

PROJECT 90
THE HARMONISATION OF THE
COMMON LAW AND
THE
INDIGENOUS LAW

REPORT ON
CONFLICTS OF LAW

SOUTH AFRICAN LAW COMMISSION

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INDIGENOUS LAW**

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September 1999

**TO DR PM MADUNA, MP, MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the *South African Law Commission Act, 1973* (Act 19 of 1973), for your consideration the Commission's Report on Conflicts of Law.

I MAHOMED

CHAIRPERSON: SA LAW COMMISSION

SEPTEMBER 1999

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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This report will be available on the Commission's Internet site once the Minister of Justice has Tabled the report in Parliament.

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BIBLIOGRAPHY

Allott A N *Essays in African Law, with special reference to the law of Ghana* (1960)
Butterworths London

- *New Essays in African Law* (1970) Butterworths London

Armstrong A K (ed) *Women and Law in Southern Africa* (1987) Zimbabwe Publishing House
Harare

Bennett T W *The Application of Customary Law in Southern Africa* (1985) Juta & Co Cape
Town

- *A Sourcebook of African Customary Law for Southern Africa* (1991) Juta & Co Cape
Town

- *Human Rights and African Customary Law* (1995) Juta & Co Cape Town

Brookes E *The History of Native Policy in South Africa from 1830 to the Present Day* (1924)
Nasionale Pers Cape Town

Burman S B *Cape Policies towards African Law in Cape Tribal Territories 1872-1883* (1973)
unpublished PhD thesis Univ of Cape Town

- *Chieftdom, Politics and Alien Law - Basutoland under Cape Rule 1871-1884* (1981)
Macmillan Press Ltd London

Chanock M L *Law, Custom and Social Order, the colonial experience in Malawi and Zambia*
(1985) CUP

Coertze R D *Die Familie-, Erf- en Opvolgingsreg van die Bafokeng van Rustenburg* (1971)
SABRA Pretoria

Forsyth C F *Private International Law* 3ed (1996) Juta & Co Cape Town

Hahlo H R & E Kahn (eds) *South Africa: the Development of its Laws and Constitution* (1960) Juta Cape Town

Hailey Lord *An African Survey: a study of problems arising in Africa south of the Sahara* 2ed (1945) OUP

Hinz M O *Customary Law in Namibia: Development and Perspective* (1995) Namibia Papers Working Document No 28 Centre for Applied Social Sciences Windhoek

Hirschon R (ed) *Women and Property/Women as Property* (1984) Croom Helm London

Holleman J F *Chief, Council and Commissioner: some problems of government in Rhodesia* (1969) Royal Van Gorcum Ltd Assen

Kahn E (ed) *The Quest for Justice: essays in honour of Michael McGregor Corbett* (1995) Juta & Co Cape Town

Kerr A J *The Customary Law of Immovable Property and of Succession* 3ed (1990) Rhodes Univ Grahamstown

Khumalo J A M *Civil Practice and Procedure of all Courts for Blacks in Southern Africa* 3ed (1984) Juta & Co Cape Town

Koyana D S *Customary Law in a Changing Society* (1980) Juta & Co Cape Town

Lewin J *Studies in African Native Law* (1947) African Bookman Cape Town

Mann K & R Roberts *Law in Colonial Africa* (1991) Heinemann Portsmouth NH, James Currey London

Okoro N *The Customary Laws of Succession in Eastern Nigeria and the statutory and judicial rules governing their application* (1966) Sweet & Maxwell London

Olivier N J J et al *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 3ed (1989)
Butterworths Durban

Palmer V V & S M Poulter *The Legal System of Lesotho* (1972) Michie Charlottesville

Phillips A (ed) *Survey of African Marriage and Family Life* (1953) OUP

Poulter S M *Legal Dualism in Lesotho: a study of the choice of law question in family matters*
(1979) Morija Sesuto Book Depot Morija

Raum O F & E J De Jager *Transition and Change in a Rural Community* (1972) Fort Hare UP
Alice

Rogers H *Native Administration in the Union of South Africa* 2ed (1949) Government Printer
Pretoria

Salacuse J W *Introduction to Law in French-speaking Africa* (1969) Michie Charlottesville

Sanders A J G M (ed) *The Internal Conflict of Laws in South Africa* (1990) Butterworths Durban

Sinclair J D (assisted by J Heaton) *The Law of Marriage* vol 1 (1996) Juta & Co

South Africa Commission of Inquiry into the Structure and Functioning of the Court (the
'Hoexter Commission') *Report* (1983) Government Printer Pretoria

South African Law Commission *Review of the Law of Succession: the introduction of a
legitimate portion or the granting of a right to maintenance to the surviving spouse* (1987)
Project 22 Government Printer Pretoria

South African Law Commission *Report on Customary Marriages* (1998) Project 90 The Harmonisation of the Common Law and Indigenous Law Government Printer Pretoria

Twining W *The Place of Customary Law in the National Legal Systems of East Africa* (1963) Law School Chicago UP

University of Ife (Institute of African Studies) *Integration of Customary and Modern Legal Systems in Africa* (1964) Ife UP & Africana Publishing Ile-Ife & New York

Van der Westhuizen J et al (eds) *Paul van Warmelo: huldigingsbundel* (1984) Univ of SA Pretoria

Welsh D *The Roots of Segregation: native policy in colonial Natal 1845-1910* 2ed (1973) OUP Cape Town

Zambia Government Law Development Commission *Report on the Law of Succession* (1982) Government Printer Lusaka

SUMMARY OF RECOMMENDATIONS

Courts and litigants need clear and explicit choice of law rules to indicate when common or customary law will be applicable to the facts of a particular case. A new enactment devoted exclusively to the application of customary law is now needed in order to disentangle choice of law rules from the two statutes currently regulating this issue: the Black Administration Act (which has close association with the policies of segregation and apartheid) and the Law of Evidence Amendment Act (which is mainly concerned with ways of proving foreign and customary systems of law). The Report makes the following recommendations.

1. General principles governing application of customary law

Application of customary law should remain a matter of judicial discretion, but more exact guides to choice of law are necessary to bring certainty to an issue that is currently vague and confused. These guides should be precise, flexible, simple and in keeping with the way in which courts have been used to solving choice of law problems.

The new choice of law rules should indicate that parties are free to agree on the law that best suits their needs. If no express agreement was made, courts should attempt to discern which law the parties would reasonably have expected to apply in the circumstances of the case. In order to assist courts in this inquiry, a list of factors that typically indicate the parties' expectations should be provided. No one factor on its own should be regarded as decisive in indicating the applicable law; rather, all the factors should be considered in combination in order to discover the legal system with which the case has its closest connection.

The procedure contained in the Black Administration Act for exempting individuals from customary law is so closely identified with colonialism and apartheid that it must now be repealed.

2. The 'repugnancy' proviso

The repugnancy proviso no longer has useful role to play and it should therefore be repealed.

3. Competence of the courts to apply customary and common law

Race should be irrelevant both as a criterion for applying customary law and 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'.

4. Marriage

Wherever marriage law permits of differences between customary and common law, conflict problems will persist. 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.

5. Wills

The Report considered whether persons subject to customary law should be free to execute wills (and thereby disregard the interests of their intestate heirs under the customary system of succession). Although no final answer to this problem was possible, for the issues must be more fully explored in the context of reforms to the customary law of succession, certain amendments to existing laws are necessary. 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 and elements of gender discrimination should be removed from the regulations governing succession to land held under quitrent tenure.

6. Intestate succession

Existing choice of law rules contained in regulations issued under the Black Administration Act and in the Act itself should be deleted or amended, since they are poorly worded, conflict with proposed reforms in the customary law of marriage or no longer serve any useful purpose.

The special rule governing succession to the estates of foreigners in reg 2(*a*) should be deleted. Regulation 2(*b*) should also be deleted, if the proposal made above to abolish the exemption procedure in the Black Administration Act is accepted.

Regulations 2(*c*) and (*d*) should be amended to provide that the law applicable to the devolution of an estate is determined by the form of a deceased's marriage, unless the deceased's actual cultural orientation indicates that a different law would be more appropriate.

Regulation 2(*d*), which allows an appeal to the Minister to vary choice of law, should be deleted. Section 22(7) of the Black Administration Act, which was enacted to protect the wives of customary marriages whose unions had been extinguished by subsequent civil marriages, should be repealed.

Section 23(9) of the Black Administration Act should be amended to clarify the law applicable to estates of people who die partially testate and partially intestate.

7. Conflicts between different systems of customary law

Section 1(3) of the Law of Evidence Amendment Act should be repealed and a new provision should be drafted to give clearer rules on choice of law. Recognition should be given to the litigants' freedom to agree on the applicable law and, in the absence of an agreement, courts should apply the law with which the case has its closest connection.

8. Conflicts with foreign systems of law

Section 1(3) of the Law of Evidence Amendment Act must be amended to exclude conflicts involving foreign systems of law.

9. Application of the Kwazulu/Natal Codes and former homelands legislation

The long established practice of applying these Codes on a territorial basis should not be disturbed. The Codes should none the less only apply to domiciliaries of KwaZulu/Natal. Principles of private international law should regulate application of the Transkei Marriage Act.

10. Proof and ascertainment of customary law

Existing methods of ascertaining customary law must be retained. The practice of calling expert assessors to assist the courts, however, should be re-introduced, although care must be taken that assessors are more representative of the composition of their communities.

CHAPTER 1

THE GENERAL PRINCIPLES GOVERNING APPLICATION OF CUSTOMARY LAW

A. Excerpt from the Issue Paper

1.1 It is unfortunately far from clear when customary law is applicable, for the rules on application are fragmentary, vague, badly drafted and out of date. At present, the principal rule is one of *recognition*, and it is contained in the Law of Evidence Amendment Act (which is concerned with the evidence necessary to prove both customary and foreign systems of law). This rule gives no guidance to courts wishing to discover when customary law is applicable.

B. Problem analysis

1.2 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 often used in South Africa.¹ The term 'customary law' is preferred in this Report, however, partly because it has a wider currency in Africa and partly because it was used in the Constitution. Because the adjective 'customary' emphasises an origin in social practice, it may cause confusion with other systems of custom, whether those adopted by religious groups, such as the Muslims or Hindu communities, or by commercial institutions such as banks. It must therefore be appreciated that 'customary law' in the present context denotes only laws that have historical roots in the societies of pre-colonial South Africa.

1.3 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 to be discussed in this Report is known as a *conflict of laws*. Such conflicts arise whenever rules derived from two (or

¹ Indigenous law is used, for example, in s 1(40) of the Law of Evidence Act 45 of 1988, where the term is defined to mean 'the Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic'.

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.

1.4 Although the conflict of laws may be a rather academic discipline, it is an essential part of any legal order which is prepared to recognize 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 at 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.

1.5 While problems like those above can crop up in nearly any part of a legal system, South Africa has very few explicit choice of law rules to solve them. The Black Administration Act² contains some rules regulating questions of succession, but apart from these the legislature has been silent. The Law of Evidence Amendment Act³ 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 choice of law.

1.6 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 a casuistic approach such as this may achieve justice in individual cases, it does so at the cost of legal certainty. We now have a situation in which application of customary law is so vague that one human rights lawyer has claimed that the individual's right to certainty in the administration of justice has been undermined.⁴

1.7 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

2 Section 23 of Act 38 of 1927.

3 Section 1 of Act 45 of 1988.

4 Van der Vyver (1982) 15 *CILSA* 312-14.

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).

C. Submissions

1.8 **Dr A M S Majeke (Fort Hare University)** posed a general question about the philosophy underlying legal pluralism (in other words, recognition of two or more systems of law within an otherwise unified legal regime). In view of the fact that indigenous communities had not created the institutions that now seek to regulate their lives, he asked who gave contemporary courts and legislatures the right to choose for people which rules to apply in a dispute. **Dr Majeke** felt that we should look to the substance of legal relationships, not to their form, in order to determine choice of law. In this regard, he noted that African communities have always had a flexible approach to solving problems. Hence the question of what law to apply would be answered with direct reference to the need to resolve a dispute between the parties.

1.9 The **National Human Rights Trust** appeared to distrust the entire notion of recognizing different legal systems. It felt that maintaining different laws for different people would not only entrench polarity and separatism in the country but would also undermine respect for the rule of law. It argued that customary laws have been eroded by time and that, if their values have not already fallen into desuetude, they would soon do so. The **Trust** said that, if people were allowed to choose the law to be applied, they would inevitably select whichever system would give them an advantage.

1.10 The last respondent's sense of unease about continuing to recognize the differences between customary and common law is a sense shared by many. **Judge Albie Sachs**, in particular, indicated considerable concern about the overall philosophy of the Discussion Paper. He felt that the Project Committee's thinking would result in 'an anachronistic and formulaic approach', one based on the dualism of the colonial and apartheid eras and one that would be 'out

of keeping with our new constitutional and social reality'. **Judge Sachs** argues that the starting point should be the 1996 Constitution, which both enhances the status of customary law and subjects it to the Constitution. He says that harmonization of customary and common law cannot be achieved by a conflict of laws approach. Instead, that approach is likely to entrench the 'archaic and technicist view of customary law as a given body of rules inherited from the past'. We should, in other words, be striving to blend South Africa's legal traditions in new laws that will reflect constitutional principles of equality and unity.

1.11 The **Gender Research Project (CALs)** echoed these views. It felt that the only justification for maintaining a dualist legal system is the important one of manifesting respect for African culture. Nevertheless, given the exhaustive changes needed to bring both customary and common law into line with the equality clause in the Constitution, and given the emergence of a democratic legislature in which the voices of black South Africans will now be heard, reconfiguring the dualist regime was not an appropriate method for remedying defects in the law. Redrafting choice of law rules prior to such changes would merely continue to violate women's rights to equality.

1.12 The **Zion Christian Church** expressed a view held by other respondents when it said that the Black Administration Act should not be kept on the statute book. In the minds of nearly all Africans, this Act is a symbol of colonial and apartheid oppression. On the general question of choice of law, the **Church** urged courts to treat each case on its merits. Nevertheless, it suspected that presiding officers would tend to choose common law in preference to customary law, a bias that will no doubt persist until the judiciary has better training in African jurisprudence.

1.13 **The Women's Lobby** said that clear choice of law rules were needed to direct courts to apply customary or common law, depending on the parties' social circumstances and the Constitution.

1.14 **Professor A J Kerr (Rhodes University)** and the **Gender Research Project (CALs)** made observations on more specific issues in choice of law. The **Project** questioned assumptions underlying residence or domicile as a basis of jurisdiction. Although both factors are supposed

to reflect the individual's consent to be bound by the laws in question (and his or her democratic voice in creating and applying those laws), in the case of customary law at least, this assumption is unfounded, particularly so far as women are concerned. The **Project** also questioned the validity of a rival, identity-based conception of jurisdiction. This conception is predicated on the assumption that a coherent community exists, with interests distinct from those of its individual members. In a democratic country, such as the new South Africa, however, it is far from clear whether there is in fact a distinct community of people observing customary law. **Professor Kerr** felt that a personal quality, such as cultural orientation, may have a role to play in the choice of law process, but it is not the only criterion nor even the most important one. He particularly criticized the principle that the applicable law should be determined by the litigants' expectations. He said that it would be artificial to require a court to speculate about an apparent consensus between the parties, when it knew quite well that they had never put their minds to the matter. **Professor Kerr** suggested that, if the parties had not expressly agreed on the applicable law before or at the close of pleadings, the court should decide which system of law to apply.

D. Historical analysis and comparative survey of laws

(1) Recognition of customary law in South Africa during the colonial period

1.15 The current lack of rules governing recognition and application of customary law can be traced to the colonial and apartheid periods in our 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.⁵

1.16 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

5 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* 319-34. Government policies are considered in Welsh *Roots of Segregation*, Rogers *Native Administration in the Union of South Africa*, Brookes *The History of Native Policy in South Africa from 1830 to the Present Day* chs 9 and 10 and Suttner (1985) 11 *Social Dynamics* 49.

suitably 'civilized'.⁶ 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 recognize.

1.17 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.⁷

1.18 The Cape government had to rethink its approach, however, when it began annexing the Transkeian territories towards the end of the century.⁸ This area was geographically remote from centres of power, settler immigration was restricted, and the people of the Transkei had not been completely subjugated.⁹ 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

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

7 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 'civilization'. See Burman *Cape Policies towards African Law in Cape Tribal Territories 1872-1883* ch 2. Although local magistrates discovered 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.

8 A significant influence had been the Cape's experience with administering Basutoland. Because the territory was not incorporated into the Cape Colony, as had been the case with Kaffraria, the policy of non-recognition did not automatically apply. See Burman *Chieftom, Politics and Alien Law - Basutoland under Cape Rule 1871-1884* 37-8.

9 The annexation decrees claimed that the inhabitants were 'not sufficiently advanced in civilization 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* 350.

authority to apply customary law only if it was 'compatible with the general principles of humanity observed throughout the civilized world'.¹⁰

1.19 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,¹¹ 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 civilized world'.¹²

1.20 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 'civilization' of the Colony. Africans who were considered suitably 'detrribalized' could apply to be subject to the common law.¹³ The second was the Code of Zulu law. In 1869, much of the customary law on marriage and divorce was reduced to writing. Six years later, a complete code was drawn up for the guidance of the courts,¹⁴ and in 1891 an amended version was made binding law.¹⁵

10 Section 23 of Procs 110 and 112 of 1879.

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

12 Ordinance 3 of 1849. See Bennett *Application of Customary Law* 79-80.

13 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.

14 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.

15 Law 19 of 1891.

1.21 None of the trekker republics established outside the sphere of British rule evolved any independent policy on customary law. The Orange Free State, for instance, did little more than recognize marriages contracted in the Thaba 'Nchu reserve.¹⁶ Similarly, the Transvaal produced specific legislation only after the period of British control, between 1877 and 1881. Law 4 of 1885, gave courts of native commissioners and certain specially appointed traditional rulers primary jurisdiction over Africans in civil cases. In these courts customary law was applicable, provided that it was consistent with the 'general principles of civilization recognized throughout the civilized world'.¹⁷

1.22 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 'civilized' conscience, the one because it was potentially polygynous and the other because it amounted to the sale of a woman.¹⁸ By implementing the repugnancy proviso in this manner, the Court repudiated two of the most fundamental institutions of African culture. As the court in *Meesadoosa v Links*¹⁹ 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.'

1.23 Mention should finally be made of Bechuanaland. In 1885, the southern portion of this territory was constituted a Crown Colony of British Bechuanaland.²⁰ 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

16 Wetboek van die Oranje Vrystaat IV 1. Provision was made for recognition of marriages elsewhere by Law 26 of 1899. The traditional leader of Witziesshoek was given civil jurisdiction and the power to apply customary law: Hahlo & Kahn (n5) 327.

17 Section 2 of Law 4.

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

19 1915 TPD 357 at 361.

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

over their peoples.²¹ 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.

1.24 What emerges from this brief 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.

(2) The 1927 Native Administration Act: segregation and apartheid

1.25 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.

1.26 Not only were such extreme differences inappropriate to the legal system of a unified state, but the rules on recognition and application were complex and confused.²² 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 sizable urban proletariat and they had developed independent political and labour associations. In order to avert a growing threat to white hegemony, the

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

22 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.

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.²³

1.27 In 1913, the Natives Land Act laid down a territorial framework for segregation.²⁴ Africans were thereafter prohibited from buying or leasing land outside certain 'scheduled' areas.²⁵ 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).

1.28 In 1927, the Native Administration Act was passed.²⁶ Although the government's ostensible purpose was to rejuvenate African tradition,²⁷ its actual intention was to establish a separate system of justice to match segregation in land and society.²⁸ 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.²⁹ 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.

1.29 Section 11(1) of the Native Administration Act prescribed conditions under which the commissioners' courts (and their Appeal Court) could apply customary law:

23 Bennett *Application of Customary Law* 46-7.

24 Act 27 of 1913.

25 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.

26 38 of 1927.

27 Thus, when the Minister of Native Affairs introduced the bill, he exhorted Parliament to accept customary marriage, polygyny 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).

28 Hence, as the **Zion Christian Church** observed in response to the Issue Paper, the Act was used principally to suppress the African population.

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

‘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.³⁰

1.30 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 case³¹ or offered a remedy.³² (This assumption was misguided, for a choice of law predicated on the existence of rules and remedies is bound to be arbitrary.)³³ 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.³⁴

1.31 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 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’.³⁵ In other words, the courts' general duty was to apply common law; they could take cognizance 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.³⁶

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

31 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).

32 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).

33 Bennett (1979) 96 SALJ 413-14.

34 *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.

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

36 *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.

1.32 This impasse was finally resolved in *Ex parte Minister of Native Affairs: In re Yako v Beyi*.³⁷ 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.

1.33 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),³⁸ 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.³⁹ This amendment involved few significant changes for customary law.⁴⁰

37 1948 (1) SA 388 (A) at 397.

38 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.

39 32 of 1944.

40 The scope of its application was broadened somewhat to include criminal matters, but it remained limited to 'Blacks'.

(3) The 1988 Law of Evidence Amendment Act

1.34 In 1988, the government undertook a more thorough-going, but this time less publicized reform of the terms of recognition of customary law. Section 1(1) of the Law of Evidence Amendment Act was passed to provide that:⁴¹

‘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’

1.35 This section introduced two important changes. The first was removal of the stipulation that parties to a suit had to be ‘Black’.⁴² 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.⁴³

1.36 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.⁴⁴ The second proviso excepted bridewealth from 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.⁴⁵

41 45 of 1988. This reform involved the repeal of s 54A(1) of the Magistrates’ Courts Act 32 of 1944.

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

43 This provision was arguably redundant, since all law in the country must be read subject to statutes in force: Bennett (1981) 30 *International & Comparative Law Quarterly* 86-7. Nevertheless, it reappeared in a more specific form in the 1996 Constitution. See below para 1.61.

44 Which is considered in more detail below chapter 2.

45 In which bridewealth transactions were held to be unenforceable because they were ‘uncivilised’. See above para 1.22.

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'.⁴⁶

1.37 We have remarkably 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 application of customary law.⁴⁷ Because the legislature did not enact specific choice of law rules to replace the previous discretionary power to apply customary law (under 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 a discretion entails.

(4) Comparison with the laws of other African states

1.38 South Africa's history of legal and judicial segregation corresponds closely with the history of other African colonies. There, too, customary law was deemed applicable only to Africans in civil suits and normally only in particular courts.

1.39 Rules restricting the jurisdiction of the courts had the effect of precluding possible conflicts of law. Tribunals run by traditional rulers and an equivalent of the South African commissioners' courts 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.⁴⁸

46 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. See below para 10.23.

47 *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 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.

48 As Lewin in *Studies in African Native Law* ch 9 commented, British colonial policy regarded questions such as the provision of conflict rules and the equity of the substantive law relatively less important than the courts and procedure.

1.40 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).⁴⁹ In effect, race was the exclusive determinant of the applicable law, since no other choice of law rules were provided.⁵⁰

1.41 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 - similar to that in South Africa - was to give the courts a more or less unfettered discretion as to when customary law should be applied.⁵¹ 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.⁵²

1.42 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 colonial rule,⁵³ and Lesotho the discretionary approach.⁵⁴ Other states undertook a thorough-going 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

49 See Salacuse *Introduction to Law in French-speaking Africa* 449 and Robert (1959) 11 *J Afr Admin* 124-31.

50 It was left to the courts and academic writers to evolve choice of law rules. See generally Salacuse *op cit* 43-65.

51 This approach was adopted in the East African Protectorate (Kenya), Uganda, Bechuanaland, Nyasaland, Somaliland and Tanganyika. See Allott *New Essays in African Law* 130-3.

52 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 *op cit* 123-30.

53 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.

54 Section 2 of the General Law Proclamation 1884.

in favour of imported systems of civil law.⁵⁵ 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.⁵⁶

1.43 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.⁵⁷ For the most part, customary and common law were retained as independent legal regimes.

1.44 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 courts⁵⁸ and common law in the High Court and magistrates' courts.⁵⁹ Possible injustices that might result from an action being brought in the wrong forum are solved by permitting transfer of cases.⁶⁰ The Swazi arrangement is no longer the norm in Africa,⁶¹ however, nor is it in all respects desirable.

55 See David (1962-3) 37 *Tulane LR* 187 on Ethiopia and Abitbol (1966) 10 *J of African Law* 141 on Ivory Coast. For more general comment, see David 1962 *Annales Africaines* 160

56 Spellenberg (1985) 4 *Jahrbuch für Afrikanisches Recht* 139 and Blanc-Jouvan 1967 *Revue Juridique du Congo* 159-87. For a more general account of the position of customary law in post-independent francophone Africa, see Prinsloo 1993 *TSAR* 189; and for Zaire, Rwanda, Burundi and lusophone Africa, see Prinsloo 1993 *TSAR* 541.

57 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.

58 Section 10(a) of the Swazi Courts Act 80 of 1950.

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

60 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.

61 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.

Although disputes may be adjudicated in tribunals familiar with the litigants' personal law and its associated procedures, plaintiffs are encouraged to 'forum shop',⁶² and transferring cases that were mistakenly initiated in the wrong forum entails unnecessary costs and delays.⁶³

1.45 In fact, African governments usually sought to give customary law a greater prominence in their legal systems by giving all courts power to apply it. Once customary law may be applied by any court in the land, 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.⁶⁴ Hence, although customary law has express recognition in the Constitution,⁶⁵ there are no rules governing its application. Although no one seems to have complained about this lacuna, the situation can hardly be considered ideal, for both courts and litigants need some guidelines on what law to apply.

1.46 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 link between a litigant and his or her system of personal law. Sometimes the link was membership of a political or cultural community,⁶⁶ sometimes an association with 'a community in which rules of customary law ... are established'⁶⁷ and sometimes simply being 'subject to' African customary law.⁶⁸

62 Namely, initiate their cases in a court more likely to give them a favourable decision.

63 See Bennett *Application of Customary Law* 92.

64 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.

65 Article 66(1) of the 1990 Constitution.

66 Section 1 of Namibia's Traditional Authorities Act 17 of 1995, for instance, speaks of affiliation to a 'traditional community', and Botswana's Common Law and Customary Law Act Cap 16:01 speaks of membership of a 'tribe' (which is defined in s 3).

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

68 Or 'affected by it'. See s 3(1) of Kenya's Judicature Act Cap 8.

1.47 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.⁶⁹ 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.⁷⁰ 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'.⁷¹ 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 arbitrary.⁷²

1.48 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'.⁷³ Kenya extended this 'cause of action' approach even further.⁷⁴ 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

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

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

71 '... 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.

72 See Wengler (1961 III) 104 *Recueil des Cours* 94.

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

74 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'.

and legitimacy); succession (both testate and intestate) and administration of estates (except property disposed of by a will made under a written law).⁷⁵

1.49 Rules promulgated in Zimbabwe introduced a significant change of emphasis:⁷⁶ the parties are free to choose the law they wanted 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.⁷⁷ 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.⁷⁸

1.50 Post-independence legislation in Botswana was similar.⁷⁹ 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.⁸⁰ 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).⁸¹

75 Magistrates Courts Act 17 of 1967.

76 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.

77 Section 3(1).

78 Section 3(2).

79 All courts in the country were given jurisdiction to apply customary law by the Customary Law (Application and Ascertainment) Act 51 of 1969. See the commentary by Himsworth (1972) 16 *J African Law* 4 and Sanders (1984) 5 *Jahrbuch für Afrikanisches Recht* 137.

80 Section 4 of the 1969 Act.

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

1.51 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.

1.52 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 characterize 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.)⁸² 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.

1.53 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.

E. Evaluation

(1) Implications of the Constitution for application of customary law

1.54 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

82 See Bennett *Application of Customary Law* 103.

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.⁸³

1.55 South Africa's new constitutional dispensation has done much to improve the overall status of customary law. From several clauses in the Constitution,⁸⁴ not to mention comments made in the Constitutional Court,⁸⁵ it is evident that customary law is at last achieving recognition as a foundation of the South African legal system.

1.56 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, notably **Judge Albie Sachs**, felt that South Africa should be working towards unified laws (and he mentions particularly family law, land law and succession). While these laws will draw their inspiration from all the country's legal traditions, s 35(3) of the Constitution requires courts to 'have due regard to the spirit, purport and objects' of the Bill of Rights when developing either customary or common law. The Law Commission is in fact endeavouring to realize this goal in its projects on marriage and succession.

1.57 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 an homogenized legal system? In any event, it must be appreciated that, for the immediate future at least, social

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

84 Notably s 211(3).

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

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.

1.58 What is more, the Constitution now provides an entitlement for invoking customary law in legal suits. Because ss 30 and 31 specifically guarantee an individual and a group's right to pursue a culture of choice,⁸⁶ it could be argued that application of customary law has become a constitutional right.⁸⁷ Previously, the state had assumed complete discretion in deciding whether and to what extent customary law should be recognized, 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.⁸⁸

1.59 This argument finds adventitious support in two sections of the Constitution. Section 15(3)(a)(ii) provides that legislation may be passed to recognize 'systems of personal and family law under any tradition, or adhered to by persons professing a particular religion'⁸⁹ and s 211(3) obliges the courts to apply customary law in appropriate circumstances.⁹⁰

1.60 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 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

86 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.'

87 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. See Bennett *Human Rights and African Customary Law* ch 2.

88 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.

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

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

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.⁹¹

1.61 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 Act⁹² 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.

1.62 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 s 8(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'.⁹³

1.63 Because many rules of customary law reflect, directly or indirectly, the patriarchal traditions of African culture, large parts of the law could be declared invalid for infringing the right to equal treatment.⁹⁴ If that were allowed, the constitutional recognition given to customary law in 1996 would be an empty gesture.⁹⁵ 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

91 Which are explored below paras 1.66ff.

92 57 of 1972.

93 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'.

94 Guaranteed in s 9 of the Constitution.

95 The decisions of the former Transvaal Supreme Court above footnote 18 provide a forbidding precedent. See Stubbs P, reported in (1929) 1 NAC (N&T) 1.

for 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.⁹⁶

1.64 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 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,⁹⁷ 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 law⁹⁸ - matters already provided for in s 8(2) - together with social context. This more circumspect approach to horizontality 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.⁹⁹ 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.

1.65 Because application of customary law has become a constitutional issue, 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,

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

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

98 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* 38-40.

99 The **Gender Research Project (CALs)**, in response to the Issue Paper, suggested that, because the value of culture lies in its capacity to foster each individual's human potential, a culture may be protected only to the extent that it facilitates the autonomy of all its members. This argument is consonant with the express limitation on the right to culture in the Constitution, ie ss 30 and 31 are subject to the Bill of Rights. Hence, an argument of culture alone may not limit an individual's right to equal treatment under s 9.

to escape the strictures of customary law without going through the formal exemption procedure.¹⁰⁰ It should now be acknowledged that freedom to pursue a culture of choice means that people are free to change their personal law through 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.

(2) Principles governing choice of law

1.66 Customary law continues to be recognized in South Africa as a separate legal system, not in order to perpetuate apartheid ideology, as some respondents to the Issue and Discussion Paper feared, but rather as the expression of an individual or group's constitutional right to maintain the African cultural tradition.

1.67 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.

1.68 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.¹⁰¹ Nevertheless, where differences between the two legal systems persist, legal dualism and the need for choice of law rules will also persist.

100 Following from the judgments 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.

101 See below paras 4.3 and 6.2.

1.69 Some respondents to the Issue Paper indicated a concern that choice of law rules would operate to entrench unequal power structures. For instance, one litigant might be allowed to rely on a particular system of law at the expense of the other; choice of law rules might sustain the dominance of the common law or the patriarchal traditions of customary law. These fears must be allayed.

1.70 In the first place, it must be appreciated that 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 (an issue discussed in more detail below in paras 1.79ff). 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.

1.71 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.¹⁰² 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.¹⁰³

102 In other words, it has been assumed that, whichever rule is applied to the facts of a case, a just decision will be produced. For customary law, the repugnancy proviso provided a safety net of sorts, because rules incompatible with natural justice or public policy were not applied.

103 Provided, of course, that the common law would secure a result more in accord with the Bill of Rights.

1.72 It is true, as **Dr Majeke** says, that the choice of law rules considered below cannot hope to reflect the approach of traditional courts to dispute resolution. Such tribunals would seek to obtain a solution satisfactory to both parties, regardless of the technicality of the conflict of laws. Nevertheless, conflict problems normally arise in magistrates' courts and the High Court, where the approach to resolving disputes is more technical and legal, and where choice of law rules are therefore necessary.

(a) The nature of the conflict

1.73 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.

1.74 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.¹⁰⁴ There is truth in what the Gender Research Project (CALs) says about the artificiality of deeming customary law applicable to an 'African' community and common law applicable to a 'western' community. 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 recognized, it follows logically that they must be attributable to separate communities - a heavy-handed but inevitable solution to an infinitely complex social phenomenon.

1.75 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.

104 Which is now in line with the constitutional right to culture: Bennett 1991 *Acta Juridica* 21-2 and *Human Rights and African Customary Law* 23-7.

(b) Parties may select the law to be applied

1.76 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.

1.77 The major principle, although one that was usually only implicit in the courts' judgments, was a sense of appropriateness or reasonableness.¹⁰⁵ What determined that sense of appropriateness was the court's objective assessment of all the circumstances of a particular case:¹⁰⁶ what would a reasonable person, given these circumstances, have deemed the most suitable law?

1.78 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.¹⁰⁷

1.79 **Professor Kerr**, however, felt that the parties should not be free to choose a law unconnected with the subject matter of their dispute. His point reflects a persistent unease amongst scholars on the conflict of laws about allowing parties complete autonomy in choice of law.¹⁰⁸ The argument (in private international law) is that litigants should not be permitted to 'contract out' of the mandatory rules of a legal system that would otherwise bind them. In

105 Bennett *Application of Customary Law* 105-6.

106 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).

107 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.

108 Forsyth *Private International Law* 276ff.

addition, it should be appreciated that the decision whether to apply customary or common law is not the parties' but the court's.¹⁰⁹ The wording of the former s 11(1) of the Black Administration Act, for instance, made it clear that parties were not entitled to usurp a judicial power.¹¹⁰

1.80 Parties should obviously not be free to adopt a law that might defeat rights acquired by a third person¹¹¹ or might in any way prejudice the broader interests of justice. Moreover, as **Professor Kerr** says, 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.¹¹² An even more important justification for party autonomy is the constitutional rule that individuals are free to participate in a culture of choice.¹¹³

1.81 If litigants should be allowed to select the applicable law, **Professor Kerr** then urges that their choice be made in writing, at the latest when pleadings close, so that the court will know in advance which system of law to apply. This requirement seems to be unduly restrictive. Why should the courts not take account of implicit agreements, ie, situations where a concurrence of intent or a general expectation may be inferred from the parties' prior conduct? In answer, **Professor Kerr** argued that it would be artificial to require a court to speculate about an apparent

109 *Lebona v Ramokone* 1946 NAC (C&O) 14 at 16.

110 Unfortunately, s 1(1) of the Law of Evidence Amendment Act, as read with s 211(3) of the Constitution, clouds this issue.

111 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.'

112 It is only when there happens to be a mandatory *choice of law* rule, such as s 23 of the Black Administration Act, that parties have no freedom to choose the law they want.

113 Sections 30 and 31 of the Constitution.

consensus between the parties, when it knew quite well that they had never put their minds to the matter.¹¹⁴

1.82 **Professor Kerr** is right in saying that litigants who are prepared to dispute the applicable law have directly opposed views when they come to court, and prior to that they probably never thought about the matter. Nevertheless, 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 is 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 claim.¹¹⁵ If the defendant does nothing to contest this choice of law, the court may infer acquiescence in the plaintiff's selection.¹¹⁶

(c) Nature and form of a prior transaction

1.83 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.

1.84 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, such as

114 For this reason, the courts in *Improvair (Cape) (Pty) Ltd v Etablissements Neu* 1983 (2) SA 138 (C) at 145 and *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 525-6 criticized the notion of implied intent when called upon to discover the proper law of a contract (a private international law issue).

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

116 That the courts have consciously inferred consent is evident in cases where the principle of estoppel was invoked. Where plaintiffs had relied 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.

bridewealth and loans of cattle, were deemed to point to application of customary law.¹¹⁷ Conversely, the commercial contracts typical of the common law suggested application of common law.¹¹⁸

1.85 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.¹¹⁹ 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.¹²⁰ 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.

1.86 Courts should not, however, rely exclusively on the form or nature of a transaction.¹²¹ As the **Gender Research Project (CALs)** noted, emphasizing only one factor could result in inconsistencies and arbitrary decisions. We shall see below, in the section considering marriage, that to apply common law to all the consequences of a marriage simply because it was celebrated in Church may be to defeat what the parties would in reality have expected.¹²²

(d) Subject matter and environment of a transaction

117 *Nxumalo v Ngubane* 1932 NAC (N&T) 34. See *Peme v Gwele* 1941 NAC (C&O) 3 and *Fuzile v Ntloko* 1944 NAC (C&O) 2 for bridewealth transactions.

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

119 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.

120 See below para 4.8.

121 And it may be impossible to rely only on form. In the case of wills, for example, most systems of customary law permit disinheritance and dispositions of property, but these practices are not the same as wills, because they require approval of the family council. What if a written, signed and witnessed disposition of property was not approved by the family but did qualify as a common-law will? The form alone would not indicate which law should be used to judge its validity. A Kenyan case, *Public Trustee v Wambui & others* (reported in (1978) 22 *Journal of African Law* 188) held that the issue had to be determined in accordance with the testator's intention.

122 See below para 4.10.

1.87 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.¹²³

(e) The litigants' cultural orientation

1.88 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.¹²⁴

1.89 All the legislation in Africa governing application of customary law refers directly or indirectly to culture. Most often the reference is indirect, as when courts are authorized to apply customary law to suits between members of a community observing a system of customary law.¹²⁵ Zimbabwe opted for a more direct reference to culture by referring to 'the mode of life of the parties', for it is from the particulars of life that the courts have to infer a general cultural alignment.

1.90 In two cases from Lesotho,¹²⁶ for instance, the courts investigated details as diverse as the parties' place of residence, occupation, religion, education, style of dress, eating and sleeping habits, use of bank accounts, preparation of wills and consultation with attorneys. From these

123 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.

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

125 In a Nigerian case, *Olowu* [1985] 3 Nigerian Weekly LR 372 (SC), for example, the court decided that the party in question, through processes similar to naturalization (Bello JSC at 389) or domicile (Oputa JSC), had become acculturated into a group other than the one into which he had been born.

126 *Mokorosi v Mokorose & others* 1967-70 LLR 1 and *Hoohlo* 1967-70 LLR 318. See Poulter *Legal Dualism in Lesotho* 24-8.

facts a prevailing cultural affiliation became evident. The **Gender Research Project (CALs)** observed that the two decisions unconsciously reflected preference for the litigants' *class*, rather than their cultural orientation,¹²⁷ and that a life style - which admittedly is the product of education and income - does not necessarily affect an individual's attachment to his or her culture. While this point is taken, the focus of any inquiry should none the less be culture, of which life style is a strong, but not exclusive indication.

1.91 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.¹²⁸ Since the removal of apartheid, however, it is far more likely that people from different cultural backgrounds will interact and litigate.¹²⁹ 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 as other factors as the general environment of the claim. From a grouping of these factors a prevailing law must be determined.¹³⁰

(f) Exemption from customary law

1.92 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.¹³¹

127 The court in *Yako v Beyi* 1944 NAC (C&O) 72 at 76-7, too, in its zeal to promote segregation, was concerned not to give effect to class distinctions emerging in African society.

128 And when they did - usually through commercial and employment contracts - the common law was applied. In any event, until the Law of Evidence Amendment Act 45 of 1988 was passed, courts could apply customary law only if both parties to a suit were African.

129 After independence, several African countries laid down express choice of law rules for this eventuality. See above para 1.47.

130 Bennett *Application of Customary Law* 110.

131 See GN 1233 of 1936.

1.93 This procedure originated in the Natal policy of encouraging Africans to co-operate with the colonial mission to 'civilize' 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.¹³²

1.94 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.¹³³ The courts also held that exempted persons remained bound by customary obligations incurred before being released from customary law.¹³⁴ 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.

1.95 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.) The **Gender Research Project's (CALs)** call for abolition of this procedure is endorsed by the Law Commission.

(g) Unifying choice of law

1.96 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

132 See Visser in Van der Westhuizen et al *Huldigingsbundel Paul van Warmelo* 258.

133 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.

134 *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.

subsidiary questions, such as defences, quantification of damages¹³⁵ 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.

1.97 Special rules were promulgated in the Black Administration Act¹³⁶ 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.¹³⁷ 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 somewhat illogical procedure of hearing all the evidence and arguments about the main claim before settling preliminary issues.

1.98 The **Gender Research Project (CALs)** proposed deleting s 11(3), so that all South Africans would have the same legal capacity, regardless of race, subject matter or gender. The Law Commission has met this proposal by recommending that the Age of Majority Act¹³⁸ be made

135 *Buthelezi v Msimang* 1964 BAC 105 (S).

136 38 of 1927.

137 Because the main clause of the section refers to ‘a transaction’, capacities associated with delictual and proprietary claims were excluded. *Maqula* 1950 NAC 202 (S), *Nhlanhla v Mokweno* 1952 NAC 286 (NE) and *Kunene* 1953 NAC 163 (NE), however, held that claims relating to property should be governed by the common law. Locus standi was therefore determined by the same system.

138 57 of 1972. See *Report on Customary Marriages* para 6.2.2.25.

applicable to everyone in the country. If this recommendation is enacted, s 11(3) will be automatically repealed.¹³⁹

1.99 Under the second proviso to s 11(3), if a woman is married according to customary law and is 'living with her husband', she is deemed to be a minor, and therefore without contractual capacity or locus standi. This provision has imposed an unwarranted burden on women and has created legal confusion.¹⁴⁰ The Law Commission has already recommended its repeal.¹⁴¹

F. Recommendations

1.100 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.¹⁴² 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 problems.

1.101 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 our private international law rules governing choice of law for contracts). 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,

139 On the principle that earlier legislation is superseded by later legislation. Little damage will be done to customary law, because the Age of Majority Act preserves the essential point of that system, namely, only mature adults are capable of performing juristic acts.

140 See Kerr (1965) 82 *SALJ* 487 and (1973) 90 *SALJ* 4.

141 See *Report on Customary Marriages* para 6.2.2.24.

142 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.

since our 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.

1.102 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.¹⁴³

1.103 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.

1.104 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.

1.105 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.

143 In a manner suggestive of the 'proper law' approach of private international law. See Bennett *Application of Customary Law* 108.

CHAPTER 2

THE `REPUGNANCY' PROVISIO

A. Excerpt from the Issue Paper

2.1 [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.

B. Problem analysis

2.2 Since the colonial administration of Natal first took cognizance 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 Act¹ 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 ...'.

2.3 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

1 45 of 1988.

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.

C. Submissions and comparative survey of laws

2.4 Both the **Zion Christian Church** and the **Gender Research Project (CALs)** urged abolition of the repugnancy proviso, and, because of its strong associations with the colonial past, most African countries abolished the proviso when they gained independence.² Where the clause was retained, it was usually made applicable only in courts of traditional leaders.³

D. Evaluation

2.5 The terms 'public policy' and 'natural justice' are notoriously vague, and their meanings may well overlap.⁴ None the less, they are still separate and definable concepts. While natural justice can denote substantive principles of the natural law, today it is normally identified with basic requirements of procedure.⁵ By contrast, public policy is usually associated with substantive law, and, unlike natural justice, it denotes the practical needs of a particular society. Hence, public policy is neither universal nor eternal and it does not necessarily propose an ideal standard to which all law ought to conform. Rather, it is a principle that can be invoked from time to time, as circumstances demand, to override rules of positive law.⁶

2 Cf Kenya, s 3(2) of the Judicature Act Cap 8, and Botswana, s 2 of the Common Law and Customary Law Act Cap 16:01.

3 In Lesotho by s 9 of Proc 62 of 1938 and Swaziland by s 11(a) of Act 80 of 1950. The assumption seems to have been that traditional leaders are more likely to favour customary law and that their partisan approach has to be corrected.

4 Use of 'or' in s 1(1) of the Law of Evidence Amendment Act, however, suggests that the terms be considered separately.

5 Such as the audi alteram partem rule. The repugnancy proviso was applied in this sense in *Phiri v Nkosi* 1941 NAC (N&T) 94 at 98 and *S v Mukwevho*; *S v Ramukhuba* 1983 (3) SA 498 (V) at 502.

6 Peart 1982 *Acta Juridica* 108.

2.6 On the few occasions when the South African courts referred to the repugnancy proviso, it was not always clear why or in what way customary law was at fault. Sometimes the courts refused to apply *rules* of customary law and sometimes particular *transactions*.⁷ Strictly speaking, transactions fall outside the scope of the repugnancy proviso, which was intended to strike down certain offensive rules for all time. Courts always have a residual discretion to refuse to enforce customs or contracts that contravene boni mores.⁸

2.7 In other cases, a rule of customary law might have violated the repugnancy proviso in the abstract or only in the context of a specific set of facts.⁹ Again, strictly speaking, the repugnancy clause should be reserved for assessing rules in abstract.¹⁰ If it were to be invoked when customary law might, on the facts of a particular case, produce a harsh result for one of the parties, the overall choice of law process would become capricious and uncertain.

2.8 In fact, notwithstanding the generous discretion implicit in the repugnancy proviso, South African courts have exercised their powers under it very sparingly. Like their counterparts in other parts of southern Africa, they declared customary law repugnant only when it impressed them 'with some abhorrence' or an obvious 'immorality'.¹¹ Thus the proviso was appealed to in only a handful of cases, most of which involved customary rules inhibiting the freedom to marry,¹²

7 As in the court's ambiguous decision in *Gidja v Yingwane* 1944 NAC (N&T) 4 at 5-6.

8 Including ones associated with common law. See the decisions in *Nowamba v Nomabetshe* 1906 NHC 39 and *Matiwane v Bottomani* 1932 NAC (C&O) 18. See further Bennett *Application of Customary Law* 84-5 and *Masango v Ngcobo* 1938 NAC (N&T) 155 at 157.

9 In *Mokhesi v Nkenjane* 1962 NAC 70 (S), for instance, a woman under the age of 21 was persuaded to run away with a man and marry him by civil rites. Her guardian sued the man under customary law for abducting his daughter and marrying her without paying lobolo. The court refused the claim, holding that the conduct complained of was sanctioned by common law. In other words, to apply customary law (with the implication that the conduct amounted to abduction) was repugnant to the principles of public policy and would penalize conduct permitted by the common law. If the woman had been over the age of 21, the court might have reached a completely different conclusion.

10 Which would be borne out by a literal interpretation of s 1(1) of the Law of Evidence Amendment Act 45 of 1988.

11 *Chiduku v Chidano* 1922 SR 55 at 58. See, too, *Matiyenga & another v Chinamura & others* 1958 SRN 829 at 831.

12 For example, *Zimande v Sibeko* 1948 NAC 21 (C) at 23, *Zulu v Mdhletshe* 1952 NAC 203 (NE) and *Mngomezulu v Lukele* 1953 NAC 143 (NE).

although some restricted liberty,¹³ encouraged sexual immorality¹⁴ or favoured succession by illegitimate children.¹⁵

2.9 Had the courts been prepared to invoke the proviso more often, they could have furthered the cause of women and children's rights by deleting outdated and socially inappropriate rules. Their hesitance is, however, understandable, for, if they had fully exploited their powers, they could have invalidated large areas of customary law.¹⁶

2.10 In recent years, no reference has been made to the proviso at all, prompting one author to say that it has outlived its usefulness.¹⁷ Nevertheless, the repugnancy proviso could be revived to play a more dynamic role in South Africa's new constitutional order. Through it the courts could screen customary law against the Bill of Rights.

2.11 Attractive as this proposition may seem, it should in principle be avoided. First, to assume that the terms 'public policy' and 'natural justice' are synonymous with the catalogue of rights contained in ch 2 of the Constitution is misleading. The repugnancy proviso involves norms of high abstraction, and, while these norms might be *informed* by human rights, they are superordinate values that transcend even the Constitution.

2.12 Secondly, the repugnancy clause should not be used to skirt the serious issues raised by the Constitution. Whether or not fundamental rights should override customary law may be formally posed as an issue of limitation of rights and horizontal application or as an issue of repugnancy. The form of the ensuing debate is not without significance. The repugnancy proviso

13 *Gidja v Gingwane* 1944 NAC (N&T) 4.

14 *Palamahashi v Tshamane* 1947 NAC (C&O) 93 and *Linda v Shoba* 1959 NAC 22 (NE).

15 *Dumalitshona v Mraji* 5 NAC 168 (1927), *Madyibi v Nguva* 1944 NAC (C&O) 36 and *Qakamba & another v Qakamba* 1964 BAC 20 (S). In a residual category of cases, customary law was struck down simply because it appeared unjust. These cases included a rule that lobolo must be returned in full when a customary marriage was terminated by the wife's premature death (*Gidja v Yingwane* 1944 NAC (N&T) 4 at 7) or a rule that a replacement beast must be given for a cow that had been loaned, when the cow had died and the death was not reported to the owner (*Mcitakali v Nkosiyaboni* 1951 NAC 298 (S)).

16 See *Meesadoosa v Links* 1915 TPD 357 at 361.

17 Peart (n149) 116.

- a mark of colonial paternalism - is not an appropriate medium for determining the constitutional validity of customary law. This is an issue deserving a more thoughtful and a more rigorous discourse.¹⁸

2.13 Finally, s 211(3) of the Constitution expressly states that application of customary law is subject to the Bill of Rights. In view of this provision, the repugnancy proviso is now superfluous to any inquiry into the constitutional validity of customary rules.

2.14 The special protection that the repugnancy proviso affords lobolo is also now redundant. According to proposals made by the Law Commission in its *Report on Customary Marriages*,¹⁹ lobolo agreements should continue to be enforced and recognized but subject to new terms and conditions set by the Bill of Rights and legislation regulating the spouses' relationships with one another and with their children.

E. Recommendations

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

18 The discourse of colonialism was grounded on an arrogant assumption that European standards were the only ones worth considering. Hence, the repugnancy proviso gave judges licence to dismiss African institutions without examining their essential purpose and context.

19 See paras 4.3.3.14-16.

CHAPTER 3

COMPETENCE OF THE COURTS TO APPLY CUSTOMARY AND COMMON LAW

A. Excerpt from the Issue Paper

3.1 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,²⁰ provided the accused was Black or the offence was suffered by a Black.

B. Problem analysis

3.2 Under s 1(1) of the Law of Evidence Amendment Act²¹ 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,²² however, continues a restriction that was imposed on courts of traditional authorities in colonial times: in civil suits they could not apply common law.²³ In criminal cases, on the other hand, traditional courts are competent to apply both common and customary law.

3.3 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.

20 Other than those specified in the Third Schedule to the Act.

21 45 of 1988.

22 38 of 1927.

23 In addition, a proviso to s 12(1) specifically excludes their jurisdiction over matters of nullity and divorce arising out of civil or Christian marriages.

C. Submissions

3.4 The **Zion Christian Church** said that it was important to make an honest attempt to revive traditional courts in their true sense, as courts of first instance for litigants who valued their laws and culture.

3.5 **Professor A J Kerr (Rhodes University)** felt that, if traditional courts were to be brought within the general judicial structure, they would have to become courts of record and their presiding officers would have to undergo extensive training in South African common law.

3.6 The **Gender Research Project (CALs)** said that the jurisdiction of traditional authorities should not to be extended to permit adjudication of all civil-law claims until the complicated issue of the integration of chiefs' and magistrates' courts had been resolved.²⁴ Resolution of disputes under customary law before a traditional authority ought to be understood as a form of informal, inexpensive and accessible dispute resolution, which parties choose precisely because their transaction was customary and because they could take advantage of the traditional authorities' expertise.

D. Evaluation

(1) Application of common law in civil cases

3.7 The Black Administration Act maintains the colonial tradition of judicial segregation by restricting the competence of certain courts to apply either customary or common law, but not both. Courts of traditional rulers (and the former commissioners' courts) were available for

24 Linked to this submission, was the **Gender Research Project's** concern that the traditional authorities' criminal jurisdiction should not be extended without first paying attention to the impact of constitutional guarantees on procedural justice in informal tribunals. The questions of extending criminal jurisdiction and the procedures to be adopted by the courts, however, are issues falling outside the scope of this Report.

African litigants, whereas magistrates' courts and the higher courts (although not barred to Africans) were mainly for whites.

3.8 While the jurisdictional competence of traditional rulers is an issue beyond the terms of reference for this Report, it overlaps with the inquiry into the circumstances in which customary law should be applied. Hence, a few words on the topic are appropriate, in particular the racist manner in which both jurisdiction and application of customary law are conceived.

3.9 The jurisdiction of traditional courts should be revised in accordance with the constitutional prohibition on racial discrimination. Thus civil claims should not be restricted to 'Blacks against Blacks',²⁵ and criminal jurisdiction should not depend on the accused or injured party being black.

3.10 If race is removed as a ground of jurisdiction, then an obvious way of defining the competence of traditional courts in civil matters would be to refer to the litigants' adherence to a particular system of law. Section 12(1) of the Black Administration Act already does this by limiting the civil (and partly the criminal) jurisdiction of traditional courts to matters involving customary law. If a case involves the common law, the parties must sue in a magistrate's court. (Conversely, if customary law is involved, they would have a choice of forum, because all courts in South Africa are entitled to apply that law.)

3.11 Once jurisdiction depends on the applicability of a particular system of personal law rather than race, the existing court structure can be reconceived to serve a different need: the parties' cultural expectations. This approach would suggest that the civil jurisdiction of traditional rulers should continue to be restricted to customary law.

3.12 Three objections arise. The first is the undesirability of compelling rural litigants to bring common-law claims in what are often inaccessible urban tribunals (normally a magistrate's court or a small claims court), thereby entailing greater expense and loss time. The second is the

25 'Black' is defined in s 35 of the Black Administration Act to mean any person 'who is a member of any aboriginal race or tribe of Africa'. Given South Africa's heterogeneous population, however, application of this definition has been far from easy. See Bennett *Sourcebook of African Customary Law* 66-7.

difficulty of knowing whether a claim arises out of common or customary law. The third is a possible charge of indirect racial discrimination.

3.13 As far as the first objection is concerned, points made by respondents to the Issue Paper were taken. If traditional courts were given the power to apply common law, their presiding officers would need to undergo extensive training in South African common law. Moreover, traditional courts ought to be maintained as cheap, informal and accessible tribunals, which parties can approach because their dispute is one rooted in customary law.

3.14 The second objection underlines the difficulties inherent in deciding what law to apply to a suit. Traditional authorities are ill-equipped to make these decisions: they are not skilled in the intricacies of the conflict of laws and they cannot be relied upon to draw the fine distinctions that higher courts might make.²⁶ (As a matter of practice, traditional rulers probably pay little attention to the legal provenance of the actions brought before them.) Even decisions of the Black Appeal Court, made in the context of s 12(1) of the Black Administration Act, were sometimes quite arbitrary.²⁷ Extending the traditional courts' civil jurisdiction to cover matters of common law (in line with their criminal jurisdiction), however, is too drastic an answer to what is in effect a technicality. It must perhaps be acknowledged that there is no straightforward solution to the choice of law problems posed by s 12(1).

3.15 The third objection of indirect discrimination can be met by weighing the right to equal treatment against the right to culture. People are surely entitled to have their disputes adjudicated

26 *Myandu v Dladla* 1978 AC 64 (NE), for instance, held that a claim for bridewealth based on a civil marriage could be heard in a traditional court, because the issue was governed by customary law. *Yeni v Jaca* 1953 NAC 31 (NE) and *Ngwenya v Mavana* 1975 BAC 75 (S), on the other hand, held that traditional courts had no jurisdiction over claims for damages for adultery, because the common law was applicable.

27 In a relatively simple suit to recover damages for defamation, for example, *Mkize* 1948 NAC 39 (NE) held that, because the words complained of would not give rise to an action in customary law, a traditional court had no jurisdiction. (See too *Ntshingili & others v Mncube* 1975 BAC 100 (NE).) It was arbitrarily assumed that common law had to be applied to ensure that the plaintiff obtained a remedy, although there might have been equal justification for applying customary law and denying the remedy. In another case involving an action for damages for rape, *Nkosi v Mdhladhla* 1945 NAC (N&T) 46, the Appeal Court held that, because customary law permitted only a criminal action in the circumstances, a traditional court lacked jurisdiction. Conversely, it was held that, if both systems of law offered remedies, the jurisdiction of traditional courts was confirmed. See *Cebekulu v Shandu* 1952 NAC 196 (NE), *Mkize v Mnguni* 1952 NAC 242 (NE) and *Mazibuko v Nyathi* 1953 NAC 118 (NE).

in a forum that will apply laws and procedures with which they are familiar. Courts abroad have had no hesitation in supporting culturally exclusive institutions against charges of discrimination.²⁸

(2) Application of customary law in criminal cases

3.16 While s 12(1) of the Black Administration Act withholds jurisdiction from traditional courts in civil matters involving common law, s 20(1)(a) of the Act gives them power to apply customary or common law in criminal matters.²⁹ Thus traditional rulers have jurisdiction over all minor crimes, whatever their legal origin. What appears to be an anomaly was perhaps a sensible decision, since in customary law careful distinctions are not drawn between crime and delict, and, even where they are, the distinctions will not always be the same as in common law.³⁰

3.17 Should traditional courts now lose their competence to apply customary criminal law? Maintenance of the status quo would be the first argument against this proposition. Any attempt to change their powers (and thereby circumscribe their jurisdiction) is unlikely to meet with compliance,³¹ since customary law does not distinguish precisely between civil and criminal matters.³² Because no particular objections have been raised to traditional courts applying both common and customary law in criminal cases, matters can perhaps be left as they are.

(3) Recognition of customary criminal law

28 See the Australian decision in *Gerhardy v Brown* (1985) 159 CLR 70 and the United States decisions in *Morton v Mancari* 417 US 535 (1974) and *US v Antelope* 430 US 641 (1977). See further *Ross-Spencer & another NO v Master of the High Court* 1971 Swaziland LR 59 (HC) at 65.

29 See *Labuschagne* (1974) 7 *De Jure* 38 and *Olivier et al Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 585-7.

30 *Holleman Chief, Council and Commissioner* 92 and the Editorial in (1967) 7 *Rhod LJ* 1ff.

31 We have no evidence, for example, of whether traditional authorities scrupulously comply with the limitations imposed on their jurisdiction.

32 For example, as a prelude to a customary marriage, it might happen that the bride-to-be is abducted by her suitor and carried off to his homestead. See *R v Swartbooi* 1916 EDL 170. Viewed from the perspective of the common law, this action could fall into the category of crime (kidnapping), whereas, from a customary-law perspective, it could be a prelude to marriage negotiations. The courts seem to have solved the problem of classification intuitively by considering the total cultural environment of the case.

3.18 It is a different matter to require other courts to apply the customary law of crime. Although it has always been assumed, since colonial times, that the common law should provide an overall framework for government and control of the population, this assumption has never been seriously considered in South Africa. To broaden the scope of customary criminal law now would pose a major question of policy - and public comment would have been appreciated - but none of the respondents to the Discussion Paper chose to mention the issue. In the circumstances, there seems to be good reason for not changing the existing position.

3.19 Criminal law, like other branches of public law, tends to be identified with state sovereignty. Hence, it will be readily accepted that everyone in the country should be subject to the same system of public law. Moreover, because the commission of crimes affects the public weal, a strong argument can be made for not allowing offenders to plead innocence on the ground that their acts were condoned by a particular cultural tradition. When laws involve not individual or narrow community interests, but wider interests of the society as a whole, the right to equal treatment will outweigh any freedom to pursue a culture of choice.³³

E. Recommendations

3.20 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).

33 Hence, several early cases held that violations of the criminal law could not be justified on the basis that the offending act was a customary practice. See, for instance, *R v Swartbooi* 1916 EDL 170, *R v Mane* 1948 (1) SA 196 (E) and *S v Sita* 1954 (4) SA 20 (E) at 22. The constitutional implications of this proposition were fully explored in a Canadian decision, *Thomas v Norris* [1992] 2 CNLR 139 (BCSC), which was further discussed by Isaac (1992) 21 *Manitoba LJ* 618.

3.21 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.

3.22 No attempt should be made to extend 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.

CHAPTER 4

MARRIAGE

A. Excerpt from the Issue Paper

4.1 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 westernized 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.

B. Problem analysis

4.2 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.

4.3 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 Law Commission's proposals in its *Report on Customary Marriages*¹ 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.

4.4 Certain differences may none the less persist. The potentially polygynous nature of customary marriages (as opposed to the monogamous nature of civil or Christian marriages) is

1 For example, capacity to marry, the property regime and grounds for divorce will be governed by the same rules. See *Report on Customary Marriages* paras 5.1.19, 6.3.4.22 and 7.2.8, respectively.

the most notable instance.² Differences will also feature in matters ancillary to the marriage, namely, lobolo and engagement agreements and actions involving third parties.

4.5 According to the *Report on Customary Marriages*, although a lobolo agreement may no longer be an essential requirement for a valid marriage,³ 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.⁴ When lobolo is linked to a civil or Christian marriage, however, the choice of law is not as obvious.⁵ Should the common law govern it?

4.6 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.

4.7 As will become apparent below, we have 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.

2 Another is the spouses' relative capacity to marry one another.

3 Nor will it affect the spouses' rights and duties and their relationship with their children: para 4.3.3.14.

4 Subject to the qualifications mentioned in the Law Commission's *Report on Customary Marriages* paras 4.3.3.14-16.

5 For a start, the marriage and the lobolo agreement involve different parties: the former is exclusively the concern of the spouses, while the latter concerns the groom (or his guardian) and the bride's father (or his heir): Bennett *Application of Customary Law* 147. See generally Peart (1984) 47 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 158ff.

C. Evaluation

4.8 The *Report on Customary Marriages* still assumes that the form of a marriage will play a role in determining the law applicable to the spouses' relationship.⁶ In other words, celebrating a union in a church or registry office leads to application of common law, while celebration by customary rites leads to application of customary law. Since colonial times, choice of law for marriage has been based on an assumption that couples who married by Christian rites intended the common law to apply to their relationship.⁷ (Marriage thus functioned as a form of exemption from customary law.)⁸ Today, a more fitting justification would be the spouses' cultural orientation.

4.9 Allowing the *form* of marriage to determine the applicable law has the great advantage of providing a simple basis for choice of law in an area likely to produce intractable problems. For instance, a quick answer could be found for the following problem: if a woman normally subject to customary law were to contract a civil marriage with a man who was normally subject to the common law, the form of the marriage would regulate the consequences of their union.

4.10 There is always a risk, of course, that tying choice of law to a culturally marked formality, such as a wedding, might not accord with the spouses' actual intent or cultural preferences.⁹ Africans might have married in Church as a matter of conscience, without intending to opt out of customary law.¹⁰ They might have wanted their personal law to continue to apply, which can

6 Paragraphs 4.1.4ff.

7 See the Nigerian cases of *Cole* (1898) 1 NLR 15 and *Asiata v Goncallo* (1900) 1 NLR 41.

8 Civil or Christian marriage offered certain secular benefits for women in particular, perhaps the most important of which was a monogamous relationship with their husbands: Phillips *Survey of African Marriage and Family Life* 29.

9 Hence, in order to discover the spouses' underlying intention to conclude a customary marriage, the *Report on Customary Marriages* paras 4.1.13 and 4.4.10 proposed referring to the observance of such typical practices as the giving of lobolo, a traditional wedding ceremony or the involvement of the two families.

10 What is more, Christian marriage has lost many of its cultural connotations, as independent African churches have emerged and the established churches have been freed of their association with colonial government.

perhaps be gauged from the fact that many Africans observe traditional ceremonies and nearly all, whether they marry in Church or not, have a lobolo agreement.¹¹

4.11 Moreover, linking choice of law to the form of a juristic act is unsatisfactory when the act initiated a long-term relationship. What has a Church ceremony to do with distribution of property on divorce or the devolution of an estate on death, issues that may arise many years after the wedding?¹² The presumption in these circumstances that the ceremony reflects the spouses' intent to be bound by a particular system of law seems at best tenuous,¹³ if not a complete fiction.¹⁴

4.12 In order to meet these objections, courts elsewhere in Africa sought to take account of the actual expectations of the parties by applying customary law to certain incidents arising from dissolution of civil or Christian marriage.¹⁵ The disadvantage of jettisoning the form of marriage as the key to choice of law, however, was inevitably to make the conflict process far less certain. The decision of what law to apply then depended on the vagaries of spouses' way of life (or cultural orientation) at the date that an action was instituted.

4.13 South African courts avoided these uncertainties by the simple expedient of giving civil and Christian marriages an overriding effect.¹⁶ Their decisions were based less on the parties' presumed intent than on the superior value accorded that type of marriage. Hence, when called

11 See, for instance, Raum & De Jager *Transition and Change in a Rural Community* 55ff and Koyana *Customary Law in a Changing Society* 27ff.

12 In Nigeria, for example, the fact that a deceased person had contracted a civil marriage meant that the estate would be distributed according to the common law: *Cole* (1898) 1 NLR 15.

13 A point taken by *Coleman v Shang* 1959 GLR 390 at 401 (and confirmed on appeal to the Privy Council [1961] AC 481).

14 See the leading Nigerian case, *Smith* (1924) 5 NLR 102 at 104.

15 See, for instance, the Lesotho decision in *Khatala* 1964 HCTLR 97 at 100 and s 2(1) of Botswana's Dissolution of African Marriages (Disposal of Property) Act Cap 29:06.

16 It followed that the validity and continuance of the marriage did not depend upon payment of lobolo: *Cheche v Nondabula* 1962 NAC 23 (S) at 28. And the wife's guardian could no longer 'impound' his ward (theleka) in order to enforce payment of lobolo, because this practice was construed as malicious desertion: *Ntsimango* 1949 NAC 143 (S) at 144.

upon to adjudicate claims for lobolo, they reasoned that lobolo was ancillary to the marriage,¹⁷ and hence had to be modified by principles governing the union.¹⁸ To the extent that lobolo is not essential to the validity of marriage, the Law Commission has endorsed this approach.¹⁹

4.14 The most controversial issue, and one that provoked the most litigation, was whether a claim for return of lobolo was valid if one of the spouses committed adultery. In customary law, a single act of adultery (especially by a husband) gives no immediate cause for complaint, nor does it necessarily justify ending the marriage.²⁰ In the common law, on the other hand, adultery by either spouse may lead to an irretrievable breakdown of the marriage. Here again, the courts subjected lobolo agreements to the exigencies of civil marriage:²¹ whether lobolo had to be returned was decided according to common-law principles.²²

4.15 A spouse's death also generated difficult conflict problems. Under the common law, death automatically terminates marriage, whereas, under customary law, the union may continue until the parties arrange to end it (which would be signified by returning lobolo).²³ Although one might have expected the courts to apply common law, they gave effect instead to customary law. As

17 See *Gomani v Baqwa* 3 NAC 71 (1917) and *Peme v Gwele* 1941 NAC (C&O) 3. More generally, the courts felt that there was only one marriage - the civil union - and any lobolo agreement should be subordinate to it. See *Tobiea v Mohatla* 1949 NAC 91 (S) and *Sgatyva v Madleba* 1958 NAC 53 (S) at 56. Courts elsewhere in southern Africa have taken a similar approach: *Muchenje v Kunaka* 1912 SR 207, *Khoza v Malambe & another* 1976 SLR 380 at 384 and *Maqutu v Hlapane* 1971-3 LLR 36.

18 *Mbonjiwa v Scellam* 1957 NAC 41 (S). In particular situations, however, they have oscillated between treating the lobolo agreement as a common-law contract (Kerr 1960 *Acta Juridica* 337) with implied terms governed by customary law and treating it as a customary agreement to be governed by customary law unless in conflict with the principles of the marriage (Peart (n181) 167).

19 In para 4.3.3.16 of its *Report on Customary Marriages*.

20 Even adultery committed by the wife, provided it was not persistent, is not necessarily a good reason to end the marriage: Bekker (1976) 39 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 364ff.

21 *Sicence v Lupindo* 3 NAC 164 (1914), *Mpoko v Vava* 3 NAC 198 (1912), *Gomani v Baqwa* 3 NAC 71 (1917), *Cobokwana v Mzilikazi* 1931 NAC (C&O) 44, *Fuzile v Ntloko* 1944 NAC (C&O) 2, *Nkuta v Mathibu* 1955 NAC 47 (C) at 49 and *Gwala v Cele* 1978 AC 27 (NE).

22 Customary law, however, determined the various deductions allowed the wife's guardian: *Qotyane v Mkhari* 1938 NAC (N&T) 192, *Phalane v Lekoane* 1939 NAC (N&T) 132 at 134, *Raphela v Ditchaba* 1940 NAC (N&T) 29 and *Fuzile's* case above.

23 Thus, if a husband were to die while his wife was still capable of bearing children, she would be expected to enter into a levirate union. If she refused to do so, her guardian would be obliged to return part of the lobolo. See Bennett *Sourcebook of African Customary Law* 414-15.

a result, the lobolo agreement was deemed to continue despite termination of the marriage.²⁴ This departure from the general rule that common law was to be applied to all incidents of civil marriages perhaps demonstrates that the courts were prepared to accommodate the parties' actual expectations.²⁵

4.16 As far as engagement agreements were concerned, courts in the past had no hesitation in applying common law to an agreement to marry in a church or registry office.²⁶ They do not appear to have encountered the more difficult problem of having to decide what law to apply where the parties had no clear intention or where the union was to be celebrated by both customary and Christian rites.²⁷

4.17 The law applicable to the spouses' marital relationship has generally been extended to govern their relationship with third parties.²⁸ Hence, common law was applied to delicts arising from impairment of the marital consortium, such as adultery, abduction or enticement,²⁹ on the understanding that these actions arose from an interference with conjugal rights established by a civil or Christian marriage.³⁰ An inflexible choice of law such as this, however, seems

24 *Mrubata & another v Dondolo* 1949 NAC 174 (S) at 176. Hence, if a widow left her husband's family, she rendered her guardian liable to restore portion of the lobolo: *Ntlongweni v Mhlakaza* 3 NAC 163 (1915), *Makedela v Sauli* 1948 NAC (C&O) 17 and *Tobiea v Mohatla* 1949 NAC 91 (S). In *Somzana v Bantshi* 4 NAC 84 (1921), a case where the *wife* had died, however, the court wavered on whether to return lobolo. Similarly, the husband's family was awarded any posthumous children born to the widow, and the husband's heir was allowed to claim lobolo paid for any daughters: *Mrubata's* case above.

25 An approach that is not without difficulty. Whose expectations are to be taken into account, only the spouses' or those of the wife's guardian too?

26 In most systems of customary law, an agreement between a man and woman to marry has no legal consequence, because marriage is a matter of family rather than individual concern. Under the common law, however, failure to fulfil a promise to marry could ground an action for damages. See Bennett *Application of Customary Law* 143-7. By applying common law, a jilted party was allowed an action for breach of promise: *Lupusi v Makalima* 2 NAC 163 (1911), *Nzalo v Maseko* 1931 NAC (N&T) 41 and *Roqoza* 1965 BAC 1 (S).

27 In the case of marriage by *both* customary and Christian rites, a Lesotho court sought to ascertain which was the predominant union. See *Mabitle v Mochema* 1971-3 LLR 271 and Poulter *Legal Dualism in Lesotho* 50.

28 Especially with their children: *Ngcobo* 1944 NAC (C&O) 16, *Morai v Morai & another* 1948 NAC (C&O) 14, *Mosehla* 1952 NAC 105 (NE), *Msomi* 1968 BAC 29 (NE) at 32, *Ramokhoase* 1971 BAC 163 (C) at 167 and *Madlala* 1975 BAC 96 (NE) at 99.

29 Poulter (n203) 64-5.

30 *Mdodana & another v Nokulele* 2 NAC 138 (1911) and *Mtshengu v Mawengu* 1954 NAC 172 (S).

inappropriate. Why should the nature of the spouses' union dictate duties for an otherwise uninvolved third party?

4.18 In summary, it is evident that courts have a long-established practice of referring to the form of civil and Christian marriages to establish an applicable law. Especially for purposes of determining the spouses' immediate rights and duties inter se, use of this factor seemed to provide satisfactory solutions. More complicated problems arose, however, in relation to engagement agreements, delicts arising out of interference with the marital bond and matters arising on dissolution of marriage, notably return of lobolo. Here, form of the marriage on its own cannot yield the overall cultural orientation of the case.

D. Recommendations

4.19 Wherever marriage law permits of 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. 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.

CHAPTER 5

WILLS

A. Excerpt from the Issue Paper

5.1 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.

B. Problem analysis

5.2 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.¹ 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 1990.²

5.3 Customary law, by contrast, allowed only intestate succession.³ 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

1 See *Glazer* 1963 (4) SA 694 (A) and the Law Commission *Review of the Law of Succession* para 6.

2 The Maintenance of Surviving Spouses Act 27 of 1990 gives a surviving spouse the right to maintenance from a deceased estate. According to current law, the Act does not apply to the spouses of a customary marriage, because the term 'survivor' is defined to mean the spouse of a *marriage* dissolved by death, and, unless the Law Commission's proposals in its *Report on Customary Marriages* to give full recognition to customary marriages are accepted, customary unions are not included in the term 'marriage'.

3 It is true that the head of a household can make arrangements for the distribution of his estate by various types of oral disposition (Kerr *Customary Law of Immovable Property* 109-11), but these are not the same as wills, because he may not disregard the usual order of intestate succession.

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.

5.4 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.⁴

5.5 Section 23 of the Black Administration Act⁵ 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.

C. Submissions

5.6 The **Council of South African Banks** stressed the importance of freedom of testation, and said that, because customary law will inevitably become less significant over time, there is much to be said for working towards a uniform system. Other submissions, however, indicated that the principle of freedom of testation is in practice very limited. For instance, the **Zion Christian Church** felt that, although individuals should be allowed the privilege of deciding the devolution of their estates (in terms of African law and within limits of the Constitution), families have interests in urban houses. Hence, while a son or daughter might be allowed to buy a house from the township council, other members of the family will claim that the property is communally owned.

5.7 The **Gender Research Project (CALs)** added a caveat that giving people the power to make wills does not ensure that women and other family dependants will gain access to property.

4 Bennett *Sourcebook of African Customary Law* 218-19.

5 38 of 1927.

Citing research conducted by the Women and Law in Southern Africa Project,⁶ it said that men usually bequeath their property to other men.

5.8 **Dr A M S Majeke (University of Fort Hare)** felt that the introduction of testamentary succession would be problematic, for customary law has no concepts of testacy, whether partial or intestate, but only rules of succession. He said that a person who accepted a benefit under a will without the approval of the deceased's family would stand a good chance of forfeiting his life. The **Committee on Constitutional Affairs for Northern Province House of Traditional Leaders** also supported maintenance of the customary regime of intestate succession rather than a general freedom to execute wills.

D. Historical survey and comparison with the laws of other African states

5.9 None of the colonial administrations in southern Africa seems to have reflected on the question whether people subject to customary law should be permitted to make wills. The Cape was perhaps an exception, for here succession was regulated by customary law under the Native Succession Act.⁷ In Transkei,⁸ Natal⁹ and the Transvaal,¹⁰ however, those subject to customary law were simply assumed to have freedom of testation.

5.10 It could have been argued, of course, that the Wills Act,¹¹ which stipulates the method for executing an ordinary underhand will, superseded customary law. This argument was in fact the basis of a Bechuanaland decision,¹² where the court dismissed contentions that a testator had no

6 Namely, *Widowhood, Inheritance Law, Customs and Practices in Southern Africa* (1995).

7 18 of 1864. See *Quvana v The Master & another* 1913 CPD 558.

8 By s 37 of Procs 110 and 112 of 1879, s 36 of Proc 140 of 1885 and s 8 of Proc 142 of 1910. See *Nomveve v Mapini* (1892-93) 7 EDC 3, *Sigidi's Executors v Matumba* (1899) 16 SC 497 and *Mayekiso v Hermanus* 1908 EDC 53.

9 In *Zikalala* 1930 NAC (N&T) 139, however, the court held that it was permissible to dispose of 'kraal' (or family) property only, because the deceased was absolute owner of it.

10 By implication of s 70 of Proc 28 of 1902.

11 7 of 1953.

12 *Fraenkel & another v Sechele* 1964 HCTLR 70 (reported in (1967) 11 *Journal of African Law* 51). See Himsworth (1972) 16 *Journal of African Law* 12. See, too, the Nigerian case of *Idehen* [1991] 6 NWLR

capacity to make a will because he was bound by Tswana customary law and had shown no indication of abandoning it.¹³ In a Southern Rhodesian case,¹⁴ the court went a step further. It said that, because testamentary capacity was *implicit* in the Administration of Estates Ordinance, any rule of customary law prohibiting the execution of wills would be inconsistent with the implications of the legislation and therefore inapplicable.

5.11 In Ghana and Nigeria, too, colonial enactments providing for the execution of wills were assumed to be applicable to everyone in the country,¹⁵ although courts and writers were doubtful whether customary laws of intestate succession could be so lightly disregarded.¹⁶ By contrast, the colonial governments of Kenya, Uganda, Northern Rhodesia and Nyasaland took a definite stand against extending the power of testation to Africans.¹⁷ It was only after independence and a careful consideration of this policy, that the rule was reversed.¹⁸

E. Evaluation

5.12 The question whether the customary law of intestate succession may be disregarded by allowing all people to make wills must be assessed in social context. In this regard, the problem to be addressed is how to ensure material support for surviving members of a family when the

382 (SC), where the Supreme Court upheld freedom of testation in the face of a proviso to the local wills legislation. The court held that the phrase '[s]ubject to any Customary Law relating thereto ...' serves only to qualify what property may be disposed of by will (namely, the testator's own property). See Sagay (1995) 39 *Journal of African Law* 173.

13 And therefore did not fall within a proviso to s 3(b) of the Administration of Estates Proc Cap 83. This argument was dismissed on the ground that the Proclamation dealt only with the narrow issue of collecting the deceased's assets, paying his debts and then distributing his estate, which had nothing to do with the power to make wills.

14 *Komo & another v Holmes* NO 1935 SR 86.

15 See Allott *Essays in African Law* 262-4.

16 Morris (1970) 14 *Journal of African Law* 5. See the Gambian case *Saidy v Saidie* (reported in (1974) 18 *Journal of African Law* 183-98) and the Nigerian cases *Yunusa v Adesubokan* (reported in (1970) 14 *Journal of African Law* 56-64 and (1972) 16 *Journal of African Law* 82-8) and *Idehen* [1991] 6 NWLR 382 (SC).

17 Regarding the position in Zambia, see Colson (1950) 2 *J of African Administration* 24ff and the Report of the Zambian Government Law Development Commission on the *Law of Succession* (1982).

18 In Kenya, following the 1968 Government Commission of Inquiry into Succession (for which see Ollennu (1969) 5 *East African LJ* 98-102), in Zambia by the Wills and Administration of Testate Estates Act 6 of 1989 and in Malawi by the Wills and Inheritance Act 25 of 1967.

breadwinner dies. Roman-Dutch common law was amended by the Maintenance of Surviving Spouses Act¹⁹ in order to deal with the same problem.

5.13 It must be appreciated that the customary law of intestate succession puts widows in a precarious position. In the first place, because a woman cannot inherit from a man, she has no means of rearing dependants apart from a personal right to maintenance from the estate.²⁰ In the second place, because most of the property acquired by a wife is deemed to belong to her husband, it falls into his estate to be distributed amongst his male heirs.²¹

5.14 If people could dispose of their property by will, they might avoid customary law and make sensible provision for their families. At present, s 23 of the Black Administration Act allows persons subject to customary law to make wills in respect of all but two categories of property. We must ask whether excluding freedom of testation in these instances is an effective means of dealing with the social problem.

(1) Movable house property

5.15 Section 23(1) of the Black Administration Act provides that:

'All movable property belonging to a Black and allotted to him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.'

19 27 of 1990.

20 This right is so hedged round with restrictions that its value is considerably diluted: Bennett *Sourcebook of African Customary Law* 418-19. *Xulu* 1938 NAC (N&T) 46 at 48 and *Macubeni* 1952 NAC 270 (S) were careful to point out that a widow has no proprietary right in the estate. Cf **Dr A M S Majeke's (University of Fort Hare)** submissions below at para 6.21.

21 See Bennett *Sourcebook of African Customary Law* 325ff. The latter problem can only be finally cured by reforming the wife's proprietary capacity, ie, by giving her real rights in the property she acquires that can be asserted against her husband and his family.

The movable property spoken of in this section is more commonly known as 'house property'.²² On marriage, an independent establishment is created for the wife and her children, and, as a man takes second, third and subsequent wives, new houses are established. Acquisitions by inmates of a house or items allotted to the house by the head of the family unit accrue to the house estate. Each estate must be kept strictly separate from other estates, for the house heir is destined to inherit it.²³

5.16 Because s 23(1) forbids testamentary disposition of property that would otherwise be inherited by house heirs in polygynous families, its main purpose is to protect their interests. There are three reasons why this provision does not meet its aim. First, for purely technical reasons hinging on the concept of 'house property', the protection it offers is not available if the testator had contracted a civil or a Christian marriage. These marriages do not create 'houses'.²⁴

5.17 Secondly, the assumption underlying s 23(1) is that polygynous marriages are a norm in African society. In fact, they are exceptions. If polygynous marriage and its household structure is no longer the rule, then the section offers only slight protection for customary-law heirs. Where a man has taken only one wife, is it appropriate to speak of the creation of a 'house' and thus 'house property'? A literal reading of s 23(1) might suggest that the prohibition on bequeathing movable house property includes property that accrues or is allotted to the wife of a monogamous

22 Section 35 of the Black Administration Act 38 of 1927 defines the term 'house', and the KwaZulu/Natal Codes (Proc R151 of 1987 and Act 16 of 1985, respectively) give specific definitions of 'house property', ie, any 'property vested in and pertaining specially to any house in a family home; such property is acquired by donations, earnings or apportionment and by receipt of *lobolo* in respect of the girls of the house.'

23 See *Sijila v Masumba* 1940 NAC (C&O) 42 at 44-7.

24 *Tonjeni* 1947 NAC (C&O) 8, *Ngcwayi* 1950 NAC 231 (S) and *Thekiso v Mogorosi* 1951 NAC 17 (C). Cf Francis 1967 *Acta Juridica* 150. Section 23(1) of the Black Administration Act does apply, however, to property accruing to the wife of a customary marriage that was automatically terminated by a later civil or Christian marriage by the husband to another woman. Such property is protected by s 22(7) of the Act, which is discussed below at para 6.28.

marriage,²⁵ but such property could just as well be regarded as 'family' property (a category considered below) and therefore devisable by will.²⁶

5.18 Thirdly, if the Law Commission's proposals in its *Report on Customary Marriages* are accepted, the concept of house property will disappear. Monogamous marriages will be deemed to be in community of property and polygynous marriages will be out of community. In both cases, the proprietary regimes will be assimilated to those created by civil or Christian unions.

5.19 Finally, it should be noted that s 23(1) does nothing to alleviate the plight of widows. By preventing the head of a household from bequeathing an important category of property to his wife, a substantial part of his estate will continue to devolve under customary law. The point made by the **Gender Research Project (CALS)** - that extending testamentary capacity offers no guarantee that men will take care of their dependants - is accepted. Nevertheless, legally empowering men to take prudent action on behalf of their families would be the first step towards solving the problem.

(2) Land held under quitrent tenure

5.20 Section 23(2) of the Black Administration Act provides that:

'All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under sub-section (10).'

This provision dates from the second half of the nineteenth century when colonial administrations allowed certain Africans to acquire land under quitrent title. (Most of this land was situated in the former Ciskei and Transkei.) In order to prevent plots from being fragmented into

25 A construction supported by the definition of 'house' in the KwaZulu/Natal Codes as 'the family and property, rights and status which commence with, attach to and arise out of the customary marriage of any Black woman'. Cf the definition of 'house property' in the Codes given above (n228).

26 Moreover, where the testator happened to be a married woman, s 23(1) is also unlikely to be apply. A wife's personal assets cannot strictly speaking be categorized as 'house' property. Customary law seldom allows wives outright ownership in property, but when it does such property is not invariably inherited by the house heirs. See Francis (n230) 150.

uneconomic holdings amongst a number of customary-law heirs, succession was legislatively regulated.²⁷

5.21 These provisions, which are currently contained in the Black Areas Land Regulations of 1969,²⁸ were specially designed to approximate the customary order of intestacy. Hence, title to land held under quitrent was to be inherited in the first instance by 'the deceased's eldest son of the principal house or, if he be dead, such eldest son's senior male descendant, according to Black custom'.²⁹

5.22 The Regulations are now of dubious validity. In the first place, they are likely to fall foul of s 9 of the Constitution, which prohibits discrimination on grounds of sex or gender. In the second place, they seem destined to become redundant in view of the land reforms that have been underway since the early 1990s. In 1991, the Upgrading of Land Tenure Rights Act³⁰ initiated the programme of land reform by converting any right (including quitrent)³¹ over surveyed land into freehold tenure. Although the Act did not immediately apply to the then independent homelands,³² the continued existence of quitrent tenures became precarious.³³

27 See s 23 of Proc 227 of 1898.

28 Annexure 24 of the Black Areas Land Regulations R188 of 1969.

29 This provision was prima facie not applicable where a deceased quitrent holder had married according to civil or Christian rites, because such marriages do not create houses. The Appellate Division, in *Ex parte Minister of Native Affairs: In re Magqabi v Magqabi & others* 1955 (2) SA 428 (A), however, held that sons of these marriages were not excluded from the terms of the regulations. Hence, a deceased's *oldest* son would inherit, and, in the event of competition between the sons of more than one marriage (of whatever form), it would simply be the deceased's oldest son. See the discussion by Kerr *Customary Law of Immovable Property* 158ff and Visser (1981) 14 *De Jure* 326ff.

30 112 of 1991.

31 Namely, a quitrent title defined in reg 1 of the Black Land Regulations Proc R188 of 1969.

32 And it became applicable in the self-governing territories only after consultation between the State President and the cabinet of the relevant territory: s 25(1) of the Upgrading of Land Tenure Rights Act (now itself repealed by s 10 of Act 11 of 1995).

33 According to s 39 of Proc 23 of 1993 (the legislation repealing the Black Land Regulations), the proclamation also did not apply to the self-governing territories, nor, of course, would it apply to the independent homelands.

5.23 If quitrent is replaced by full ownership, the reason for s 23(2) may disappear.³⁴ Nevertheless, an important question of policy, one harking back to the nineteenth century, should be reconsidered: should relatively small allotments of land (especially agricultural land) be devisable by will? As **Professor Kerr** points out, if landholders were given freedom of testation, their plots could be split up into holdings so small that they will become uneconomic.

(3) **Immovables and family property**

5.24 Subsection 23(3) of the Black Administration Act provides that '[a]ll other property of whatsoever kind' may be devised by will. It is implicit in this section that the two main categories of property amenable to disposition by will are immovables and what is usually called 'family' property.

5.25 As the word suggests, 'family' property is not in the exclusive control of the deceased.³⁵ For this reason most African countries allow testamentary disposition of only 'personal' property.³⁶ In the circumstances, the South African legislature's decision to permit freedom of testation over family property seems anomalous.

5.26 The **South African Council of Banks** was against any restriction on the power to dispose of family property by will. It said that allowing only personal property to be devised by will would prevent people from choosing heirs to family houses, which are usually the most significant asset in any estate. Other respondents to the Issue Paper, however, indicated that members of a family are unlikely to support wills purporting to dispose of land or houses.

34 Especially when new tenures become applicable to land, such as those contemplated in s 8(2)(d) of the Communal Property Associations Act 28 of 1996, as read with the Schedule to the Act.

35 For a definition, see Bennett *Sourcebook of African Customary Law* 237-8.

36 See, for instance, *Idehen* [1991] 6 NWLR 382 (SC) and Okoro *Customary Laws of Succession in Eastern Nigeria* 226.

5.27 Formerly, any land subject to the Black Areas Land Regulations could not be disposed of by will.³⁷ In those areas where the Regulations did not apply,³⁸ however, it was an open question what effect a will bequeathing land would have, especially in view of the fact that, as **Professor Kerr** says, customary forms of land tenure have no concept of absolute ownership.³⁹

5.28 It could always be argued, of course, that a beneficiary under a will cannot legally acquire more rights than the testator had. Admittedly, Roman-Dutch law allows testators to dispose of things they do not own,⁴⁰ but they still cannot create rights they never had.⁴¹ Hence, a will does not have the effect of increasing or enlarging interests in land.⁴²

5.29 In short, to permit persons in control of family property, whether land, livestock or cash, to dispose of that property by will is both a legal anomaly and potentially seriously disruptive for surviving family members.

(4) Guardianship clauses

5.30 Guardianship clauses, ie directions in wills that guardianship of a testator's minor children is to go to a particular person, create a problem analogous to bequests of family property. In customary law, rights to a child born in a valid marriage vest in the father's family, not in the

37 Regulation 53(5) of Proc R188 of 1969.

38 Especially, of course, urban land. See Prinsloo (1990) 107 *SALJ* 494. Most (if not all) urban titles were converted to full ownership under the Upgrading of Land Tenure Rights Act 112 of 1991, and hence could be disposed of by will.

39 Although he says that this is the correct term to use for rights to residential and arable land. In general, however, customary law does not have a technical vocabulary of ownership to describe land tenure: Bennett 1985 *Acta Juridica* 173.

40 Even property belonging exclusively to a third party may be bequeathed, provided that a testator was aware, when he or she made the will, that it belonged to someone else: *Receiver of Revenue v Hancke & others* 1915 AD 64 at 73, *Estate Brink* 1917 CPD 612 and *Attridge NO v Lambert* 1977 (2) SA 90 (D).

41 A will disposing of someone else's property merely obliges the executor to acquire or pay over the value of the property bequeathed: *Hancke's* case above at 73.

42 Courts in West Africa, on the other hand, simply bowed social pressure and allowed wills to create new titles. See Park (1965) 9 *Journal of African Law* 15 and 16 and, more generally, Lloyd (1959) 3 *Journal of African Law* 105.

father personally.⁴³ What if the father were to execute a will and transfer these rights to a person outside the family? What if the mother - who in customary law has no legal right of guardianship at all - were to purport to devise guardianship of her children?

5.31 It is arguable that these dispositions are invalid, unless guardianship had been transferred to someone who had an independent entitlement under customary law. The problem may well be solved, however, by the Law Commission's recommendations in its *Report on Customary Marriage*. On constitutional grounds, the Commission said that both mothers and fathers should be deemed to have rights of custody and guardianship over their children.⁴⁴ Once parents have a personal entitlement to guardianship, it follows that they can validly transmit it by will.⁴⁵

5.32 The Law Commission's proposal in the Issue Paper preceding this Report - that guardianship clauses should be permitted - were supported by **The Women's Lobby**. The **Gender Research Project (CALs)** also said that parents should be entitled to name the guardian of their children but only if they acted jointly.

F. Recommendations

5.33 The general question of freedom of testation cannot be comprehensively answered by this Report, because the issues must be more fully canvassed with reference to broader policies governing succession and land tenure.

5.34 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.

43 Provided, of course, that bridewealth was paid.

44 Para 7.5.16.

45 Subject, of course, to the principle that the child's best interests are an overriding consideration. See Stewart in Armstrong *Women and Law in Southern Africa* 94.

5.35 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.

5.36 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.

CHAPTER 6

INTESTATE SUCCESSION

A. Excerpt from the Issue Paper

6.1 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.

B. Problem analysis

6.2 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.¹ The Law Commission has in fact published an Issue Paper on this subject.

6.3 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.

6.4 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 an

1 The **Gender Research Project (CALs)**, for instance, expressly supported proposals for a general code of succession law.

antenuptial 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.

6.5 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.² 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.³

C. Submissions

6.6 Most of the responses received to the Issue and Discussion Papers were concerned with the substance of the law of succession or with the procedures for administering deceased estates.⁴ **Professor A J Kerr (Rhodes University)** expressed a general concern that we should avoid creating a system whereby one law applies to those who can afford to go to court and another to those who cannot. He also felt that the family should have a role in distributing estates, as it does in customary law, when the deceased head of a polygynous household has not divided his property amongst his various houses.

6.7 On the issue of choice of law, **Professor Kerr** noted that, because most estates are dealt with by public service officials and not by the courts, clear guidance in choice of law was necessary. The **Zion Christian Church** and **The Women's Lobby** felt that the estates of those

2 See, for example, *Smith* (1924) 5 NLR 102 at 104. And, of course, many people marry according to both customary and Christian rites.

3 See Visser (1982) 15 *De Jure* 137.

4 Thus **A M Moleko** considered that the statutory regime of intestate succession should be applied to the devolution of all estates, while the **Principal State Law Adviser (Gauteng Provincial Government)** asked for administration practices under the Black Administration Act to be brought into line with the Administration of Estates Act.

who, from their lifestyles, indicated a clear propensity to live according to African custom should devolve according to customary law. The **Committee on Constitutional Affairs for Northern Province House of Traditional Leaders** made a similar submission: that, instead of using wills, the distinctively customary modes of distributing estates should be retained.

6.8 The **Gender Research Project (CALs)**, on the other hand, felt that the form of marriage and lifestyle could lead to inconsistent and irrational results in choice of law, since the applicable law could be dictated by an individual's class and financial position rather than a more meaningful connection with a cultural tradition.⁵ **Professor Kerr**, too, felt that care should be taken if a law was to be chosen after a person had died on the basis of factors the deceased might not have considered.

D. Evaluation

6.9 The law to be applied to the devolution of estates (including immovable property) of Africans who die without wills is currently governed by choice of law rules contained in reg 2 of Regulations⁶ issued under the Black Administration Act.⁷ From the intricate provisions of these regulations, the following situations should be distinguished.

5 Which, as the **Gender Project** said had happened in two Lesotho cases *Mokorosi v Mokorosi & others* 1967-70 LLR 1 and *Hoohlo* 1967-70 LLR 318, cited above in footnote 126.

6 The Regulation commences: 'If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the [Black Administration] Act shall be distributed in the manner following' The existing regulations (GN R200 of 1987) are substantially the same as those issued in 1929. The first set of regulations was amended in 1947, repealed and replaced in 1966, and then again repealed and replaced in 1987. See Visser (n254) 133-5 on which version of the regulations should be applied in particular cases.

7 Section 23(10) of Act 38 of 1927. Section 1(4)(b) of the Intestate Succession Act 81 of 1987 provides that the Act will apply to intestate estates 'in respect of which section 23 of the Black Administration Act does not apply'.

(1) **Foreigners**

6.10 Regulation 2(a) provides that:

'If the deceased was, during his lifetime, ordinarily resident in any territory outside the Republic other than Mozambique, all movable assets in his estate after payment of such claims as may be found to be due shall be forwarded to the officer administering the district or area in which the deceased was ordinarily resident for disposal by him.'

This regulation - one obviously rooted in the labour policies of colonialism and apartheid - was designed to cater for the large migrant work force that used to be recruited from South Africa's neighbouring states. Thus movable assets in the estates of Africans who are ordinarily resident in countries outside South Africa (except Mozambique) are to be sent for distribution to the official administering the area in which the deceased was ordinarily resident. No doubt, the intention behind reg 2(a) was to allow South African officials to avoid the complexities of administering small estates under a foreign law.

6.11 The mass recruitment of labour from abroad has, of course, ended, and with it the reason for subjecting foreign residents to a special statutory regime. Normal conflict principles should therefore be applied, namely, the rules of private international law. Under this system, devolution of a deceased foreigner's estate would be governed by the law of that person's last domicile.⁸

6.12 The **Council of South African Banks** noted that executors would be reluctant to administer small estates if a complex set of choice of law rules were involved. If we accept what the **Council** says - and it is no doubt quite correct - then special rules should be made for administering small estates, regardless of the culture, residence, domicile or nationality of the deceased. Such an undertaking falls outside the scope of this Report, however.

(2) Persons exempt from customary law

6.13 Regulation 2(b) provides that:

'If the deceased was at the time of his death the holder of a letter of exemption issued under the provisions of section 31 of the Act, exempting him from the operation of the Code of Zulu Law, the property shall devolve as if he had been a European.'

Persons exempted from customary law generally become subject to the common law,⁹ which would include the statutory and common-law rules of intestate succession. Regulation 2(b) gives the misleading impression that exemption can be claimed only from the provisions of the KwaZulu/Natal Codes. The ambit of s 31 of the Black Administration, which in fact governs this procedure, is far broader: any person in the country may apply for exemption.

(3) Married persons

6.14 Under s 23 of the Black Administration Act, movable house property must devolve according to customary law and the devolution of land held under quitrent tenure is governed by statutory tables of succession. All other property may be devised by will.

6.15 In the absence of a will, succession to such property (which would normally be so-called 'family property') is subject to choice of law rules laid down in the remaining provisions of reg 2.

- '(c) If the deceased, at the time of his death, was -
- (i) a partner in a marriage in community of property or under antenuptial contract; or
 - (ii) a widower, widow or divorcee, as the case may be, of a marriage in community of property or under antenuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage,
- the property shall devolve as if the deceased had been a European.'
- (d) When any deceased Black is survived by any partner -

9 See above para 1.94.

- (i) with whom he had contracted a marriage which, in terms of subsection (6) of section 22 of the Act, had not produced the legal consequences of a marriage in community of property; or
 - (ii) with whom he had entered into a customary union; or
 - (iii) who was at the time of his death living with him as his putative spouse; or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister to render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said Black had been a European.
- (e) If the deceased does not fall into any of the classes described in paragraphs (a), (b), (c) and (d), the property shall be distributed according to Black law and custom.'

In broad terms, the relevant system is selected by combining two connecting factors: the form of a deceased's marriage and his or her matrimonial property system. These factors are presumed to reflect the deceased's general cultural orientation.

(a) Civil/Christian marriages in community of property

6.16 Courts and legislatures have often taken marriage by civil or Christian rites as an invitation to apply the common law to the spouses' personal status.¹⁰ Before common law becomes applicable to intestate succession, however, reg 2(c) stipulates that the deceased must also have been married in community of property. This additional connecting factor saves people who married by civil or Christian rites from being caught unawares by the law associated with their marriage.¹¹ It follows that, if common law is to govern devolution of an estate, the deceased must have deliberately chosen a community of property regime (which would be done by making a prenuptial declaration or executing an antenuptial contract) and, further, that the deceased must not have been party to a valid, subsisting customary marriage.¹²

10 See above para 4.8.

11 In other words, choice of law is also based on something additional and *active*: Visser (n254) 130.

12 Visser (n254) 132 identified the following anomaly: if a person had married first by customary law, had then contracted a marriage by civil rites in community of property, had dissolved the second marriage, and had then died survived by the customary-law wife, *both* reg 2(c) and (d) would seem to be applicable.

6.17 There is merit in using the form of marriage together with the nature of a deceased's matrimonial property system to designate the applicable law. These factors are easy to ascertain and they can be readily applied by executors and others who have to distribute deceased estates. None the less, this somewhat complicated choice of law rule presents several problems.

6.18 The first is a general objection to using the form of a juristic act, such as marriage, as an *invariable* guide to a deceased person's actual cultural orientation. Apart from the fact that a marriage in church does not necessarily indicate the spouses' intention to live according to the common law, a deceased might have decided to pursue a different culture after marrying. Flexibility is therefore necessary to make allowance for exceptional cases (not to mention succession to the estates of unmarried persons).

6.19 Secondly, for purely legal reasons, few people comply with all the requirements specified in reg 2(c). Before 2 December 1988, civil and Christian marriages by Africans did not automatically produce a community of property, because s 22(6) of the Black Administration Act provided that their marriages would be automatically *out of* community of property, unless the spouses had made a prenuptial declaration to vary this consequence.¹³ Such declarations were seldom made.¹⁴ It is true that since 1988 civil and Christian marriages contracted by Africans have been in community of property,¹⁵ but marriages entered into by Africans *before* 1988 are still out of community.¹⁶ Intestate succession to the estates of these spouses is therefore still governed by customary law.

13 Although this section did not exclude their power to execute an antenuptial contract.

14 See Coertze *Die Familie-, Erf- en Opvolgingsreg van die Bafokeng van Rustenburg* 241 and Burman in Hirschon *Women and Property/Women as Property* 124.

15 When the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 repealed s 22(6) of the Black Administration Act and brought African marriages into line with earlier reforms to the common law promulgated by s 25(1) of the Matrimonial Property Act 88 of 1984. This rule could be varied only by antenuptial contract.

16 The amending legislation was not made retrospective, although s 4 of Act 3 of 1988 (inserting s 25(3) into Act 88 of 1984) allowed spouses, whose matrimonial property system was governed by s 22, to harmonize the consequences of their marriage with the new law by execution and registration of a notarial contract.

6.20 The third problem concerns possible prejudice suffered by the widows of civil or Christian marriages under the customary system of succession.¹⁷ A woman would have spent her entire married life subject to the common law, but, when her husband dies, she reverts to the position of a customary-law widow. This eventuality might not have been contemplated by the spouses, especially if they had deliberately married by civil rites to escape the strictures of customary law.

6.21 Whether a widow actually suffers prejudice under (an unreformed) customary law is perhaps a moot question. **Professor Kerr**, for instance, pointed out that widows have a right to land¹⁸ and **Dr A M S Majeke (University of Fort Hare)** claimed that widows were not unduly discriminated against, since they had a large measure of control over the deceased estate.¹⁹ Nevertheless, according to the official version of customary law, widows are dependent for their support on maintenance paid by the heir,²⁰ provided that they remain with the estate.²¹

6.22 A fourth, technical problem arises where a deceased, after having dissolved an earlier marriage,²² contracted a civil or Christian marriage out of community of property. Do surviving sons of *both* marriages qualify as heirs of 'house' property? The marriages could be treated as separate and distinct or they could be treated as two polygynous unions, in which case the civil marriage would be deemed to have established a 'house'.

6.23 The most equitable approach to solving such a convoluted problem would have been to regard the two marriages as constituting two families and then to allow the heir of the civil

17 To the extent, of course, that customary law prejudices widows. Cf *Mthembu v Letsela & another* 1997 (2) SA 936 (T).

18 Which he describes in more detail in *Customary Law of Immovable Property and of Succession* ch 11.

19 Hence **Dr Majeke** said that widows are not dependent on the heir for support, because the estate is deemed family property to be run by a corporate unit (in which the widow is the most powerful decision-maker). It follows that death of a family head does not break up an estate, since property is not inherited by an individual but by the family.

20 *Mnani* 1977 BAC 264 (S). See Kerr *Customary Law of Immovable Property* 171.

21 *Sonamzi v Nosamana* 3 NAC 297 (1914), *Mavuma v Mbebe* 1948 NAC (C&O) 16 and *Tulumane v Ntsodo* 1953 NAC 185 (S). Although, once customary marriages have full recognition, a widow would qualify under the Maintenance of Surviving Spouses Act 27 of 1990 for maintenance from the estate, free of any restrictions imposed by customary law.

22 Which might have been by customary, civil or Christian rites.

marriage to inherit only the property acquired during that marriage;²³ but there are authoritative decisions going the other way.²⁴ Quite apart from the problem of deciding who should inherit, it could be almost impossible to determine what property was acquired during which marriage. For instance, if property from the first marriage were traded and increased during the second, who would be entitled to the increase?²⁵

6.24 The fifth, and the most serious, problem is that the basis for this reg 2(c) may well fall away. If the Law Commission's proposals in its *Report on Customary Marriages* are accepted, all future customary marriages will be deemed to be in community of property. (This rule may be varied by spouses of polygynous unions and those who execute antenuptial contracts.) Not only will the community of property regime contradict the philosophy underlying the current choice of law rule, but the nature of a matrimonial property regime will no longer offer any particular indication of a deceased's cultural orientation.

(b) Marriages out of community of property or under customary law

6.25 Customary law applies to determine succession if a deceased is survived by a customary-law spouse or children (or remoter issue) or if the deceased had married by civil or Christian rites but *out of* community of property.

6.26 Probably because of its intricate wording, this provision does not cover all the situations to which it was obviously intended to apply. What of a person who had married by customary law, but who died leaving *no* surviving spouse or children? Presumably, *a contrario* the terms

23 Which was the decision in *Mboniswa* 1952 NAC 235 (S) at 239-40. See too *Moloto* 1953 NAC 91 (NE). This approach was advocated by Francis 1967 *Acta Juridica* 152-6 and Kerr *Customary Law of Immovable Property* 170.

24 The most persuasive authority is the Appellate Division's decision in *Ex parte Minister of Native Affairs: In re Magqabi v Magqabi* 1955 (2) SA 428 (A). Because this case was concerned with s 23(2) of the Black Administration Act, however, it can be distinguished. When the problem was first considered in *Dlalo v Ndwe & others* 4 NAC 189 (1922), the court held that the eldest son of the first marriage (which happened to be a customary union) inherited the property acquired during that union and the eldest son of the second union (a civil marriage) inherited property acquired during that marriage. See too *Tonjeni* 1947 NAC (C&O) 8.

25 Kerr *Customary Law of Immovable Property* 170.

of the section, the common law would apply. What of a deceased who had divorced his or her spouse? Presumably, customary law still applies to the estate, even though a critical choice of law factor - the customary marriage - is missing.

6.27 When application of customary law under reg 2(d) seems inappropriate or inequitable, potential beneficiaries can petition 'the Minister' - since abolition of the Department of Development Aid it is not clear which Minister is contemplated - for a directive that the common law be applied instead.²⁶ While this saving provision may afford the less affluent a cheap method for determining the law applicable to a deceased estate, it has the disadvantage of reducing choice of law to an administrative process. In other words, although a ministerial directive may avoid the costs of litigation, this type of procedure tends to preclude argument from all interested parties.²⁷

(c) Discarded wives: the problem of dual marriages

6.28 Formerly in South Africa, a civil or Christian marriage would automatically nullify an existing customary union. For instance, if a man married by customary law were to marry another woman by civil rites, the second marriage would automatically extinguish the first.²⁸ Section 22(7) was inserted into the Black Administration Act in an attempt to alleviate some of the hardships inflicted on the 'discarded' customary-law wife by this rule. This section provided that:

'No marriage contracted after the commencement of this Act [1 January 1929] but before the commencement of the Marriage and Matrimonial Property Law Amendment act 1988 [2 December 1988] during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and any issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union.'²⁹

26 Whether this provision is still applicable, in view of the Department's abolition, is questionable.

27 Kerr *Customary Law of Immovable Property* 171 and Bennett *Application of Customary Law* 170.

28 *Nkambula v Linda* 1951 (1) SA 377 (A).

29 This is the version substituted by s 1 of Act 3 of 1988.

6.29 By preserving the property rights of a 'discarded' wife, s 22(7) had the unfortunate side-effect of reducing the status of the civil-law wife to that of a customary-law widow. Thus, on the death of a husband, both the civil- and customary-law wives (and their progeny) had the same claims to his estate. Customary law revived, as it were, to govern devolution of the deceased estate.³⁰

6.30 This is a paradoxical situation. After the law had declared that the customary wife was no longer married, she might many years later regain her status. At the same time, the civil-law spouse would find her position suddenly downgraded to that of a customary-law widow (after enjoying, again possibly for many years, the benefits of common law). By seeking to eliminate one evil, s 22(7) succeeded in inflicting equal harm on an innocent party. This curious regime continues to apply to the victims of dual marriages contracted between 1929 and 1988.

6.31 Can a man, who terminated his customary marriage by a civil or Christian marriage, protect his second spouse by making a will to institute her as heir to property acquired during the civil marriage? A concerned husband might in this way avoid the full rigour of s 22(7) by ensuring that his common-law widow was not subjected to an unmitigated customary-law regime. Alternatively, if he did not make a will, could his widow appeal to the Minister under reg 2(d) for an order that the common law apply?

6.32 **Professor Kerr** maintains that both these courses of action are available,³¹ in part because the legislature did not lay down which system of law was to govern the property. Another reading of the regulations is, however, possible. Because s 22(7) is explicit in saying that the civil marriage shall not in any way affect the material rights of the customary wife and that the one widow's rights shall not be preferred to the other's, a husband could not defeat the customary-law wife's rights. An appeal to the Minister might also be excluded, because reg 2(d) is primarily concerned with choice of law and it does not appear to encompass the problems generated by s 22(7).

30 Which meant that the civil-law widow was entitled to no more than maintenance out of the estate: *Tukuta & another v Panyeko* 5 NAC 194 (1927) and *Khabane* 1952 NAC 295 (C) at 298.

31 Kerr *Customary Law of Immovable Property* 173.

(4) Unmarried persons

6.33 Because choice of law in regs 2(c) to (d) is based, in the first instance, on the form of a deceased's marriage, the rules do not cater for those who never married.³² Instead, reg 2(e) applies: if a deceased does not fall into any of the previous categories, customary law governs devolution of his or her estate.

6.34 The drafters of the regulations evidently assumed that all Africans are automatically subject to customary law, and that, if they wanted to avoid application of this law, they should have executed a will.³³ While this assumption might in some cases be well-founded, there must be many situations where, on the ground of general cultural orientation, application of the common law would be more suitable.

(5) The KwaZulu/Natal Codes

6.35 The KwaZulu/Natal Codes contain special provisions that override the Black Administration Act and the regulations outlined above. The Codes stipulate that estates of Africans married by civil or Christian rites, regardless of the matrimonial property system, are to devolve according to common law.³⁴

32 Visser (n254) 130.

33 And an appeal to the Minister for application of the common law instead is precluded, since this device is permitted only under reg 2(d).

34 See ss 79(3) and 81(5) of the KwaZulu/Natal Codes, Act 16 of 1985 and Proc R151 of 1987, respectively. The Codes incorporate the Succession Act 13 of 1934, presumably as amended by the Intestate Succession Act 81 of 1987.

(6) Partial testacy

6.36 Section 23(9) of the Black Administration Act provides that:

'Whenever a Black has died leaving a valid will which disposes of any portion of his estate, Black law and custom shall not apply to the administration or distribution of so much of his estate as does not fall under sub-section (1) or (2) and such administration and distribution shall in all respects be in accordance with the Administration of Estates Act, 1913 (Act No 24 of 1913).'

It would be logical to assume that, if a will applied to only portion of someone's estate, the customary law of succession should govern devolution of the intestate balance. However, s 23(9) has been interpreted to mean that the common law must apply to the devolution of any property not governed by a will.³⁵ Although **Professor Kerr** supports this construction, a closer reading could suggest application of customary law. The section speaks only of 'administration and distribution' of an estate being subject to the Administration of Estates Act (and thus common law). The *devolution* of property is an entirely separate issue.

E. Recommendations

6.37 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. Comments on how the new succession law should be formulated obviously fall outside the scope of this Report, but certain recommendations are needed on the existing choice of law rules.

6.38 Before proceeding, it must 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. As **Judge Albie Sachs** said, the position of widows under customary law needs

35 A choice of law that is vindicated on the basis of the testator's intention: Visser (n254) 124-5. Section 1(4)(b) of the Intestate Succession Act 81 of 1987 does not take the matter much further, since it applies only to 'any part of an estate which does not devolve by virtue of a will or in respect of which s 23 of the Black Administration Act does not apply'.

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,³⁶ customary marriages must be given full recognition on a par with civil and Christian marriages.

6.39 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.

6.40 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'.

6.41 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.

6.42 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.

6.43 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.

6.44 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.

CHAPTER 7

CONFLICTS BETWEEN DIFFERENT SYSTEMS OF CUSTOMARY LAW

A. Excerpt from the Issue Paper

7.1 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.

B. Problem analysis

7.2 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.¹

'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.'

7.3 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.²

1 45 of 1988. Note that the 'indigenous law' mentioned in this section is defined in s 1(4) to mean 'the Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic'.

2 See, for instance, *Mahlaba v Mdladlamba* 1946 NAC (C&O) 51 and *Govuzela v Ngavu* 1949 NAC 156 (S).

7.4 If the appropriate law cannot be chosen by reference to an agreement, a court would then have to consider the remaining choice of law rules listed in s 1(3). It would have to apply the law of the place where the defendant resided, carried on business or was employed,³ provided that only one system of law prevailed in that area. This rule bristles with problems. What if the defendant is resident in one area and employed in another? What if he or she is resident in one area but has a closer attachment, such as a domicile, with another? Why should the common-law connecting factor of residence⁴ be preferred to a traditional customary-law connecting factor, such as allegiance to a traditional authority?

7.5 If more than one system of law is applicable in the defendant's area, and, if the place of residence, business or employment is not within a 'tribal area' (which presumably means an urban area), and further provided that the defendant's tribal law is one of the systems applicable within the area, the court would be obliged to apply the law of the defendant's tribe. This rule is also unsatisfactory.⁵ First, it is arbitrary to prefer the defendant's as opposed to the plaintiff's tribal law,⁶ for roles of plaintiff and defendant are determined by the tactics of litigation, which is hardly a principled foundation for choice of law. Secondly, the concept of tribe is vague and confusing.⁷

C. Comparison with the laws of other African countries

7.6 Choice of law rules in Botswana and Zimbabwe, two countries that legislated about conflicts between different systems of customary law, are similar in one respect to s 1(3) of South African's Law of Evidence Amendment Act: they also placed emphasis on the litigants' actual or presumed intention.⁸ These similarities end, however, because, if no intent can be imputed to the

3 See *Govuzela's* case above and *Rubushe v Jiyane* 1952 NAC 69 (S).

4 According to *Ex parte Minister of Native Affairs* 1941 AD 53, the concept of residence must be interpreted according to the common law. See further *Madhlala v Mbata* 1939 NAC (N&T) 141.

5 See Forsyth (1979) 96 *SALJ* 418 and Lewin (1944) 61 *SALJ* 269.

6 Although preference for the defendant's law has ancient origins: Bennett *Application of Customary Law* 120.

7 Bennett *Application of Customary Law* 118-19.

8 Section 4 of Zimbabwe's Customary Law and Local Courts Act Cap 7:05 and s 6(1) Rule 4(c) of Botswana's Common Law and Customary Law Act Cap 16:01.

parties, the legislation in Botswana and Zimbabwe adopted choice of law rules derived from private international law.

7.7 In Zimbabwe,⁹ the court must apply the law 'with which the case and the parties have the closest connexion'. And, if that law is not ascertainable, the court is directed to whichever law it considers 'just and fair' to apply in the case. The notion of close connection is widely used in private international law to determine the 'proper law' applicable to contracts. In Botswana, in matters concerning land, the applicable law is that of the place where the land is situated¹⁰ and in matters of inheritance the 'law applying to the deceased'.¹¹ Subject to these two provisions, courts are directed to the parties' actual or presumed intent.¹²

D. Evaluation

7.8 The current s 1(3) of the Law of Evidence Amendment Act was lifted directly from s 11(2) of the Black Administration Act.¹³ Not only were these provisions poorly drafted but the conceptual basis for the choice of law rules was also defective (for the reasons mentioned above).

7.9 The only defensible rule contained in s 1(3) is the reference to an agreement by the parties. Nevertheless, it should be appreciated that in practice litigants will very rarely enter into an express agreement before they come to court. Reference to an implicit agreement would therefore cater for many more cases.¹⁴

7.10 To some extent it is true that the notion of an implied consent is artificial. As **Professor A J Kerr (Rhodes University)** says, a judge's decision will seldom in reality represent the parties'

9 Section 4 of the Customary Law and Local Courts Act Cap 7:05.

10 Section 6(1) Rule 4(c) of the Common Law and Customary Law Act Cap 16:01.

11 Section 6(1) Rule 5. See, too, *In re Larbi* [1977] 2 GLR 502 (CA) and *Olowu* [1985] 3 Nigerian Weekly LR 372 (SC) for references to the personal law of a deceased.

12 Section 6(1) Rule 2.

13 38 of 1927. The original version of s 11(2) was taken from Transkeian legislation of 1879, which directed courts to apply the law of the defendant's place of residence. This provision was amended by s 5 of Act 21 of 1943 to produce the exemplar for s 1(3) of the Law of Evidence Amendment Act.

14 See above para 1.82.

common intent.¹⁵ Indeed, when seeking to impute an agreement to the parties, courts are likely to traverse grounds similar to those needed for discovering with which law the case has its closest connection. Implied intent and close connection merely emphasize subjectivity and objectivity, respectively. Both approaches have a role to play in choice of law (as is evident from the statutory rules in Zimbabwe) and both are widely used in private international law to discover the 'proper law' of contracts and sometimes delicts.

7.11 The 'proper law' approach is a sensible one for most choice of law problems, because it encourages the courts to investigate a wide range of connecting factors. These would include: the domicile, residence or affiliation to a traditional authority and the place where a cause of action arose. From a grouping of these factors a prevailing law may be inferred.¹⁶

7.12 While this approach would in most cases obviate the need to consult any other choice of law rules, the two included in Botswana's legislation are worth mentioning. Referring questions about land to the law of the place where the land is situated yields a quick, certain solution,¹⁷ and so, too, does reference of matters of succession to the personal law of the deceased.¹⁸

E. Recommendations

7.13 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.

15 Because litigants usually have directly opposed views when they come to court, and prior to that they probably never thought about the matter. See above para 1.81.

16 The proper law approach was also generally advocated for conflicts between customary and common law. See above paras 1.91 and 1.102 and Bennett *Application of Customary Law* 122.

17 Bennett in Kahn *The Quest for Justice* 123.

18 In private international law, questions of intestate succession are generally referred to the law of the deceased's last domicile: Forsyth *Private International Law* 340-1.

7.14 New legislation should recognize 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.

7.15 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.

CHAPTER 8

CONFLICTS WITH FOREIGN SYSTEMS OF LAW

A. Excerpt from the Issue Paper

8.1 Section 1(3) of the Law of Evidence Amendment Act is worded in such broad terms - 'In *any* suit or proceedings between Blacks who do not belong to the same tribe ...' - that it could be interpreted as being applicable to regulate all these species of conflict.

B. Problem analysis

8.2 Any connection between the litigants (or cause of action) and a foreign state may generate a conflict problem falling into this category, and many variations are possible. For instance, a South African subject to Venda customary law might marry a Nigerian subject to Yoruba law. Or a South African subject to Zulu law might die domiciled in Zimbabwe, where the common law might be applicable to the estate.

8.3 The same system of customary law may be involved, but the foreign system might have been repealed or modified by legislation and the South African version unchanged. For example, both parties might be subject to Tswana law, but the one might be domiciled in South Africa and the other in Botswana (where the customary law had been superseded by statute). Alternatively, it might not be clear what systems of law are in conflict: the common law of one state might seem to be applicable and the customary law of the other state.

8.4 What choice of law rules should be used to select the appropriate system? Section 1(3) of the Law of Evidence Amendment Act,¹ opens with the phrase 'In *any* suit or proceedings between Blacks who do not belong to the same tribe ...', which is so broad that it could be interpreted as applying to conflicts involving foreign law.² Section 1(4) might cure this ambiguity,

1 45 of 1988.

2 Bennett *Application of Customary Law* 131.

of course, because the section provides that the 'indigenous law' referred to earlier means 'the Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic'. By definition, then, foreign systems of customary law would be excluded from the ambit of the Act. If that is the case, how should courts decide conflicts with foreign laws?

C. Evaluation

8.5 In principle, whenever the law of a foreign state is involved, the courts should use choice of law rules provided by private international law,³ because these rules were specifically designed to cater for conflicts conceived in territorial terms.⁴

8.6 Once a conflict problem involves both a system of personal law and the law of a foreign state, choice of law should proceed in two stages. A court must first, via private international law, locate the issue in the appropriate territorial system, and then, by reference to whatever internal conflict rules are available in that system, decide which system of personal law to apply. In a sense, the process involves two conflicts, one territorial and the other personal. When two territorially defined systems of law appear to be applicable to a case and one or both recognize personal systems of law, the court must first apply choice of law rules derived from private international law to decide which state's law is applicable. If that state enforces two or more systems of personal law, the court must then ask which of the personal laws are applicable. To answer that question, internal conflict rules from the country concerned would be applicable.⁵

3 Botswana made express statutory provision in this regard: s 6(2)(a) of the Common Law and Customary Law Act Cap 16:01.

4 Bennett (1980) 43 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 28.

5 See, for instance, *King v Elliot* [1972] 1 Ghana LR 54 and *Omane v Paku* [1972] 1 Ghana LR 295 (HC); [1973] 2 Ghana LR 66 (CA) and the comment by Tier (1986) 30 *Journal of African Law* 10-13.

D. Recommendations

8.7 Section 1(3) of the Law of Evidence Amendment Act must be amended to make it clear that conflicts involving foreign systems of law are excluded. Once this change has been made, the courts will be free to apply principles of private international law to solve conflicts arising in this category. An explicit statutory provision to that effect would be unnecessary.

CHAPTER 9

APPLICATION OF THE KWAZULU/NATAL CODES AND FORMER HOMELANDS LEGISLATION

A. Excerpt from the Issue Paper

9.1 Customary law is personal in the sense that it should apply to litigants by reason of their cultural orientation, regardless where they happen to be. Both Codes correctly purport to apply to the Zulu *people*, but several cases have suggested that the Natal Code is territorial in application, ie, that within the province it overrides any other potentially applicable system of personal law. The effect of these decisions is to base choice of law on the conflicting criteria of person and territory.

B. Problem analysis

9.2 Especially difficult choice of law problems have been spawned by legislation emanating from South Africa's former homelands. It is uncertain when and to whom this legislation applies (not to mention legislation passed by the South African Parliament).

9.3 Complications began with the Natal Code, even before South Africa was fragmented into a series of partially or totally independent entities under apartheid. Zulu law was codified at a time when Natal was a separate colony (and the Zulu kingdom itself was deemed a separate political entity for certain purposes). Subsequent application of the Code was then influenced by Natal's status as unit politically distinct from the other colonies, protectorates and independent republics in southern Africa.

9.4 Although the Code was deemed to apply only within the territory of Natal, a system of customary law is personal to those it binds, which means that in principle individuals should be subject to it wherever they happen to be living. Section s 11(2) of the Black Administration Act (the predecessor to s 1(3) of the Law of Evidence Amendment Act) could have been interpreted

to regulate application of the Zulu laws captured in codified form, since it was framed in broad terms;¹ but this was never the practice. Instead, several decisions of the Black Appeal Court held that the Natal Code applied territorially. Where Sotho people had settled in the province, for instance, they were deemed to be subject to the provisions of the Code even though it did not reflect their personal law.²

9.5 A contradiction between the principles of personality and territoriality became apparent in another situation: where people from the province of Natal moved to other parts of South Africa. Did the Code continue to apply to them in their new places of residence (or domicile)? Again s 11(2) of the Black Administration Act was ignored, and, although no authoritative decision was made, certain dicta indicated that the Natal Code was limited to the borders of the province.³

9.6 Yet another uncertainty was whether an individual had to be a domiciliary of Natal or simply a member of the Zulu nation in order to qualify as someone subject to the Code.

9.7 More conflict problems were generated when the homeland of KwaZulu gained legislative competence.⁴ It issued its own code of Zulu law, which was much the same as the Natal version but with certain minor differences.⁵ Consonant with the general approach to application of the Natal Code, it seems to have been assumed that the two Codes applied territorially rather than personally.

1 'In any suit or proceedings between Blacks who do not belong to the same tribe'

2 *Molife* 1934 NAC (N&T) 33 and *Ndhlovu v Molife* 1936 NAC (N&T) 33 held that the only way in which such people could guarantee continued application of their law would be to enter into an agreement to that effect. It was not clear in these cases whether the litigants became subject to the Code on the basis of mere residence within the province or whether a more permanent attachment was necessary.

3 *Zwana v Zwana & another* 1945 NAC (N&T) 59 and *Mashapo & another v Sisane* 1945 NAC (N&T) 57.

4 Under the Bantu Homelands (subsequently National States) Constitution Act 21 of 1971.

5 Section 229 of the Interim Constitution 200 of 1993 perpetuated this problem by providing that all laws 'which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory' should continue in force 'subject to any repeal or amendment ... by a competent authority'. Although Natal and KwaZulu have been amalgamated into one province, no provision has yet been made for reconciling differences between the Codes.

9.8 The potential contradiction between the principles of personality and territoriality was then repeated whenever laws were passed by one of the semi-independent homelands. Like KwaZulu, each of these legislative assemblies was given the power, in the area for which it was established, to legislate over matters of personal law regarding its *citizens*.⁶ By implication, the South African legislature lacked competence in the same circumstances.⁷

9.9 Presumably homeland citizens were bound by homeland legislation even when they were in South Africa. It was uncertain, however, whether, for conflict of laws purposes, the appropriate legal connection between an individual and his or her homeland should be citizenship, residence or domicile. Compounding this uncertainty was the possibility that the territoriality principle used to determine application of the Natal and KwaZulu Codes could be applied.

9.10 To these problems were added the conflict issues posed by legislation enacted in the TBVC states. Because these entities were (notionally at least) fully sovereign, they had to be treated as foreign states. Application of their laws should accordingly have been determined by private international law, and, under this system, the connecting factor used to decide matters of personal status is domicile. Hence, Transkeian domiciliaries, for example, would have been subject to the Transkei Marriage Act⁸ even when they happened to be in South Africa.

9.11 A converse problem was whether South African enactments should apply to the homelands. As far as the independent states were concerned, principles of state sovereignty would be applicable: South African statutes would not be given extraterritorial effect and thus should not have applied there. But the applicability of the same acts to the *self-governing*

6 Section 3 of the National States Constitution Act 21 of 1971.

7 Namely, over homeland citizens within the areas of the homelands. Until a self-governing territory, such as KwaZulu, had decided to exercise its powers by passing legislation, however, South African law (including its legislation) continued to apply.

8 21 of 1978.

territories was uncertain,⁹ a problem exacerbated by the large number of citizens or domiciliaries of these entities who lived and worked in South Africa.

C. Evaluation

9.12 Any feeling of exasperation about the vagueness surrounding applicability of laws to have emanated from the homelands is quite justified.¹⁰ Under the Interim Constitution, immediate action was taken to suppress the 'burgeoning and volatile lawmaking bodies' of the apartheid era and to reunite South Africa.¹¹ Nevertheless, legislation of the national homelands and TBVC states was expressly preserved until repealed.¹² Although most of this legislation has now been repealed,¹³ the KwaZulu and Natal Codes and parts of the Transkei Marriage Act were spared, and they seem set to remain on the statute book. Definite rules on the application of these laws are now needed.

9.13 We have the option of selecting one of several connecting factors as a basis for choice of law. We could, for instance, choose citizenship, a factor that would offend neither the territoriality nor personality principles and a factor that has already been used in the National States Constitution Act of 1971. But reference to the separate 'citizenship' of individuals who are now all identified as citizens of a reunified South Africa seems clearly inappropriate.

9.14 Another option would be some type of affiliation to a cultural group. It would be difficult to know how to interpret this factor, however, in view of South Africa's political history. Would it be possible to ignore the ethnic categories imposed during apartheid? How would the concept

9 Another lingering uncertainty is whether the KwaZulu/Natal Codes are subordinate to South African legislation, such as the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. Other South African laws, such as the Divorce Act 70 of 1979 and the Matrimonial Property Act 88 of 1984, were extended to the entire 'national territory' by s 2 of the Justice Laws Rationalisation Act 18 of 1996. See Sinclair *The Law of Marriage* 129-31.

10 See Bekker in Sanders *The Internal Conflict of Laws in South Africa* 38 and the hypothetical examples given by Sinclair op cit 208 fn 7.

11 Hence, nine new provincial units were created under s 124, as read with Schedule 1, of the Interim Constitution 200 of 1993.

12 Section 229 of the Interim Constitution, as read with s 232(1)(a)(ii).

13 By the Justice Laws Rationalisation Act 18 of 1996.

of cultural affiliation relate to the legislative units established under the National States Constitution Act?

9.15 In the circumstances, it would probably be best to defer to whatever established practice exists. This conservative approach would imply that we take account of the assumption that, although customary law is in general applicable to persons rather than places, when that law has been captured in legislation, it should be territorially applied. This principle would preserve the established practice in KwaZulu/Natal.

9.16 The practice, however, needs refinement, and here the common-law concept of domicile would be useful.¹⁴ The Codes could be deemed applicable to those people domiciled within the area of KwaZulu and Natal. People who have a more transient connection with these areas would remain subject to their personal laws (as determined by their cultural affiliation). On the other hand, domiciliaries of KwaZulu and Natal who leave the province could continue to be bound by the Code until they acquire a domicile elsewhere.¹⁵

9.17 Principles of private international law, which emphasize territoriality, should dictate application of the Transkei Marriage Act. Hence the Act would apply to decide whether a marriage had been validly celebrated within the borders of the territory and it would dictate consequences of marriage for domiciliaries who married in Transkei.

14 These concepts (which are gaining currency in European system of private international law) have been preferred to domicile in order to avoid the technicality associated with domicile.

15 According to principles used by the court in the case of *Olowu* [1985] 3 Nigerian Weekly LR 372 (SC).

D. Recommendations

9.18 Although the free movement of people throughout South Africa would suggest that an exclusively territorial application of the Natal and KwaZulu Codes will lead to anomalies, and although customary law is a personal legal system, the long established practice of applying the Codes on a territorial basis should not be disturbed.

9.19 The Codes should none the less apply to those domiciled in KwaZulu/Natal. Mere residents within the borders of the province should remain subject to their personal laws (as determined by their cultural affiliation). Domiciliaries of KwaZulu/Natal who leave the area should continue to be bound by the Codes until they acquire a closer attachment elsewhere.

9.20 Principles of private international law should regulate application of the Transkei Marriage Act.

9.21 These recommendations will involve changes to ss 1(3) and (4) of the Law of Evidence Amendment Act in order to exclude the applicability of those sections. Because subsection 1(4) defines 'indigenous law' to mean 'the Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic', s 1(3) could be interpreted as applicable to conflicts arising from the KwaZulu/Natal Codes and the Transkei Marriage Act.

CHAPTER 10

PROOF AND ASCERTAINMENT OF CUSTOMARY LAW

A. Excerpt from the Issue Paper

10.1 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.

B. Problem analysis

10.2 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.¹ Customary law is different. Not only was it originally unwritten but its validity must always be tested against actual observance in society.

10.3 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,² 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.

1 While custom is still a valid source of law, it is insignificant in comparison with legislation, precedents and authoritative writings of recognized jurists.

2 Section 1(1) of Act 45 of 1988.

10.4 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.

10.5 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?

C. Submissions

10.6 The **Zion Christian Church** said that, although customary law is recognized on a par with common law, recognition will ring hollow unless that law is comprehensively investigated (without reference to such laws as the Black Administration Act). The **Church** felt that such an inquiry should be complemented by an honest attempt to train aspirant lawyers to understand and interpret African law with the same passion that they bring to the Roman-Dutch authorities. Thus the **Church** expressed a widely held view that customary law should be more intensively studied.

10.7 **Besana Skosana** alluded to a problem prevalent with systems of customary law in all parts of Africa. Because western authors recorded and documented the law, it has been misinterpreted and misunderstood. For instance, it is wrong to say that a woman cannot inherit on the death of a family head. While a male from the family would be appointed to administer the estate (as women could not deal with cattle), the estate still remained an inheritance of the surviving spouse, and the administrator was not entitled to dispose of it.

10.8 To offset the general lack of expertise in customary law, the **Gender Research Project (CALs)** supported re-introduction of the practice of attaching assessors to the court, and it urged the inclusion of women as assessors.

D. Historical survey and comparison with the laws of other African states

10.9 Historically, the demand in Africa for readily accessible, reliable sources of customary law has been met in four ways: by codifying the law, by stating or restating it, by laying down procedures for adducing evidence of the rules and by co-opting experts to the service of the courts.

10.10 Codification has often been associated with state attempts to amalgamate customary law with received systems of European law, in other words, to produce a unified national law. The Ethiopian project, initiated by the government of Haile Selassie, is a classic example;³ another, although on a much more modest scale, is the Natal Code of Zulu law.⁴ All codes, whether they were imposed by central government or generated by African communities themselves,⁵ suffer from the same defect: they reflect the law (more or less accurately) at a particular date, and in consequence they are bound to lose touch with social practice.⁶

10.11 The answer to this problem has been the second method: to draft statements of customary law, whether official or unofficial. Both colonial and modern governments have sponsored

3 But the French comparative lawyer, René David, who was in charge of the project, felt that customary law was too variable, unstable and lacking in true juridical qualities to warrant much consideration. See David 1962 *Annales Africaines* 160.

4 The current version of the Natal Code is contained in R151 of 9 October 1987 *Reg Gaz* 4136. In Act 6 of 1981, KwaZulu issued its own code of Zulu law. Subsequently this was amended by Act 13 of 1984 and then revised and reissued in KwaZulu GN 36 of 1985.

5 Such as the Laws of Lerotholi (a compilation of laws initiated in 1903 by the Basutoland National Council for the guidance of traditional courts) or the 'self-stated' legal texts produced by traditional authorities in northern Namibia. See Palmer & Poulter *The Legal System of Lesotho* 101-27 and Hinz *Customary Law in Namibia: Development and Perspective* 91ff, respectively.

6 On the problems of codifying customary law, see Keuning in University of Ife (Institute of African Studies) *Integration of Customary and Modern Legal Systems in Africa* 64, Kerr (1958) 2 *Journal of African Law* 96 and Twining *The Place of Customary Law in the National Legal Systems of East Africa* 32.

restatement projects,⁷ and so, too, have various private organizations.⁸ Because restatements are not legally binding, they avoid the rigidity of codes.⁹

10.12 The third method of coping with customary law has been to stipulate procedures for adducing new or contested rules in court. Botswana, for instance, enacted a detailed procedure which allows customary law to be ascertained both from texts and witnesses.¹⁰

'If any court entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings, after having considered such submission thereon as may be made by or on behalf of the parties, it may consult reported cases, textbooks and other sources, and may receive opinions either orally or in writing to enable it to arrive at a decision in the matter'

10.13 Subsequent provisions have two main objectives: to specify the court as the ultimate authority¹¹ - an issue often forgotten, because in the tactics of litigation the parties may seem to usurp its position - and to stipulate basic principles of procedural fairness.¹² If any rule is in

7 A classic example is Isaac Schapera's *Handbook of Tswana Law and Custom* (1938), a work commissioned by the colonial administration of the Bechuanaland Protectorate. The Cape and Natal administrations also launched official commissions of inquiry to gather information on customary law, once they had decided to enforce it: the Natal Native Commission (1852) and the Cape Commissions on the Laws and Customs of the Basutos (1873) and the Transkeian Territories (1883).

8 Such as the School of Oriental and African Studies (London University). See, for instance, E Cotran *Restatement of African Law: Kenya I: The Law of Marriage and Divorce* (1968) and *Restatement of African Law: Kenya II: The Law of Succession* (1969) and J O Ibik *Malawi I: the law of marriage and divorce II* (1970) and *Malawi II: land and succession* (1971). In South Africa, the Centre for Indigenous Law (a research unit in the Law Faculty of the University of South Africa) has produced four restatements (mainly in areas of public law): A C Myburgh (ed) *Indigenous Criminal Law in Bophuthatswana* (1980), M W Prinsloo *Inheemse Publiekreg in Lebowa* (1983), A C Myburgh & M W Prinsloo *Indigenous Public Law in KwaNdebele* (1985), Centre for Indigenous Law (ed) *Indigenous Contract in Bophuthatswana* (1990). A fifth project, *A Restatement of the Customary law of the AmaSwazi of the Eastern Transvaal*, by L P Vorster & F C de Beer is still in progress.

9 Restatements function only as guides, leaving courts and litigants free to adduce new or more accurate rules. See Allott (1984) 28 *Journal of African Law* 68 and Allott and Cotran in University of Ife (n331) 18-20.

10 Section 7(2) of the Common Law and Customary Law Act Cap 16:01. Although these provisions implicitly acknowledge the nature of customary law as both law and fact, s 7(1) stipulates that it is not to be deemed fact. Similar provisions exist in s 9 of Zimbabwe's Customary Law and Local Courts Act Cap 7:05.

11 Section 7(2)(i) of the Act.

12 Section 7(2)(ii) of the Act provides that 'any cases, textbooks, sources and opinions consulted by the court shall be made available to the parties' and s 7(2)(iii) that any 'oral opinion shall be given to the court in the same manner as oral evidence'.

doubt, the parties must be invited to make their own submissions, after which the court may consult an open list of written sources ('reported cases, text-books and other sources') or call for oral evidence.

10.14 The fourth method has been to attach assessors to the court. This practice, which was first developed by Britain during its rule in India, was used widely in all the anglophone colonies.¹³ It will be examined in more detail below.

E. Evaluation

10.15 The presumption that courts already know customary law generates problems both general and specific. At a general level, few members of the South African judiciary have training or experience in customary law. Previously, litigation involving customary law was confined to commissioners' courts, the presiding officers of which were supposed to have an intimate knowledge of the law and communities with which they worked. When these courts were abolished in 1986,¹⁴ judges and magistrates were still unprepared to take over the cases in which commissioners had specialized. In the short term, this problem can be solved only by educating the judiciary. In the long term, as the **Zion Christian Church** said, law curricula need to be adjusted to give graduates better training in customary law.

10.16 Another problem of a general nature, and one that is inevitable with any custom-based system of law, is the constant need for up-to-date information amenable to use by courts.¹⁵ Many respondents to the Issue Paper requested a restatement of customary law in South Africa, some type of nation-wide survey to establish which customs are still observed and which serve the interests of the African community. Unfortunately, what may appear a straightforward solution entails serious difficulties.

13 Allott *New Essays in African Law* 267.

14 Their jurisdiction was transferred to magistrates' courts by s 1 of the Special Courts for Blacks Abolition Act 34 of 1986.

15 In its potential for change customary law is no different from any other law; the difference lies in the manner in which change is expressed. With Roman-Dutch common law, changes are implemented through legislation and the decisions of the courts, sources that give the law certainty and stability. With customary law, change derives from more subtle shifts in social practice.

10.17 Any written statement of customary law represents the rules at a particular time. Unless it is regularly updated, it will, like all codes and restatements, gradually fall behind social practice. Earlier codes and restatements are now disparagingly called the 'official' version of customary law.¹⁶ Modern scholars have called this version into question not only because it lags behind advances in community attitudes and behaviour but also because it reflects the preconceptions of the time in which it was written.¹⁷ No matter how sensitively compiled, a new restatement would always run the risk of reflecting contemporary preoccupations and thus attract later criticism that it had distorted the social data.

10.18 More prosaic objections to restating customary law concern the time and cost needed for such a project. Restatement is much easier to undertake in a country with a small population and a relatively uniform system of customary law. The project in Botswana, for instance, was completed by Schapera in only four years.¹⁸ Given the diversity of South Africa's systems of customary law, however, restatement would be an immense task.

10.19 Even if resources were available to engage in such a project, it would be a mistake to assume that the product would be a final and definitive restatement of all systems of customary law in South Africa. What legal status would the restatement enjoy? Should it be preferred to the writings of anthropologists? How would it relate to existing precedent and codified law? Would its existence preclude parties from leading evidence of new rules to the contrary? Underlying all these questions, is a fundamental problem: any written statement of customary law is liable to be superseded by new practices, rendering a restatement contestable almost as soon as it appears.

10.20 These various objections suggest that our energies are better spent in addressing the specific problems entailed in proving rules of customary law in particular cases.

16 Scholars, such as Sanders (1987) 20 *CILSA* 405ff, are now careful to distinguish an authentic, 'living' law, namely, the law actually observed by African communities.

17 Because 'official' customary law was tainted by colonialism and apartheid, it is now described as an 'invented tradition'. See generally Roberts (1984) 28 *Journal of African Law* 1-5, Chanock *Law, Custom and Social Order* and the various contributions in Mann & Roberts *Law in Colonial Africa*. On South Africa, more specifically, see Gordon (1989) 2 *Journal of Historical Sociology* 41.

18 Between 1934 and 1938.

10.21 Before the Law of Evidence Amendment Act was passed in 1988, the Supreme Court refused to take judicial notice of customary law.¹⁹ Although this decision was entangled with the politics of recognition - the Black Administration Act allowed full recognition only in commissioners' and traditional courts - the Supreme Court was technically correct in refusing to accept text-book verification of rules derived from custom. By implication, customary law was equated with the common-law custom,²⁰ which meant that it had to be proved by calling witnesses. The practical difficulties of having to prove each rule of customary law as it arose,²¹ however, soon forced the Supreme Court make exceptions.²² Hence, judicial notice was taken of customs that had been incorporated into statute (notably, of course, the Code of Zulu law)²³ or had been captured in precedent.²⁴

10.22 Courts specially established to cater for African litigation (the commissioners' courts and the Black Appeal Courts), on the other hand, could not refuse to take judicial notice of customary law. They resolved the problem of ascertaining it in two ways: by calling assessors to advise on the law applicable in specific cases²⁵ and by referring to texts specially prepared for their use.²⁶

10.23 Now that any court in the country may take judicial notice of customary law, and in the absence of a nation-wide code or restatement, we seem committed to follow practices of the past. Thus, although courts will in the first instance have to rely upon texts that are part of the so-called 'official' version of customary law, the Law of Evidence Amendment Act adds a qualification:

19 *Tabata* (1887) 5 SC 328. See Kerr (1957) 74 SALJ 313ff.

20 *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A) at 394-5, *Mosii v Motseoakhumo* 1954 (3) SA 919 (A) at 930 and *Masanya v Seleka Tribal Authority & another* 1981 (1) SA 522 (T) at 524.

21 See the tests laid down in *Van Breda & others v Jacobs & others* 1921 AD 330.

22 Kerr (n344) 313. The court in *Ngcobo* 1929 AD 233 at 236, for instance, acknowledged that, if each rule had to pass the tests set for custom, applying customary law would become so time-consuming and laborious that the courts could not do their job. See further Bekker (1976) 39 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 359.

23 *Mcunu* 1918 AD 323 at 328.

24 *R v Mpanza* 1946 AD 763 at 771.

25 Under s 19(1) of the Black Administration Act 38 of 1927.

26 Notably, Colonel J Maclean's *Compendium of Kafir Laws and Customs* (1906), S M Seymour's *Native Law in South Africa* and M B Whitfield's *South African Native Law* (1930).

`in so far as such law can be ascertained readily and with sufficient certainty'.²⁷ In addition, any party may adduce `evidence of the substance of a legal rule ... which is in issue at the proceedings concerned'.²⁸

10.24 It follows that litigants are not bound by text-books or precedents. They are free to allege the existence of new or more genuine rules. The courts nevertheless have final authority to declare the law,²⁹ a position that entitles them of their own accord to call for evidence on disputed or questionable rules.³⁰ This power does not, however, license judicial officers to engage in private investigations.³¹ They should observe principles of procedural fairness, which would suggest that, if any rule is in doubt, the parties must be informed so that they have an opportunity of calling witnesses of their own.³²

10.25 Whoever asserts a new rule of customary law or questions the validity an established one bears the burden of proof.³³ This burden is normally discharged by calling witnesses. Wisely perhaps, the courts never specified the number and qualifications of these witnesses.³⁴ As it happened, the courts preferred the testimony of traditional rulers on the ground that they were actively engaged in adjudicating customary-law cases.

27 Subsection 1(1) of the Act.

28 Subsection 1(2) of the Act.

29 Although they would be wrong to arrogate to themselves a uncontestable knowledge of community practice. *S v Sihlani & another* 1966 (3) SA 148 (E), for instance, held that, if a commissioner decided to rely on his specialized knowledge to reach a finding, he should indicate this on the record.

30 *Morake v Dubedube* 1928 TPD 625 at 631.

31 *Rowe v Assistant Magistrate, Pretoria & another* 1925 TPD 361 at 369-70.

32 Whenever a court is uncertain whether the rule before it is an authentic representation of customary law, its approach should in principle be that outlined by in *R v Dumezweni* 1961 (2) SA 751 (A) at 756-7.

33 *Maqovuka v Madidi* 1911 NHC 132 and *Mosii v Motseoakhumo* 1954 (3) SA 919 (A) at 930.

34 Nor was their role ever clearly fixed: were they before the court to give an expert opinion as to the existence of the rule, or, like witnesses in the case of custom, did they attest to the factual existence of the rule in social practice? Allott *New Essays in African Law* 262-4.

10.26 The test of sufficient proof of custom, despite intimations to the contrary,³⁵ was on a balance of probabilities.³⁶ If a litigant were unable to meet this test, an awkward problem could arise. It could be argued that the court should develop an existing rule of customary law (culled no doubt from the 'official' version) to cover the point in question. Or, as **Professor A J Kerr (Rhodes University)** suggested, the common law could be applied, if it had an applicable rule.³⁷

10.27 To spare litigants the cost of having to call witnesses of their own, and to avoid situations where the parties are unable to prove a rule of customary law, there is good reason to revive the statutory authorization to employ assessors.³⁸ They enable the courts to keep contact with local practices³⁹ in a manner similar to juries.⁴⁰

10.28 If the practice is re-introduced, certain changes should be made. Previously, assessors were invariably selected from the ranks of traditional rulers, and so they tended to reflect a conservative opinion. Assessors should now be drawn from a more representative sample of people in a community, and there is no reason why anthropologists and other such experts should not be included.⁴¹

F. Recommendations

35 *Dumalisile* 1948 NAC 7 (S) and *Nomantunga v Ngangana* 1951 NAC 342 (S).

36 *Gecelo* 1957 NAC 161 (S).

37 But, as **Professor Kerr** says, citing *Umvovo* 1953 (1) SA 195 (A) at 201, adoption of common law in these circumstances would not be invariable.

38 When commissioners' courts were abolished in 1986, s 19(1) of the Black Administration Act was also repealed. In the years before abolition of commissioners' courts, however, assessors were seldom called: *Khumalo Civil Practice and Procedure of all Courts for Blacks in Southern Africa* 60.

39 See *Matyesini v Dulo* 3 NAC 102 (1915), *Sikwikwikwi v Ntwakumba* 1948 NAC 23 (S) and *Shabangu v Mkonto* 1945 NAC (N&T) 15.

40 See *Zulu* 1938 NAC (N&T) 265 and Allott *New Essays in African Law* 266-9.

41 Unfortunately, the value of anthropologists as expert witnesses has generally been underestimated, although a person who had conducted a scientific study of a particular community might give even better evidence than a traditional ruler, since the discipline of anthropology imposes methodological restraints that are calculated to yield a more reliable version of custom than legal tests. Cf *Sibasa v Ratsialingwa & Hartman NO* 1947 (3) SA 369 (T) at 378. See generally Akanki (1970) 4 *Nigerian LJ* 27.

10.29 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.

10.30 It is not feasible, however, to restate South Africa's customary legal systems. Of necessity, therefore, 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.

Proposed Application of Customary Law Bill

GENERAL EXPLANATORY NOTE:

[] Words in bold type between square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

B I L L

B E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—
 - (i) "customary law" means the customs and usages traditionally observed by the indigenous African peoples of the Republic and which form part of the culture of those peoples whether or not such customs and usages are codified;
 - (ii) "foreign customary law" means the customs and usages traditionally observed by indigenous African peoples outside the Republic and which form part of the culture of those peoples whether or not such customs and usages are codified;
 - (iii) "ways of life" in respect of a person mean the patterns of behaviour, traditions and habits of that person which indicate whether he or she has a closer connection—
 - (a) to customary law than to common law; or

- (b) to one system of customary law or another,
as the case may be.

Courts may apply customary law in civil matters

2. Any court in the Republic may apply customary law in civil suits brought before it.

Application of customary law by agreement

3. When deciding whether customary law is applicable, a court may give effect to an express or implied agreement between the parties that customary law should apply, unless the court is satisfied that it is inappropriate to do so.

Factors determining application of customary law in absence of agreement

4. In the absence of an agreement between the parties, a court may apply the law with which the parties or the issues have their closest connection and in determining that law the court may take into account all relevant factors, including—
- (a) the nature, form and purpose of any transaction between the parties;
 - (b) the place where the cause of action arose;
 - (c) the parties' respective ways of life;
 - (d) for purposes of deciding interests in land, the place where that land is situated.

Devolution of assets

5. (1) Customary law shall be applied to the devolution of a deceased estate if all relevant factors including the deceased's ways of life and, for purposes of deciding interests in land, the place where that land is situated, indicate that the deceased had his or her closest connection to that law unless it appears—
- (a) that the deceased had executed a will, in which case the terms of the will must be applied;

- (b) taking account of the factors referred to in this paragraph, that it would be more appropriate to apply the common law; or
- (c) that the application of customary law would result in unjust or unfair consequences.

(2) Notwithstanding paragraph (1)(a) customary law may be applied to the interpretation of the terms of a will executed by a person normally subject to customary law.

Proceedings involving different systems of customary law

6. (1) Where two or more different systems of customary law may be applicable, a court must apply the law that the parties expressly or impliedly agreed should apply.

(2) In the absence of an agreement, a court may apply the law with which parties or the issues have their closest connection and in determining that law the court may take into account all relevant factors, including—

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

Application of private international law

7. The rules of private international law shall apply to any matter where the question arises whether a system of foreign customary law may be applied.

Proof and ascertainment of customary law or foreign customary law

8. (1) In order to prove the existence or content of a rule of customary law, or foreign customary law, a court may—

- (a) consult cases, textbooks and other authoritative sources;
- (b) receive expert opinions either orally or in writing; and
- (c) appoint assessors from the community in which the rule of customary law applies.

(2) The provisions of subsection (1) shall not prevent a party from presenting evidence of a rule contemplated in that subsection.

Amendment and repeal of laws

9. (1) The Law of Evidence Amendment Act, 1988 (Act No. 45 of 1988) is hereby amended by the repeal of section 1.

(2) The Black Administration Act, 1927 (Act 38 of 1927) is hereby amended to the extent set out in the Schedule.

(3) Government Notice R200 of 1987 is hereby amended by the repeal of regulation 2.

Short title and commencement

10. This Act shall be called the Application of Customary Law Act, ..., and shall come into operation on a date fixed by the President in the *Gazette*.

SCHEDULE

Amendments to Sections of the Black Administration Act, 1927 (Act No. 38 of 1927)

(Section 9)

1. The amendment of section 22 by–
 - (a) the deletion of subsection (7); and
 - (b) the deletion of subsection (9).
2. The repeal of section 30.

ANNEXURE B

LIST OF RESPONDENTS WHO COMMENTED ON DISCUSSION PAPER 76

1. Mr Justice Albie Sachs of the South African Constitutional Court;
2. The Gender Research Project (Centre for Applied Legal Studies): University of the Witwatersrand;
3. Professor AJ Kerr, Professor Emeritus of Law in Rhodes University and Honorary Research Fellow;
4. Dr AMS Majeke of the University of Fort Hare;
5. The Family Law Committee of the Law Society of the Cape of Good Hope;
6. Mr AM Moleko at the request of the Natal Law Society;
7. The House of Traditional Leaders of the Eastern Cape;
8. The Committee on Constitutional Affairs for the Northern Province House of Traditional Leaders;
9. Mr Besana Skosana, Magistrate, Johannesburg;
10. The Human Rights Trust;
11. Ms Willemien du Plessis;
12. The Women's Lobby;
13. The Council of South African Banks; and
14. The Zion Christian Church.