important that what emerges is in effect a newly created body of norms.³⁵

3. Development of New Norms peculiar to the state courts.

A number of rules are so directly concerned with the state court processes that they could not exist outside those processes, but are so related to lawyers' customary law that they are referred to as rules of customary law. An example of this occurs when it has been established that a group has legal personality and so could be a party to a suit. In the state courts it then becomes necessary to have rules determining which individuals might act on behalf of the corporate and the process of consultation between the representatives and the corporate.

4. Explicit Modification of Norms by the Court

In some classes of cases the courts have spoken as if they could have applied customary law, but have declined to do so on specific grounds usually based on statutory authority.

(i) Repugnancy Clause

The so called 'repugnancy clause' provides the court with the power to qualify any application of native law or custom if such an application is repugnant to justice, equality or good conscience.³⁶

³⁵ Woodman, 1987 p. 198

³⁶ See Daniels, W, *The Common Law in West Africa* (London: Butterworths, 1964), for the use of the Repugnancy clause in the Supreme Court Ordinance, 1867 of the Colony of the Gold Coast and Lagos. See also the Discussion of the Repugnancy proviso in the South African Law Commission, "The Harmonisation of the Common Law and Indigenous Law: Conflict of Laws" Discussion Paper 76, (Pretoria, South African Law Commission, April 1998). Section 1(1) of The Law of Evidence Act (SA) declares that customary law may be applied.

“ Provided that [it] shall not be opposed to the principles of public policy or natural justice”

See also Woodman, for various examples of the use of the repugnancy clause in the Courts of Ghana and Nigeria

(ii) *The importation of common-law doctrines*

Common law doctrines are sometimes introduced to customary law because justice is seen to require it. In Ghana and Nigeria the doctrines of Estoppel by Acquiescence and Estoppel by Judicial Decision have been applied and it has been assumed that they must be applied.³⁷

5. Summary

The use of customary law in modern legal systems will always modify the customary legal norms to what Woodman refers to as Lawyers' customary law. The extent of modification will be determined by the resources available to the state Courts, both documented and personal in the form of experts. It is areas of conflict between the systems (however customary law is constructed), which the South African Law Commission's Project 90 deals with.

IV. SOUTH AFRICAN LAW COMMISSION PROJECT 90: THE HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW

In 1996, South Africa's new Constitution formally acknowledged Roman -Dutch law and customary law as the major components of the state's legal system. Customary law comprises the various laws observed by communities indigenous to the country; hence the term 'indigenous law' is also often used in South Africa.

The courts now need to know when they must apply rules from customary or common law, because notwithstanding recognition of customary law as part of the general law of the land, the circumstances in which it is to be applied are still vague. The problem that the report of the South Africa Law Commission Project 90 addresses is known as a *conflict of laws*. Such conflicts arise whenever rules derived from two (or possibly even more) different legal systems are potentially applicable to the same set of facts. *Choice of law rules* are therefore needed to determine which rule to apply.

³⁷ Woodman, 1987 pp. 200-202

Although the conflict of laws may appear a rather academic discipline, it is an essential part of any legal order that is prepared to recognise and enforce two or more different systems of law. 'Choice of law' rules have to deal with everyday legal disputes. To take two examples from many: if a woman were seduced, in customary law her guardian would have an action for damages; in common law, she personally would have the action, but only if she were a virgin at the time of seduction. Under common law debts prescribe if they are not claimed in time; under customary law debts last indefinitely. In both these examples, the conflict of laws indicates which law to apply.

While problems like those above can arise in nearly any part of a legal system, South Africa has very few explicit choice of law rules to solve them. The Black Administration Act³⁸ contains some rules regulating questions of succession, but apart from these the legislature has been silent. The Law of Evidence Amendment Act³⁹ is the main instrument (together with the Constitution) dealing with customary law, but it does no more than oblige the courts to take judicial notice of customary law, which is a rule of recognition rather than of choice of law.

It follows that deciding when to apply customary law has generally been a matter of judicial discretion, with the result that judges have tended to decide each case on its merits. Although this approach may achieve justice in individual cases, it does so at the cost of legal certainty.

Clear and explicit choice of law rules are therefore needed, and they must be placed in a separate enactment devoted to recognition and application of customary law. It is necessary to create separate legislation in order to disentangle choice of law from the two statutes in which it is currently regulated: the Black Administration Act (which has unhappy associations with policies of segregation and apartheid) and the Law of Evidence Amendment Act (which, as the title suggests, is principally concerned with ways of proving foreign and customary systems of law).

³⁸ Section 23 of Act 38 of 1927

³⁹ Section 1 of Act 45 of 1988

1. The Past- Recognition of Customary law in South Africa during the Colonial Period

The current lack of rules governing recognition and application of customary law can be traced to the colonial and apartheid periods of South Africa's legal history. Existing laws have not in substance been changed since 1927, the date when the Black Administration Act was passed. That Act did little more than repeat preceding colonial enactments.⁴⁰

A distinctive policy towards customary law in southern Africa began with Britain's occupation of the Cape in 1806. The new colonial power confirmed the Roman-Dutch law already operating in the Cape as the general law of the land, for that system was deemed to be suitably 'civilised'.⁴¹ No account was taken of indigenous KhoiSan laws, primarily because the people concerned were thought too primitive to have a legal system worthy of respect. In addition, however, KhoiSan social and political institutions were, by the early nineteenth century, fast disintegrating. Without the vigour of a living society to sustain it, there was no system of law to recognise.

In 1828, Ordinance 50 was passed with the aim of 'improving the conditions of Hottentots and other free persons of colour at the Cape' (and ultimately, of course, freeing the slaves). Thereafter, in an argument remarkably similar to that proposed by modern human rights lawyers, the principle of equal treatment was used as a justification for applying only Roman-Dutch law. Application of indigenous law would have subjected a section of the population to an inferior brand of justice. In terms of the same thinking, the Cape administration took no account of existing indigenous laws when Kaffraria was annexed on the eastern borders of the Colony.⁴²

⁴⁰ A general overview of approaches towards recognition of customary law in South Africa can be found in Hahlo & Kahn *South Africa: the Development of its Laws and Constitution I*: 1960 pp 319-34. Government policies are considered in Welsh *Roots of Segregation* 1971, Rogers *Native Administration in the Union of South Africa*: 1948, Brookes *The History of Native Policy in South Africa from 1830 to the Present Day* 1927: chs 9 and 10 and Suttner (1985) 11 *Social Dynamics* 49.

⁴¹ *Wi Parata v Bishop of Wellington* (1887) 3 NZ Jur 72 at 78.

⁴² When Sir George Grey became governor, the policy of non-recognition was given further justification in Britain's drive to convert Africans to Christianity and western notions of 'civilisation'. See Burman *Cape Policies towards African Law in Cape Tribal Territories 1872-1883* ch 2. Although local magistrates discovered

The Cape government had to rethink its approach, however, when it began annexing the Transkeian territories towards the end of the century. This area was geographically remote from centres of power, settler immigration was restricted, and the people of the Transkei had not been completely subjugated.⁴³ In the circumstances, it was simply not feasible to impose Roman-Dutch law on the entire population. Despite these considerations, the colonial conscience balked at unqualified recognition of customary law. Hence the annexation proclamations gave the courts authority to apply customary law only if it was ‘compatible with the general principles of humanity observed throughout the civilised world’.⁴⁴

The Cape’s more considered policy in Transkei owed much to what had been happening in Natal. When Britain annexed the territory in 1843, Roman-Dutch law was again declared the general law of the new colony, but shortly afterwards courts were also allowed to apply customary law in disputes between Africans. This break with established colonial policy was due mainly to Shepstone (the Diplomatic Agent to the Native Tribes and Secretary of Native Affairs). He succeeded in persuading the authorities to co-opt the service of African leaders to the colonial administration,⁴⁵ and with recognition of traditional rulers came recognition of customary law. Again, recognition was subject to the formula that was later to be adopted in Transkei (and throughout Africa, in fact): ‘so far as [customary law] was not repugnant to the general principles of humanity observed throughout the civilised world’.⁴⁶

British rule in Natal left its stamp on customary law in two other respects. The first was an exemption procedure, which originated in complaints that Shepstone’s policy was doing nothing to promote ‘civilisation’ of the Colony. Africans who were considered suitably ‘detrified’ could apply to be subject to the common law.⁴⁷ The second was the Code of Zulu law. In 1869, much of the customary law on marriage and divorce was reduced to

that this policy was untenable in practice, no concessions were made, apart from allowing customary law to be applied in cases of intestate succession under the Native Succession Act 10 (Kaffraria) and 18 (Cape) 1864

⁴³ The annexation decrees claimed that the inhabitants were ‘not sufficiently advanced in civilisation and social progress to be admitted to the full responsibility granted and imposed respectively by the ordinary laws of the Colony’. See Brookes (n5) 108 and Hailey *African Survey* 1938: p 350.

⁴⁴ Section 23 of Procs 110 and 112 of 1879. .

⁴⁵ Under Ord 3 of 1849, traditional rulers were to exercise unspecified judicial functions, subject to the general control of colonial magistrates.

⁴⁶ Ordinance 3 of 1849. See Bennett 1985: pp 79-80.

⁴⁷ Law 11 of 1864, as amended by Law 28 of 1865, allowed such individuals to petition the Governor for exemption, stating particulars of family, property, local chief and so on, and furnishing proof of an ability to read and write.

writing. Six years later, a complete code was drawn up for the guidance of the courts,⁴⁸ and in 1891 an amended version was made binding law.⁴⁹

While the Transvaal recognition formula was akin to Natal's, the Supreme Court of the Republic refused to give effect to customary marriages or bridewealth agreements. Both were regarded as inconsistent with the 'civilised' conscience, the one because it was potentially polygamous and the other because it amounted to the sale of a woman.⁵⁰ By implementing the repungancy proviso in this manner, the Court repudiated two of the most fundamental institutions of African culture. As the court in *Meesadoosa v Links*⁵¹ was eventually to concede,

If the decision of this Court not to recognise marriages contracted according to native custom is to be extended to its logical conclusion ... we might as well sweep overboard all the native customs ... insofar as they affect the status of members of that family ... and the ownership and disposal of property belonging to the different members of the family. The consequence would be that it would strike at the foundation of the custom which prevails among natives as to the family system.

Mention should finally be made of Bechuanaland. In 1885, the southern portion of this territory was constituted a Crown Colony of British Bechuanaland.⁵² Because the region was sparsely populated and had few attractions for white settlers, apart from its strategic importance as a trade route to the interior, Britain did very little to interfere with the Tswana leaders' rule over their peoples.⁵³ Hence, when British Bechuanaland was annexed to the Cape in 1895, no attempt was made to impose the Cape policy of non-recognition of customary law.

What emerges from [an] account of the legal history of southern Africa is that the settlers' grudging recognition of customary law had little to do with a concern for the well-being of the African people. Considered too barbarous and backward to function as a viable legal system, customary law was tolerated in areas of marginal significance to the colonial regime, namely, marriage, succession, delict and land tenure. At no time was recognition regarded as a right inhering in the people to whom it applied. Instead, it was considered a precarious favour bestowed by a conquering power.⁵⁴

⁴⁸ Initially, when published in 1878, the Code was not legally binding in Natal, but by Proc 2 of 1887 it was made law for Zululand.

⁴⁹ Law 19 of 1891

⁵⁰ *R v Mboko* 1910 TPD 445 at 447 and *Kaba v Ntela* 1910 TPD 964 at 969.

⁵¹ 1915 TPD 357 at 361.

⁵² Northern Bechuanaland (now Botswana) became a separate Protectorate.

⁵³ Policy was formally expressed by Proc 2 of 1885, in which traditional rulers were given wide powers of civil and criminal jurisdiction.

⁵⁴ South African Law Commission *Report on Conflict of Laws* 1999: p 9.

(i) *The 1927 Native Administration Act: segregation and apartheid*

When the union of South Africa was established in 1910, the position of customary law differed radically from one part of the country to the other. In the Cape, and for all intents and purposes in the Transvaal too, customary law had no official recognition. In British Bechuanaland, and to a lesser extent in Natal and the Transkeian territories, it was regularly applied subject to the supervision of the higher courts.

Not only were such extreme differences inappropriate to the legal system of a unified state, but also the rules on recognition and application were complex and confused.⁵⁵ The implementation of a new, uniform policy for the whole country was to complement the Union government's doctrine of segregation. At this time, it was apparent that social and political changes in the African population were posing a serious challenge to white rule. Traditional leaders, who formerly had been a constant threat to the colonial enterprise, were fast losing the support of their subjects. Africans now formed a sizeable urban proletariat and they had developed independent political and labour associations. In order to avert a growing threat to white hegemony, the government began to revive traditional institutions in the hope that the energies of an increasingly competitive class of people would be deflected towards a 'tribal' culture.⁵⁶

In 1913, the Natives Land Act laid down a territorial framework for segregation.⁵⁷ Africans were thereafter prohibited from buying or leasing land outside certain 'scheduled' areas.⁵⁸ This Act, the first so-called 'pillar of apartheid', drew a clear division between the white-owned urban areas and farmlands (the seat of all real economic and political power) and the rural reserves (where Africans were supposed to get on with their own destiny).

⁵⁵ The Supreme Court, for instance, called for legislative intervention to bring order to 'this chaotic state of affairs' and to the 'curious jumble' of proclamations and colonial acts. See *Roodt v Lake & others* (1906) 23 SC 561 at 564 and *Sekelini v Sekelini & others* (1904) 21 SC 118 at 124, respectively.

⁵⁶ Bennett, 1985: pp.46-47

⁵⁷ Act 27 of 1913.

⁵⁸ The Native Trust and Land Act 18 of 1936 later released more land for the settlement of Africans. From areas demarcated in the two land Acts, the bantustans (later called the 'homelands' and then 'national states' or 'self-governing territories') developed in the period after 1948.

In 1927, the Native Administration Act was passed.⁵⁹ Although the government's ostensible purpose was to rejuvenate African tradition,⁶⁰ its actual intention was to establish a separate system of justice to match segregation in land and society. Under the Act, a new system of courts was created to hear civil disputes between Africans. Henceforth, approved traditional rulers were given judicial powers with jurisdiction to apply customary law.⁶¹ They exercised civil jurisdiction concurrently with native commissioners' courts, which also heard appeals from courts of traditional leaders. At the top of this hierarchy was the Native Appeal Court. Section 11(1) of the Native Administration Act prescribed conditions under which the commissioners' courts (and their Appeal Court) could apply customary law:

Notwithstanding the provisions of any other law, it shall be in the discretion of commissioners' courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black law applying to such customs except in so far as it [had] been repealed or modified

The new Native Appeal Court construed this discretion as a judicial one, which, if exercised capriciously, arbitrarily or without substantial reason, could be upset on appeal.⁶²

At first, the obscure requirement that a suit or proceeding had to involve 'questions of customs followed by Natives' was taken to mean that customary law could be applied only if it contained a rule appropriate to the facts of the case⁶³ or offered a remedy.⁶⁴ Two Appellate Division decisions later reversed this approach by holding that the existence or absence of remedies was not critical to application of customary law.⁶⁵

With no specific choice of law rules to guide them, the Native Appeal Court inevitably deferred to practices that had been established in the colonial period. The Cape and Orange

⁵⁹ 38 of 1927.

⁶⁰ Thus, when the Minister of Native Affairs introduced the bill, he exhorted Parliament to accept customary marriage, polygamy and bridewealth (Hansard 28 April 1927 col 2918 and 2 May 1927 col 3047), and claimed that neglect of indigenous laws and customs had weakened traditional authority, thereby depriving rulers of their power to restrain the young (Hansard 28 April 1927 col 2907-8 and 2914-18).

⁶¹ Section 12(1) of the Native Administration Act.

⁶² *Umvovo* 1950 NAC 190 (S) and *Mtolo v Poswa* 1950 NAC 253 (S).

⁶³ See *Nzalo v Maseko* 1931 NAC (N&T) 41, *Magadla v Hams* 1936 NAC (C&O) 56 and *Mkize v Mnguni* 1952 NAC 242 (NE).

⁶⁴ See, for example: *Muguboya v Mutato* 1929 NAC (N&T) 73 at 76, *Ntsabelle v Poolo* 1930 NAC (N&T) 13, *Nqanoyi v Njombeni* 1930 NAC (C&O) 13, *Mtolo v Poswa* 1950 NAC 253 (S) and *Sibanda v Sitole* 1951 NAC 347 (NE).

⁶⁵ *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A) at 399 and *Umvovo* 1953 (1) SA 195 (A) at 201.

Free State division of the Appeal Court, for instance, construed its discretion in s 11(1) to mean that customary law was applicable only in matters ‘peculiar to Native Customs falling outside the principles of Roman-Dutch law’.⁶⁶ In other words, the courts’ general duty was to apply common law; they could take cognisance of customary law only by way of exception. The Natal and Transvaal division took the opposite view: that customary law was primarily applicable and common law could be applied only in exceptional cases.⁶⁷

This impasse was finally resolved in *ex parte Minister of Native Affairs: In re Yako v Beyi*.⁶⁸ In this case, the Appellate Division held that neither common nor customary law was prima facie applicable. Courts had to consider all the circumstances of a case, and, without any preconceived view about the applicability of one or other legal system, select the appropriate law on the basis of its inquiry.

The structures established in 1927 lasted until the 1980s, when, confronted with the imminent collapse of apartheid, the government was forced to initiate a series of reforms. Commissioners’ courts, which had become the main judicial agency of the apartheid regime, were abolished (together with the Appeal Court),⁶⁹ and their jurisdiction was transferred to the magistrates’ courts. In consequence, s 11(1) of the Black Administration Act was repealed and re-enacted as s 54A(1) of the Magistrates’ Courts Act.⁷⁰ This amendment involved few significant changes for customary law.⁷¹

(ii) The 1988 Law of Evidence Amendment Act

In 1988, the government undertook a more thorough-going, but this time less publicised reform of the terms of recognition of customary law. Section 1(1) of the Law of Evidence Amendment Act was passed to provide that:

⁶⁶ *Nqanoyi v Njombeni* 1930 NAC (C&O) 13.

⁶⁷ *Matsheng v Dhlamini & another* 1937 NAC (N&T) 89 at 92, *Kaula v Mtimkulu & another* 1938 NAC (N&T) 68 at 71 and *Yako v Beyi* 1944 NAC (C&O) 72 at 77.

⁶⁸ 1948 (1) SA 388 (A) at 397.

⁶⁹ Section 2 of Act 34 of 1986. This reform followed from recommendations of the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts *Fifth Report* Part V para 6.1.

⁷⁰ 32 of 1944.

⁷¹ The scope of its application was broadened somewhat to include criminal matters, but it remained limited to ‘Blacks’.

Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles

This section introduced two important changes. The first was removal of the stipulation that parties to a suit had to be 'Black'.⁷² By implication, whites too could be subject to customary law. The second was to extend the sphere of application of customary law to all courts in the country. Less important amendments were omission of the confusing qualification that a case should involve 'questions of customs followed by Blacks' as well as the proviso that customary law might be applied only in so far as it had not been repealed or modified.

The courts' power to take judicial notice of customary law was still subject to three provisos, two of which were carried over from s 11(1) of the Black Administration Act. The first was a general reservation in favour of public policy and natural justice, the so-called 'repugnancy proviso' inherited from the colonial period. The second proviso excepted bridewealth from the purview of the first. This exception was a special dispensation that had been included in s 11(1) of the 1927 Act to safeguard against repetition of the decisions of the Transvaal Supreme Court. The third proviso, however, was an innovation: the courts could take judicial notice of customary law only if the law could be 'ascertained readily and with sufficient certainty'.⁷³

There is little judicial interpretation of s 1(1) the Law of Evidence Amendment Act. The main reason for this dearth of precedent is the disappearance of commissioners' courts and their courts of appeal two years before the Act was promulgated. They had been a fruitful source of authority on the application of customary law.⁷⁴ Because the legislature did not enact specific choice of law rules to replace the previous discretionary power to apply customary law (under

⁷² As defined in s 35 of the Black Administration Act 38 of 1927.

⁷³ Otherwise customary law must be proved according to the rules specified for custom. For this purpose s 1(2) of the Act allows the parties to lead evidence of the substance of any legal rule in contention

⁷⁴ *Thibela v Minister van Wet en Orde* 1995 (3) SA 147 (T) is the only case to have been reported in which choice of law was specifically considered. The court interpreted s 1(1) of the Law of Evidence Amendment Act to be mandatory rather than permissive. Arguably, the decision in this case is incorrect, notwithstanding s 211(3) of the Constitution (which will be considered below para 1.59). As Professor Kerr pointed out in his response to the Issue Paper, s 1(1) means *must* as regards judicial notice but *may* as regards application of customary law. See further Kerr (1994) 111 *SALJ* 577 ar 580-1.

s 11(1) of the Black Administration Act), we must conclude that application of customary law is still a matter of judicial discretion - with all the vagueness and uncertainty that such discretion entails.

2. Implications of the Constitution for application of customary law

The history of customary law in South Africa has been closely bound up with the political fate of the African people. Even at the height of segregation and apartheid, when the South African government was at pains to assert an African cultural tradition, customary law was considered a second-rate system. Roman-Dutch common law has always been treated as the general law of the land and the model to which customary law should conform.⁷⁵

South Africa's new constitutional dispensation has done much to improve the overall status of customary law. From several clauses in the Constitution,⁷⁶ not to mention comments made in the Constitutional Court,⁷⁷ it is evident that customary law is at last achieving recognition as a foundation of the South African legal system.

The question that must now be asked is whether customary law should be retained as a separate legal system - which is what the conflict of laws implies. Several respondents to the Issue and Discussion papers felt that South Africa should be working towards unified laws.⁷⁸ Blending two very different legal systems in a synthetic code is an immense undertaking, however, which has been accomplished in very few African countries (in fact only Ivory Coast and Ethiopia) and then largely at the expense of customary law. At a technical level, it may be questioned whether all legal differences can be reconciled. For instance, how are common-law rules on the prescription of actions and charging interest on overdue debts to be adjusted to customary-law principles, which would permit neither of these claims? At a social level, it may be questioned whether everyone in the country either wants or is prepared for a single law. Are the peoples of South Africa willing to compromise their cultural traditions in a

⁷⁵ See generally Lazar (1970) 19 *International & Comparative Law Quarterly* 492 and Burman (1976) 3 *British J of Law & Soc* 204.

⁷⁶ Notably s 211(3).

⁷⁷ In *S v Makwanyane* 1995 (3) SA 391 (CC) at 515-17.

homogenised legal system? In any event, it must be appreciated that, for the immediate future at least, social and legal differences will remain, and, if that is the case, the conflict of laws will have an important role to play in selecting appropriate laws in particular cases.

It also needs to be noted that the South African Constitution now provides an entitlement for invoking customary law in legal suits. Because sections 30 and 31 specifically guarantee an individual and a group's right to pursue a culture of choice,⁷⁹ it could be argued that application of customary law has become a constitutional right.⁸⁰ Previously, the state had assumed complete discretion in deciding whether and to what extent customary law should be recognised, an attitude typical of colonial thinking, for Africans were subject to whatever policies the conquering state chose to impose on them. Now, however, the state has a duty to allow people to participate in the culture they choose, and implicit in this duty is a responsibility to uphold the institutions on which that culture is based.⁸¹

This argument finds adventitious support in two sections of the Constitution. Section 15(3)(a)(ii) provides that legislation may be passed to recognise 'systems of personal and family law under any tradition, or adhered to by persons professing a particular religion'⁸² and s 211(3) obliges the courts to apply customary law in appropriate circumstances.

The courts' duty to apply customary law under s 211(3) is subject to three important qualifications: that customary law is 'applicable', that it is compatible with the Constitution

⁷⁸ See chapter 1, South African Law Commission, *Discussion Paper 76: The Harmonisation of the Common Law and Indigenous Law* 1998

⁷⁹ Section 30 of the Constitution states that all persons have the right to 'participate in the cultural life of their choice' and s 31(1) provides that: 'Persons belonging to a cultural ... community may not be denied the right, with other members of that community - (a) to enjoy their culture ... and (b) to form, join and maintain cultural ... associations and other organs of civil society.'

⁸⁰ This idea finds support in international law, especially in art 27 of the International Covenant on Civil and Political Rights (1966), the more general right to self-determination and the emerging body of 'aboriginal' rights.

⁸¹ A broad interpretation of the word 'culture' would denote a people's entire store of knowledge and artefacts, especially the laws and values that give social groups their unique characters. See Kaganas & Murray (1994) 21 *J of Law & Society* 412.

Culture has been defined broadly as a system of shared symbols and values- a structure of meanings through which human beings shape their experience. Politics in its widest sense is one of the main public arenas in which structures unfold, interact and confront each other.

Cultural systems are not static, frozen in time, but dynamic processes that, ideally speaking, draw on other systems and in turn influence them. The sustainability and dynamism of [cultural] pluralism is then dependent on whether in a given culture, memory, myths, symbols, and rituals can provide the sources to manage existential and societal problems

Smitu Kothari, "Cultural Pluralism and Development" CCD/Cont/95/INF.16, (1995). 2.

and that it has not been superseded by 'any legislation that specifically deals with customary law'. The first qualification might suggest that courts have an unrestricted discretion in deciding when to apply customary law, which could imply that application of customary law is again dependent on the vagaries of state policy. A preferable reading of 'applicable', however, and one that is more in keeping with the general tenor of the Constitution, is to say that this discretion must be exercised in accordance with general principles governing choice of law.

The third qualification - that customary law must be deemed repealed to the extent that it is inconsistent with legislation - clarifies a previously nebulous issue. While general legal doctrine would decree that statutes always override precedent, custom and the writings of jurists, customary law might none the less have been exempt if Parliament had intended an act to change only the common law. (It has long been uncertain, for example, whether the Age of Majority Act applied to persons who were subject to customary law.) Section 211(3) now makes it clear that statutes will prevail only if they are aimed at amending customary law.

The second qualification is the most complex, since it implies that any legal relationship governed by customary law is subject to the Bill of Rights. That human rights should be imported into personal relationships - should in other words be horizontally applicable - is reinforced by s8 (2) of the Constitution. This subsection declares that a provision in the Bill of Rights will bind natural persons 'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.⁸³

Many rules of customary law reflect, directly or indirectly, the patriarchal traditions of African culture, so that large parts of the law could be declared invalid for infringing the right to equal treatment. If that were allowed, the constitutional recognition given to customary law in 1996 would be an empty gesture. No one in South Africa today would wish customary law to be relegated to its former position; and, if courts and Parliament are sincere in their respect for

⁸² In addition, s 15(3)(a)(i) provides that legislation may be passed to recognise 'marriages concluded under any tradition, or a system of religious personal or family law'.

⁸³ Section 8(1) provides that the Bill of Rights applies 'to all law, and binds the legislature, the executive, the judiciary and all organs of state'.

African cultural traditions, they must construe application of the Bill of Rights in such a way that the common law does not again emerge as the dominant regime.⁸⁴

The word ‘applicable’ in s 8(2) could, of course, be interpreted to mean that the Bill of Rights applies only when organs of state are involved, which is the traditional approach to the application of human rights. But such a reading would defeat a clear intention of the drafters of the Constitution. A sensible construction of a word as vague as ‘applicable’ would be to follow jurisprudence abroad, where constitutional norms have been extended from their usual sphere of ‘vertical’ operation only by way of exception. Courts have had to consider the nature of the constitutional right concerned and the offending rule of private law⁸⁵ matters already provided for in s 8(2) - together with the social context. This more circumspect approach to horizontal application requires both a policy assessment of the extent to which the state should intervene in private relations and a legal assessment of how constitutional rights should relate to one another. In summary, the overall effect of the Constitution is to require, on the one hand, greater respect for customary law and, on the other, a filter through which its rules must now be interpreted.

The application of customary law has become a constitutional issue, and for that reason the conflict of laws must also be reconsidered in view of the Bill of Rights. Previous courts did very little to acknowledge or support social and legal changes in South Africa’s plural society. Although the common law should have been applied to those individuals who no longer considered themselves part of an African cultural tradition, the courts refused to allow individuals, women in particular, to escape the strictures of customary law without going through the formal exemption procedure.⁸⁶ It should now be acknowledged that freedom to pursue a culture of choice means that people are free to change their personal law through

⁸⁴ Bennett 1985.

⁸⁵ See *Mthembu v Letsela & another* 1997 (2) SA 936 (T), for example, which considered the extent to which customary law actually prejudices women and children. In deciding which aspects of customary law are to be deemed unconstitutional, obvious targets would be rules of the ‘official’ version, that owe little to an authentic African tradition or to contemporary social practice. See Bennett *Human Rights and African Customary Law* 1995: 38-40.

⁸⁶ Following from the judgements of McLoughlin P in *Ngwane v Nzimande* 1936 NAC (N&T) 70, *Yako v Beyi* 1944 NAC (C&O) 72 at 76 and *Mashego v Ntombela* 1945 NAC (N&T) 117 at 121. He reasoned that if one party were given the benefit of a change in personal law, the other would be put at a disadvantage. Underlying this thinking, however, was a desire to maintain the policy of segregation: Bennett *Application of Customary Law* 66-7.

integrating themselves into whichever culture suits their needs. On this basis, it can be argued that parties are free to choose the law that best suits their needs.

3. Principles governing choice of law

Customary law continues to be recognised in South Africa as a separate legal system, not in order to perpetuate apartheid ideology, but rather as the expression of an individual or group's constitutional right to maintain the African cultural tradition.

Reformulating choice of law rules is obviously not a way of removing contradictions between customary law and the Constitution, since separate legislative and judicial processes must perform that task. It would be wrong, however, to assume that, once constitutional reforms have been implemented, common and customary law will be the same and that legal dualism will vanish. Differences in culture are always likely to generate differences in law, with consequent conflicts of law.

Common and customary law may, of course, be legislatively integrated into a single code of rules, as happened in Ivory Coast and Senegal. Indeed, the Law Commission is currently engaged in projects to achieve this aim in the areas of marriage and succession. Nevertheless, where differences between the two legal systems persist, legal dualism and the need for choice of law rules will also persist.

The purpose of choice of law rules is to select the law that will do justice in the case. It is the court's power (and responsibility) to decide which law to apply, paying due regard to the parties' interests and their choice of legal system. Hence, although the courts must respect the individual's freedom to choose a particular law, they must not do so at the expense of the other party. If a plaintiff were to sue under the common law, for instance, and if the defendant were to acquiesce, the court need have no hesitation in applying common law to the claim. But if the defendant were to argue for customary law, the court would be obliged to investigate the parties' relationship more deeply to discover another basis for deciding what law to apply.

In the second place, a court's decision to apply customary or common law must be in harmony with the supervening value system of the country, the Bill of Rights. Indeed, it can be argued that constitutional norms should now directly enter the choice of law process to determine the selection of an applicable law. For instance, where a plaintiff and defendant's interests diverge on account of an underlying conflict of laws, the court's choice of one or other legal system should be determined by selecting the law that gives best expression to the Bill of Rights. This would be a novel approach in South Africa, where choice of law rules have generally been mechanically applied, without regard to the ultimate result. Because a bill of rights is a transcendent code of norms, however, the conflict of laws should no longer remain value-neutral. Until rules of customary or common law have been amended by court or Parliament to bring them into line with the Bill of Rights, if application of customary law results in unfair discrimination, the common law may (as a temporary measure) be applied in its place.

(i) The nature of the conflict

The conflict problems considered below are conflicts between different systems of *personal law*. This phrase means that the common law and customary law are associated with different cultural traditions, which are applicable to people rather than places. In other words, no matter where litigants happen to be, they remain subject to either customary or common law.

Given South Africa's political history, the criterion for deeming a person subject to customary law was race. Hence, it was usually assumed that common law should be ascribed to whites and customary law to blacks. Latterly, however, this assumption was corrected, and, consonant with developments elsewhere in Africa, an individual's personal law came to be regarded as a matter of cultural affiliation. No community is so culturally homogeneous that only one system of law can express the attitudes and life styles of all its members. None the less, once the separate identity of customary and common law is recognised, it follows logically that they must be attributable to separate communities - a heavy-handed but inevitable solution to an infinitely complex social phenomenon.

A conflict of personal laws may arise in two situations: if parties to the case are normally subject to different personal laws, one to common law and the other to customary law, or, if the nature of their relationship requires application of a law other than their personal law.

(ii) *Parties may select the law to be applied*

Previous courts had little to guide them in choice of law. As we have seen, s 11(1) of the Black Administration Act simply gave the commissioners' courts a discretion to apply customary law. None the less, during the sixty years of their existence, these courts developed a set of principles that provide a useful foundation on which to develop more precise choice of law rules.

The major principle, although one that was usually only implicit in the courts' judgements, was a sense of appropriateness or reasonableness.⁸⁷ What determined that sense of appropriateness was the court's objective assessment of all the circumstances of a particular case.⁸⁸ What would a reasonable person, given these circumstances, have deemed the most suitable law?

The courts also took a more subjective approach, which entailed deference to the expectations of the parties themselves; and a sense of reasonableness would dictate that the parties' views should direct a court's decision. If they had concluded an express agreement that a particular law should apply to their relationship, then the court need only enforce the agreement. Such forms of 'conflict planning' are usually welcomed, because they remove much of the uncertainty about what law will govern an action, and, as indicated above, statutory choice of law rules in at least two African countries feature agreements between the parties.⁸⁹

⁸⁷ Bennett, T. 1985: pp 105-6

⁸⁸ Which is apparent in the Appellate Division's decision in *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A).

⁸⁹ See s 6(1) Rule 2 of Botswana's Common Law and Customary Law Act Cap 16:01 and s 3(1)(a)(i) of Zimbabwe's Customary Law and Local Courts Act Cap 7:05.

Parties should obviously not be free to adopt a law that might defeat rights acquired by a third person⁹⁰ or might in any way prejudice the broader interests of justice. Moreover, if the Bill of Rights is applied horizontally, then any rule of customary law that is inconsistent with the Bill will no longer be valid, and so cannot be chosen by the parties. Apart from these caveats, however, there seems to be no convincing reason why litigants should not be free to select a law, which happens to be convenient for their purposes.

After all, persons subject to customary law may apply for exemption from it and they have always been free to use the forms and institutions of the common law, such as wills and contracts. An even more important justification for party autonomy is the constitutional rule that individuals are free to participate in a culture of choice.⁹¹

Reference to an implied intent may account for a large number of cases (probably the majority), where no one questions choice of law. In practice, it may be apparent from the face of a plaintiff's summons (namely, the nature of a remedy or the type or quantum of damages sought) that a particular legal system had been contemplated as the basis of a claim⁹². If the defendant does nothing to contest this choice of law, the court may infer acquiescence in the plaintiff's selection.⁹³ If the defendant contests the plaintiff's choice of law, as it appears in the pleadings, the court may determine whether the parties had considered application of a particular law at an earlier stage of their dealings. This inquiry will entail an assessment of the words and deeds out of which the claim arose.

In cases heard by the former Black Appeal Courts and in statutory choice of law rules prescribed elsewhere in Africa, choice of law was often inferred from the nature of a transaction on which a suit was based. Transactions associated with African customary law,

⁹⁰ In Botswana s 6(1) Rule 1 of the Common Law and Customary Law Act Cap 16:01 provides that: `Where two persons have the same personal law one of them cannot, by dealing in a manner regulated by some other law with property in which the other has a present or expectant interest, alter or affect that interest to an extent which would not in the circumstances be open to him under his personal law.

⁹¹ Sections 30 and 31 of the Constitution.

⁹² See, for instance, *Mbaza v Tshewula NO* 1947 NAC (C&O) 72.

⁹³ That the courts have consciously inferred consent is evident in cases where the principle of estoppel was invoked. Where plaintiffs had relied on a particular system of law to bring a claim, they were precluded from objecting to the defendants' use of defences under the same system: *Warosi v Zotimba* 1942 NAC (C&O) 55 at 57. Conversely, where a defendant had raised a defence known to only one system of law, he was estopped from objecting to the plaintiff relying on the same system: *Goba v Mtwalo* 1932 NAC (N&T) 58.

such as bridewealth and loans of cattle, were deemed to point to application of customary law. Conversely, the commercial contracts typical of the common law suggested application of common law.⁹⁴

Where a transaction was known to both systems of law, the parties' use of a form peculiar to one was sometimes taken as an implicit intention to abide by that law. In the case of marriage and wills, for instance, reference to culturally marked forms has been especially important.⁹⁵ Where the parties had married in church or in a civil registry office, the form of the ceremony was taken to imply the applicability of common law to issues associated with the marriage. Similarly, if someone wanting to dispose of property on death were to draw up a document and have it duly signed and witnessed, the document would be treated as a will, with the result that its validity, terms and interpretation could be governed by the common law.

(iii) *Subject matter and environment of a transaction*

Where a transaction (or juristic act) was not culturally marked in any way, courts have delved deeper into the circumstances in which it occurred in order to discover a general cultural orientation. Thus the purpose of a transaction, the place where it was entered into and its subject matter have all been used as indications of the law to be applied.⁹⁶

(iv) *The litigants' cultural orientation*

Many suits, notably those arising out of delicts or family relationships, do not involve transactions. In these cases, the parties' adherence to a particular cultural tradition has provided the basis for choosing an applicable law. People who observed the habits and customs of an African tradition were deemed subject to customary law, while those who had become acculturated to the 'western' tradition were deemed subject to the common law.⁹⁷

⁹⁴ *Dhlamini v Nhlapo* 1942 NAC (N&T) 62 and *Maholo v Mate* 1945 NAC (C&O) 63.

⁹⁵ Section 6(1) Rule 2 of Botswana's Common Law and Customary Law Act Cap 16:01 makes express provision for the form of marriage.

⁹⁶ See *Mhlongo* 1937 NAC (N&T) 125 and *Sawintshi v Magidela* 1944 NAC (C&O) 47, and, further, *Mpikakane v Kunene* 1940 NAC (N&T) 10 and *Warosi v Zotimba* 1942 NAC (C&O) 55.

⁹⁷ See *Tumana v Smayile & another* 1 NAC 207 (1908), *Mboniswa v Gasa & another* 1 NAC 264 (1909), *Ntsabelle v Poolo* 1930 NAC (N&T) 13, *Monaheng v Konupi* 1930 NAC (N&T) 89, *Nzalo v Maseko* 1931 NAC (N&T) 41, *Ramothata v Makhothe* 1934 NAC (N&T) 74 at 76-7, *Magadla v Hams* 1936 NAC

In most of the cases heard in South Africa, it so happened that both litigants adhered to the same culture. By and large, the courts were spared the classic conflict of laws situation - where a plaintiff followed one cultural tradition and the defendant another - because South Africa's policy of segregation ensured that whites had minimal contact with blacks. Since the removal of apartheid, however, it is far more likely that people from different cultural backgrounds will interact and litigate. The only viable approach to solving such conflicts would be to refer to the parties' expectations, which could be deduced from underlying transactions, and to such other factors as the general environment of the claim. From a grouping of these factors a prevailing law must be determined.⁹⁸

(v) Exemption from customary law

Under s 31 of the Black Administration Act, Africans who were deemed to be sufficiently acculturated to a 'western' culture could apply for exemption from customary law. The power to grant exemption was vested in the State President.

This procedure originated in the Natal policy of encouraging Africans to co-operate with the colonial mission to 'civilise' subject peoples. In the context of the 1996 Constitution, exemption finds a more acceptable justification in the principle that every person should be free to pursue a culture of choice, which implies that people may not be involuntarily bound by a system of personal law. Another purely technical justification can be found in the certainty exemption brings to status: an individual can unequivocally declare in advance of any litigation a change in personal law.

The effect of exemption, however, was never entirely clear. Although the courts were prepared to apply common law to an exempted person in matters of personal status, they would not grant immunity from racist legislation.⁹⁹ The courts also held that exempted persons remained

(C&O) 56, *Lebona v Ramokone* 1946 NAC (C&O) 14, *Sibanda v Sitole* 1951 NAC 347 (NE), *Mbuli v Mehlomakulu* 1961 NAC 68 (S) and *Mvubu v Chiliza* 1972 BAC 66 (NE) at 69.

⁹⁸ Bennett, 1985 p.110

⁹⁹ Hence, *Mahludi v Rex* (1905) 26 NLR 298 at 315 and *Mdhlalose v Mabaso* 1931 NAC (N&T) 24 held that Africans remained subject to the jurisdiction of commissioners' courts.

bound by customary obligations incurred before being released from customary law.¹⁰⁰ From these decisions it is apparent that exemption did not function as a complete change of legal regime. Rather, it seemed to indicate an express choice of law, and hence only one factor that could be taken into account in deciding the applicable law.

In any event, very few people ever applied for exemption. This is hardly surprising, for the procedure has strong connotations of racism and paternalism. (Whites, for instance, could not exempt themselves from common law, indicating the clear bias against customary law.)

(vi) *Unifying choice of law*

Once a court had decided which law to apply to a claim, the tendency was to subject all aspects of the action to the same legal system. The largely unconscious assumption that subsidiary questions, such as defences, quantification of damages and capacity, should be governed by the law applicable to the main claim had the positive effect of unifying, and thereby simplifying, choice of law.

Special rules were promulgated in the Black Administration Act to unify choice of law with regard to locus standi in judicio and contractual capacity. Section 11(3) provides that:

The capacity of a Black person to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Black, be determined as if he were a European; Provided that -

- (a) If the existence or extent of any right held or alleged to be held by a Black or of any obligation resting or alleged to be resting upon a Black depends upon or is governed by any Black law (whether codified or uncodified) the capacity of the Black concerned in relation to any matter affecting that right or obligation shall be determined according to the said Black law;
- (b) A Black woman (excluding a Black woman who permanently resides in the province of Natal) who is a partner in a customary union and who is living with her husband shall be deemed to be a minor and her husband shall be deemed to be her guardian.

This section provides that, if a right or obligation arises out of a common-law transaction, then the capacity to enter that transaction and the capacity to sue or be sued upon it must be tested by the same law. Before questions of capacity can be considered, however, a court must decide whether the main claim is subject to customary or common law. This determination involves a

¹⁰⁰ *Kaula v Mtimkulu & another* 1938 NAC (N&T) 68 and *Ngcobo v Dhlamini* 1943 NAC (N&T) 13. Cf *Miya v Nene* 1947 NAC (N&T) 3.

somewhat illogical procedure of hearing all the evidence and arguments about the main claim before settling preliminary issues.

4. Recommendations of the South African Law Commission with Regard to the Application of Customary Law

Application of customary law should remain a matter of judicial discretion, but more exact guides to choice of law are needed to bring certainty to an issue that is currently vague and confused.¹⁰¹ These guides have to be both precise and flexible enough to accommodate the great variety of factual problems likely to arise. They should also be simple and in keeping with the way in which courts have been used to solving conflict of laws problems.

In the first instance, it should be made clear that the residual power to decide which law to apply lies with the court, not with the parties. In the second place, parties should be free to choose the applicable law, provided that their choice does not infringe rights acquired by others. If no express choice is made (and it must be appreciated that in practice litigants seldom make an express choice of law), then, the court should be free to infer a choice, which suggests that an implied agreement may be attributed to the parties. (The notion of implied agreement is already an established principle in private international law rules governing choice of law for contracts both in South Africa and New Zealand). Any sense of unease about allowing parties freedom to apply customary law to their relationship and thereby evade the Bill of Rights or principles of public policy may be laid to rest, since the courts have always had a residual power to refuse to give effect to contracts infringing public policy and the Bill of Rights. In any event, the discretion to apply customary law rests ultimately with the courts, not with the parties.

Through either the subjective concept of implied choice or the objective concept of reasonable expectation, courts are given appropriate grounds for delving deeper into the parties' relationship in order to discover a prevailing law. A list should be provided of typical factors that could assist in what may be a complex inquiry. This list could include: the nature, form

and purpose of a prior transaction, the place where a cause of action arose, the parties' life styles (and hence cultural orientation) and their understanding of the relevant laws. While the nature and form of a particular transaction might prove especially significant, no one factor on its own should be regarded as decisive in indicating the applicable law. Rather, all of them should be considered in combination, so that the legal system with which the case has its closest connection may be ascertained.¹⁰²

Further choice of law rules about issues ancillary to the main claim (ie, damages, defences, capacity, etc) need not be specified. The courts have evolved a consistent, and evidently satisfactory way of dealing with these questions. Similarly, no mention need be made of the role of the Constitution in choice of law, for this is a matter where exercise of judicial discretion is required.

Once a uniform age of majority becomes applicable to all persons in South Africa, the reason for s 11(3) of the Black Administration Act will disappear and the section may be repealed.

Although the exemption procedure contained in the Black Administration Act could perform a useful function by circumventing the need to discover a litigant's personal law, it seems to have played no useful role in the past. Moreover, because the procedure is so closely identified with colonialism and apartheid, it can have no place in a reformed South African legal system.

5. Specific Recommendation of the Report on Conflict of Laws

The RCL focused on specific areas of the conflict between received and customary law and had the following is summary of their recommendations.

¹⁰¹ Principles elaborated by previous courts and statutory choice of law rules from certain African states (notably s 3 of Zimbabwe's Customary Law and Local Courts Act Cap 7:05 and s 6 of Botswana's Common Law and Customary Law Act Cap 16:01) provide useful models.

¹⁰² Bennett, 1985 p.108

(i) *Repugnancy Proviso*

Problems:

[The repugnancy proviso is] a clear reflection of the ethnocentric bias in South Africa's legal system. [It] is unsatisfactory for other, technical reasons. In the first place, its scope of application is vague, for it is uncertain whether customary rules should be considered in abstract or in the context of particular facts or whether the clause should be used as a choice of law rule to avoid hard cases. In the second place, the clause can be used to subject customary law to the Constitution.¹⁰³

Since the colonial administration of Natal first took cognisance of customary law in the mid-nineteenth century, recognition formulae have always contained a so-called 'repugnancy proviso'. Although colonial authorities both here and elsewhere in Africa were prepared to tolerate customary law, they would not enforce rules that might offend European standards of morality and justice. South Africa's current statute on recognition continued this tradition. Section 1(1) of the Law of Evidence Amendment Act declared that courts may take judicial notice of customary law, 'Provided that [it] shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles ...'..

It is somewhat surprising to find that, even in the colonial period, courts have seldom invoked this clause; and for the last thirty years they have scarcely mentioned it. On the face of it, then, the repugnancy proviso appears to be an anachronism. Nevertheless, it could gain a new lease of life in the hands of a judiciary determined to promote human rights, for the terms 'natural justice' and 'public policy' could be read as co-extensive with the Bill of Rights. The courts would then have a pretext for subordinating customary law to the Constitution without having to engage in the difficult debate about whether to extend the Bill of Rights to private relationships or whether to allow rights to be limited by rules of customary law.

Recommendations

The repugnancy proviso is an unwelcome reminder of the superior role enjoyed by the common law in South Africa's legal system. The proviso no longer has a useful role to play, and it should therefore be repealed.

¹⁰³ South African Law Commission *Report on Conflict of Laws* (Pretoria: SA Law Commission, 1999) p.39

(ii) *Competence of the Courts to Apply Customary and Common Law*

Problem

All courts in South Africa are competent to apply customary law. Under s 12(1) of the Black Administration Act, however, courts of traditional authorities only have jurisdiction 'to hear and determine *civil* claims arising out of Black law and custom' brought before them 'by Blacks against Blacks resident within [their] area of jurisdiction'. Thus, in civil suits, these courts have no competence to apply common law. Under s 20(1)(a) of the Act, on the other hand, traditional leaders may try certain offences at either common or customary law, provided the accused was Black or the offence was suffered by a Black.

Under s 1(1) of the Law of Evidence Amendment Act and s 211(3) of the Constitution, all courts in South Africa are competent to apply customary law. Section 12(1) of the Black Administration Act, however, continues a restriction that was imposed on courts of traditional authorities in colonial times: in civil suits they could not apply common law. In criminal cases, on the other hand, traditional courts are competent to apply both common and customary law.

Three questions arise here: first, whether traditional courts should be entitled to apply common law in civil cases; secondly, whether traditional leaders should continue to apply customary criminal law; and, thirdly, whether customary criminal law should be given wider recognition in other courts.

Recommendation

Not only should race be irrelevant as a criterion for applying customary law but it should also be irrelevant for determining the jurisdiction of traditional courts. Hence, s 12(1) of the Black Administration Act must be amended to delete any reference to 'Blacks'. For the same reasons, it would seem advisable to amend s 20 of the Act. For purposes of trying criminal cases, therefore, residence of an offender or commission of an offence within a court's area of jurisdiction would be a more acceptable ground of jurisdiction (for the sovereignty implicit in traditional rule would entail the power to sanction wrongdoing).

The current limitation on the traditional courts' powers of jurisdiction to apply only customary law in civil matters should be retained. This restriction helps to preserve the special character

of the courts as informal tribunals dispensing justice according to the precepts of customary law.

No attempt should be made to extend the application of customary criminal law to other courts. Criminal justice is an area where the country needs a unified system of law. On the other hand, because no objections have been raised to the competence of traditional courts to apply both common and customary law in criminal suits, their jurisdiction in this regard should be preserved.

(iii) Marriage

Problem:

Since colonial times, Christian marriage has been taken as a sign not only of religious commitment but also as an indication that the spouses decided to follow a westernised way of life. This assumption had a direct bearing on what law was chosen to govern the marital relationship: the form of marriage was deemed to indicate the spouses' intention that their rights and duties *inter se* and their relations with their children should be governed by common law.

In South Africa, if an African couple contracted a marriage according to civil or Christian rites, the form of the marriage would dictate application of the common law to most of the consequences of their union. Nevertheless, because the spouses' personal law was customary, certain aspects of their relationship, such as the devolution of an estate on the death of one of the parties, continued to be governed by that system.

Many difficult conflict of laws problems were generated by the possibility of both customary and common law being applied to civil/Christian marriages. These conflicts presupposed the co-existence of different laws. If the South African Law Commission's proposals in its *Report on Customary Marriages* for a common code of marriage law are accepted, however, the conflicts will disappear, because whatever form of marriage a couple may contract the consequences will be the same.

Certain differences may none the less persist. The potentially polygamous nature of customary marriages (as opposed to the monogamous nature of civil or Christian marriages) is the most notable instance. Differences will also feature in matters ancillary to the marriage, namely, lobolo and engagement agreements and actions involving third parties.

According to the *Report on Customary Marriages*, although a lobolo agreement may no longer be an essential requirement for a valid marriage, it is still a legally enforceable contract. When promised in conjunction with customary marriages, customary principles would obviously govern the terms and conditions of the agreement. When lobolo is linked to a civil or Christian marriage, however, the choice of law is not as obvious. Should the common law govern it?

Furthermore, the Law Commission's proposals to integrate customary and common law make no mention of engagement agreements and only passing mention of delicts involving third parties. Because rules from the two legal systems on these issues differ markedly, conflicts of law are bound to arise, and again the question is whether common or customary law should apply.

As will become apparent below, there is now an established body of precedent to govern most of these questions. Hence the main issue to be considered here is whether choice of law for lobolo agreements and other issues associated with marriage should now be legislatively regulated or whether matters should be left to the courts' discretion.

Recommendation

Wherever marriage law permits differences between customary and common law, conflict problems will arise. Special statutory choice of law rules to regulate these conflicts would be undesirable, however, since existing case law indicates that the issues are too complex to permit legislative solutions. Accordingly, the topic is best left to the courts to deal with on a case-by-case basis. Although the courts' decisions have tended to be unduly influenced by the form of marriage, choice of law should in principle be directed by the general principles described above for solving conflicts between common and customary law.

(iv) *Wills*

Problem

The first issue to consider in matters of succession is whether people subject to customary law may disregard their personal law by making wills. In view of the destructive effect that freedom of testation may have on a family's material security and social cohesion, many African countries restricted this power to persons subject to common law. The question has never been seriously debated in South Africa, where it has always been assumed that anyone may make a will.

The common law used to allow all people complete freedom of testation, ie the power to transmit their property by will to whomever they chose. This unrestricted freedom was based on an 'absolute' notion of ownership: that owners of property had a full and exclusive power to dispose of their possessions in any way they wanted. Although a will disinheriting the testator's spouse and other intestate heirs could seriously prejudice the material security of surviving members of the family, complete freedom of testation persisted until legislative intervention in 1990. Customary law, by contrast, allowed only intestate succession. According to predetermined rules certain members of the family succeeded to a deceased's property and status on the holder's death. That people were not at liberty to ignore these rules was due in part to the absence of any concept of individual ownership in productive resources (mainly land and cattle).

In such property personal interests were subordinate to those of the family.

An issue fundamental to choice of law in succession is whether individuals subject to customary law may disregard their personal law by making wills. In South Africa, it has always been assumed that people are free to make use of any of the institutions of common law, in particular, of course, commercial contracts. Unlike a contract, however, which creates a new legal relationship, a will has the potential of violating existing relationships, namely, the interests of intestate heirs. In fact, wills may seriously upset the integrity of a surviving family.

Section 23 of the Black Administration Act restricted freedom of testation for Africans in two respects. It provided that movable house property and land held under quitrent tenure was to

devolve under the customary law of intestate succession. The question now posed is whether these provisions serve any useful social purpose and whether they rest on a sound legal basis.

Recommendations

The general question of freedom of testation was not comprehensively answered in the RCL, because the issues must be more fully canvassed with reference to broader policies governing succession and land tenure.

If freedom of testation is to be supported, however, there seems no sense in continuing to exempt the category of house property. Section 23(1) of the Black Administration Act should be amended to provide that only the testator's *personal* interests in property may be disposed of by will. Such a provision would solve the confusion inherent in permitting bequests of family property.

While more specific regulations may be necessary to govern the disposition of land by will, any reforms in this regard must defer to policies adopted by the Department of Land Affairs. In the interim, the current regulations on land held under quitrent tenure should be amended to remove elements of gender discrimination.

An express legislative provision to permit guardianship clauses in wills is unnecessary, if recommendations made by the Law Commission in its *Report on Customary Marriage* are accepted.

(v) Intestate Succession

Problem

Specific rules regarding application of customary law in cases of succession and civil or Christian marriages are contained in the Black Administration Act 38 of 1927 and in obscure and confusingly worded regulations passed under it. These provisions (most dating from 1927) did little more than repeat nineteenth and early twentieth-century enactments from Transkei and Natal, and nearly all are now obsolete. What is more, because the only criterion for applying customary law is race, they are unacceptably discriminatory.

A general code of succession law would obviously be desirable in South Africa, not only in order to update and reform the customary law of succession but also to bring it into line with the Bill of Rights. The Law Commission has in fact published an Issue Paper on this subject.

Compiling such a code obviously involves difficult policy decisions regarding the present rules of both customary and common law on intestate succession, how these rules are to be reconciled and to what extent they comply with the Bill of Rights. Until a new and integrated law is achieved, conflicts between common and customary law will persist and the need will remain for suitable choice of law rules.

As in other cases of conflicts between customary and common law, what law to be applied to a matter of intestate succession must in the final analysis depend upon the deceased's cultural affiliation. The current statutory choice of law rules take the form of a deceased's marriage together with his or her matrimonial property regime as invariable indicators of cultural affiliation. Hence, if someone had married by civil or Christian rites and in addition had entered into a prenuptial contract (or had otherwise ensured that the marriage was in community of property), the common law will apply to devolution of his or her estate.

The assumption underlying these indicators was that the form of the marriage and the property regime were culturally marked. Thus, by using these forms, an individual was presumed to have tacitly intended to be bound by the law with which they are associated. While reliance on form injects a high degree of certainty into the choice of law process, it has the disadvantage of oversimplifying issues. In other words, the form of a juristic act is not an infallible guide to an individual's actual expectations. Many people who marry by Christian rites have no intention of living according to the common law. Furthermore, whatever justification the choice of law rule may find in a deceased's presumed intention, it seems arbitrary in relation to the spouses' children and family, who had nothing to do with the decision to marry according to particular rites.

Recommendations

As indicated earlier, if a common code of succession is to be adopted, conflict problems will disappear. In fact, a good reason for embarking on a reform of the law would be to clear up the many contradictions, unresolved problems and ambiguities which bedevil the present medley of choice of law rules contained in the Black Administration Act and the regulations issued under it.

It should be noted that improvements in choice of law will do nothing to alleviate social problems unless attention is also given to the substantive law in both succession and marriage. The position of widows under customary law needs urgent attention. But, if widows are to benefit from a new rule entitling them to inherit from their husbands, women must be given full proprietary capacity. Similarly, if persons subject to customary law are to benefit from a statutory reform such as the Maintenance of Surviving Spouses Act, customary marriages must be given full recognition on a par with civil and Christian marriages.

The following changes are recommended for the current choice of law rules. The special rule for foreigners in reg 2(a) should be deleted. Its removal from the statute book will have the effect of subjecting the devolution of estates owned by foreign domiciliaries to the ordinary rules of private international law.

If the proposal to abolish the exemption procedure is accepted, then reg 2(b) should also be deleted. If the exemption procedure is to be retained, the regulation should be amended by replacing the term 'Code of Zulu Law' with 'customary law' and by replacing the phrase 'as if he had been a European' with 'according to the common law'.

If a common code of succession law is not accepted within the foreseeable future, then choice of law rules must be provided to regulate application of customary law to intestate estates. The form of marriage is a useful indication of the appropriate law, but it must be subject to a qualification aimed at discovering the deceased's actual cultural orientation.

Once exceptions to the basic choice of law (based on the form of marriage) have been admitted, the present regulation allowing an appeal to the Minister must be repealed, since the courts, not the executive should control the choice of law process.

The legislature's laudable attempt to protect so-called 'discarded' wives of marriages contracted before 1988 is more likely to do harm than good. If a customary widow's rights are to be protected, innocent parties, namely, the civil-law wife and children are inevitably prejudiced. To make the best of a bad situation - and it should be noted that a minimal number of women are now affected by this provision - it is preferable to abandon the customary marriage. For all legal purposes the union was extinguished (and may in reality have been terminated many years previously) in favour of the second marriage. This approach would involve repealing 22(7) of the Black Administration Act.

The position of people who die partially testate and partially intestate should be clarified. The ambiguously worded s 23(9) of the Black Administration Act should be amended to provide that devolution of the intestate portion of the testator's estate should be governed by customary law, unless the testator intended the common law to apply

(vi) *Conflict between Different Systems of Customary Law.*

Problem: Because South Africa does not have a single, unified system of customary law, the courts may have to decide which of two or more different systems of customary law apply to the facts of any given case.

Section 1(3) of the Law of Evidence Amendment Act lays down choice of law rules for courts presented with conflicts between different systems of customary law.

In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.

Although not clearly stated, this section suggests a hierarchy of choice of law rules. In the first instance, courts are directed to apply whatever law was agreed upon by the parties. Because the section does not stipulate an express agreement, courts would be free to impute a tacit or implied agreement, and to do so they might refer to the parties' prior conduct, the nature or form of a transaction and the parties' cultural orientation.

Recommendations:

The many problems associated with s 1(3) of the Law of Evidence Amendment Act can be resolved only by repealing and replacing it with a new section. For conflicts between domestic systems of customary law, the choice of law rules need to be simplified, preference for the defendant's law removed and reference to 'tribal' law deleted.

New legislation should recognise the litigants' freedom to choose the law that best suits their purposes. Hence, they should be entitled to agree expressly on the applicable law, or, failing an express agreement, the courts should be directed to impute an implicit agreement to the parties based on their previous dealings with one another.

In the absence of any form of agreement, the courts should apply the law with which the case has its closest connection. (The criteria for determining 'close connection' will in fact be similar to those used for selecting domestic systems of common or customary law.) Causes of action involving land and succession may conveniently be referred to the law of the place where the land is situated and the deceased's personal law, respectively.

(vii) *Proof and Ascertainment of Customary Law*

Problem:

Rules of customary law are subject to constant and (from the point of view of most courts) imperceptible change, a characteristic inherent in any law derived from social practice. It follows that, if the courts are to administer an authentic version of customary law, they must be prepared to take account of shifts in behaviour and attitude. However, a court's knowledge of customary law is bound to be second-hand, a consequence of the fact that, apart from tribunals of traditional authorities, courts are socially distanced from the communities they serve.

All courts are presumed to know the law they apply. This presumption derives from the nature of western systems of law, for the sources of those systems are written and are dependent for their validity on formal legal tests. Customary law is different. Not only was it originally unwritten but also its validity must always be tested against actual observance in society.

Given its source in social practice, courts cannot reasonably be presumed to know customary law. It bears a close resemblance to the common-law custom, and for judicial purposes custom is treated as fact rather than law. The Law of Evidence Amendment Act, however, allows the courts to take judicial notice of customary law, which implies that customary law is either law (and thus ascertainable in authoritative texts) or a fact so notorious that everyone is aware of it.

As far as courts of traditional rulers are concerned, the rule of judicial notice is a sound one, because the presiding officers have a constant and immediate involvement in the affairs of their communities. Tribunals of the western type, however, such as magistrates' courts and the High Court, are socially detached from the society they serve. They cannot possibly be aware of the customary rules being observed in all the communities of South Africa at any particular time. Admittedly, texts are available on customary law, but, as we shall see below, their accuracy and authority has on several grounds been contested by modern scholars.

The following questions therefore arise: how can courts ascertain customary law when the system is not reliably documented (if it is documented at all) and how are courts to keep abreast of changes in the law?

Recommendations: Since customary law has constitutional recognition on a par with Roman-Dutch law, it is correct that all courts in the country may take judicial notice of it. Because customary law rests on social practice, however, the courts (especially magistrates' courts and the High Court) cannot assume that current written versions of the law are a reliable expression of valid rules. It is not feasible, however, to restate South Africa's customary legal systems, and so existing methods of ascertaining custom must remain. In light of the courts' general lack of expertise in customary law and the difficulty of proving new rules, the practice of calling assessors should be re-introduced. While a court should have the power to call for the assistance of any expert in customary law, care should be taken that assessors are selected from a more representative sample of people in affected communities.

V. CONCLUDING THOUGHTS

In order to realise the vision of socially inclusive laws and political and legal institutions in Aotearoa/ New Zealand, which actualise the relationship explicit and implicit in the Treaty of Waitangi, Maori customary law needs to play a more significant role.

1. Hybrid Codes

In order to achieve a more significant role for Maori customary law Aotearoa/New Zealand may unify customary and common law to form hybrid codes or merely to integrate certain topics, such as succession. This results in a single code of rules, and therefore the court has only one law to apply. However appealing this option may seem, it has proven to be difficult to implement. Although it is tempting to look for a direct relationship between Customary and western legal concepts, Metge points out that customary concepts hardly ever correspond exactly to those western concepts, which they may appear to resemble on the surface. While there is a degree of overlap there are usually divergences as well.¹⁰⁴ These divergences are in some areas so great that reconciliation is at times impossible. It appears from this and other case studies undertaken for the Laws and Institutions for Aotearoa/New Zealand project, that hybrid codes may be a workable solution in certain areas of law but that complete hybridisation of the law results in the subordination of one of the codes. For example Ivory Coast and Ethiopia have blended two very different legal systems into a synthetic code; however this has been largely at the expense of customary law, in favour of received civil law.¹⁰⁵

2. Dual/Plural Systems

In most of Africa, customary law of the indigenous people was retained in some form especially in terms of civil law. Customary and common law operate as independent legal regimes.

¹⁰⁴ Joan Metge, "Commentary on Judge Durie's Custom Law," (1995) . Part1, 2.

¹⁰⁵ South African Law Commission *Report on Conflict of Laws* 1999 p 16.

In the South African model of a pluralist legal system serious criminal offences are dealt with under one legal code. It appears criminal justice is an area where the country needs a unified system of law, while application of sentence may differ according to culture. Customary criminal law may be able to be applied in community based traditional courts/tribunals, but this would be only in minor matters, as once the case enters the formal court system the unified system (which in the case of Aotearoa/New Zealand may contain kaupapa Maori aspects) would apply to all equally, regardless of cultural affiliation.

3. Constitutional Recognition

The recognition of customary law as part of the law of the country on par with received law has been constitutionally recognised in the 1996 South African Constitution. While South Africa has made great progress, they are still attempting to realise the reality of such a pluralist relationship. It needs to be noted that the progress made to date has not solved all the social and institutional inequities in the country. Constitutional and legislative developments need to go hand and hand with other social and institutional improvements.

While New Zealand does not at present have a single written constitution, this type of recognition could be incorporated into the Constitution Act or the Bill of Rights Act. A similar process to ss 6,7 of the Bill of Rights Act could be included to protect customary law. For example where possible, enactments would be given a meaning consistent with customary law, and any bill introduced to the House of Representatives that appears to be inconsistent with customary law, could be reported on to Parliament by the Attorney General. Aotearoa/New Zealand could of course entrench the statute recognising customary law, but, as the discussion surrounding the Bill of Rights Act shows, this is unlikely to be an option that would be embraced by Parliament or the public.

4. Choice of Laws

In nations where customary law systems are recognised in conjunction with received law these systems should be viewed as overlapping systems. It is in the overlap where these systems share jurisdiction, choice of law becomes an issue. Where differences between the two legal systems persist, legal dualism and the need for choice of law rules will also persist.

The purpose of choice of law rules is to select the law that will do justice in the case. It is the court's power (and responsibility) to decide which law to apply, paying due regard to the parties' interests and their choice of legal system. Hence, although the courts must respect the parties' interest and their choice of legal system, they must not do so at the expense of the other party, or public policy considerations.

Where the system has a choice of laws the Court's decision to apply customary or common law must be in harmony with the supervening value system of the country- in South Africa the Bill of Rights. It is these areas of shared values that can be expanded to emphasise the similarities (or common ground) between cultures rather than the differences.

In the light of the courts' general lack of expertise in customary law and the difficulty of proving new rules, the court should have the power to call for the assistance of any expert in customary law. Care should be taken that assessors are selected from a representative sample of people in affected communities. Reliable texts should be seen as assistance but not definitive. It is in this area of background texts which the Laws and Institutions for Aotearoa/New Zealand project could make a considerable contribution.

VI. HOW DO WE CHOOSE WHICH LAW TO APPLY?

In areas where two laws apply the criterion for which law is to apply should **not be race**, but rather a matter of cultural affiliation.

The South African Law Commission has suggested that it should be made clear that the residual power to decide which law to apply lies with the court, not with the parties. However parties should be free to choose the applicable law, provided that their choice does not interfere with the rights acquired by others. If no express choice is made (and in practice litigants seldom make an express choice of law), then the court should be free to infer a choice, which uses the notion of implied agreement between the parties. It needs to be remembered that the courts will not allow parties the freedom to choose customary law to evade principles of public policy, or obligations under the Bill of Rights Act, and that the ultimate choice remains with the courts.

Through either the subjective concept of parties' choice or the objective concept of implied reasonable expectation, the courts should be given grounds for delving deeper into the parties' relationship in order to discover a prevailing law. Such inquiries could include: the nature, forms and purpose of a prior transaction, the place where a cause of action arose, the parties' life style (and hence cultural orientation) and their understandings of the relevant laws. While the nature and form of the transaction may prove to be especially relevant, no one factor should be regarded as decisive in indicating the applicable law.

In the context of Aotearoa/New Zealand, if we adopted a system of pluralist laws or processes, and there was a choice of laws in a particular instance, it does not mean that Maori customary law would automatically apply to Maori. For some urban Maori the imposition of Maori customary law or processes could be equally as culturally foreign as imposing Maori customary law on all Pakeha. Conversely there may be circumstances where Maori customary law could be applied to certain Pakeha in order to do justice in the case.

(i) End Word but Not the Last Word

As with other comparative studies undertaken for the Laws and Institutions for Aotearoa/ New Zealand project, South Africa has many interesting and useful lessons for the development of a culturally inclusive legal system. However it needs to be kept in mind that the South African legal system is a product of the country's unique history. While we can incorporate aspects which have worked in other jurisdictions these must be firmly placed in the context of the relationship between Maori and Non-Maori within Aotearoa/New Zealand. The African experience is rich in examples, which will add to and inform the national conversation, which is vital for the evolution of a sustainable culturally inclusive legal and social system, to reflect the creative relationship envisaged by the Treaty of Waitangi. One of the exciting aspects, which the South African example shows, is that a pluralistic legal system or a pluralistic application of a legal system does not entail a dismantling of that legal system, nor segregation, division, or secession.

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