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INTERIM BILL OF RIGHTS AND CUSTOMARY LAW

T W BENNETT
Customary law must continue to be recognized in the new constitution. Apart from having profound symbolic and political values for the people aof the country, this legal regime is already part of South African law, and it would be unthinkable to withdraw recognition now. At the same time, if only for ideological and educative purposes, the gender gaguality clause must also be included in the Rill of Rights. From my reading of the expertsâ\200\231 opinions, I understand that they are all broadly of the view that neither customary law nor the Bill can be sacrificed. This means that a patent conflict will be built into the Bill of Rights.

Unfortunately, this conflict has been oversimplified for purposes of the current debate. There is a tendency to assume that because patriarchy infuses African culture, all aspects of customary law are equally objectionable and that all are liable to be struck down by the Bill of Rights. Such an overâ\200\224generalization then tends to suggest that the conflict is overwhelming and irreconcilable, with no solution other than a ruling that either customary law or the Bill is paramount.

The traditionalistâ\200\231s understandable fear that customary law is in danger of being superseded by the common law must be allayed. Human rights are only a means to an end. According to the argument of cultural relativism (a principle that would be entrenched in the Bill following recognition of customary law), the social institutions peculiar to particular cultures may achieve the same goal as human

rights: human dignity. And, if we are realistic about social and

economic conditions in Africa, existing social instituï¬¬\201ions may cater for the needs of individuals more effectively thanm a bill of rights.

In any event a bill of rights has a limited reach. It will be implemented only in formal, state institutions, to which the poor and powerless have restricted access. Reform of domestic law is notoriously difficult to achieve; and it must be appreciated that any authentic regime of customary law is one that will continue to exist beyvond the reach of state institutions. Recause a bill of rights can at best be applied only in courts and bureaucractic agencies that are closely supervised by the state, it is more than likely that a parallel, informal, customary system will continue to operate in the way that it always has. Informal dualism of this nature is widespread. States have simply ignored it, recognized aspects of it (such as informal tribunals), or included the informal regime as part of the state legal system (as in South Africa). The latter approach, of course, has the advantage of allowing the state to exercise more effective control.*

When contemplating the reform of customary law, I would suggest that certain specific issues are more urgent and more sensitive than others, and that different issues can be resolved in different ways. I would support what I take to be a broad measure of agreement amongst

the experts: the legislature must be put on terms, as it were, during

1 Indirect rule in a new guise. This may operate in a negative sense, by allowing appeals from informal courts and by reviewing the decisions of local authorities, and in a positive sense, by providing training and paying officials of the informal institutions.

the period of the interim constitution, to correct some of the more glaring anomalies and defects in customary law.=Â®

(a) Customary marriages must now be given full recognition on a par with civil/Christian unions.â\204¢

(b)) Section 11(Z)(bH) of the Black Administration Act (which condemns customary wives to the status of minors) must be deleted.Â®

{(c) Wives of customary marriages should have legally recognized parental rights to their children.Â®

{(d) Wives must be entitled to claim maintenance stante matrimenico and on divorce.Â® :

Other uncontroversial issues could also be dealt with immediately by

legislation: & minimum age for marriage should be fixed:;â\200\235 a woman

should be given the power to conclude a marriage despite the objection of her guardiani;Â® a final ruling should be made whether the Age of Majority ActÂ® applies to persons subject to customary law.

Further issues can be addressed in more particular contexts by

using one of at least three different techniques: the repugnancy

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Certain of these have already been identified by the SA Law Commissionâ\200\231's Repart on Marriages and Customary Unions of Black Fersons (1985) No 10. However, the Commission cannot be assumed to reflect a general opinion amongst the black population, since a comprehensive attitudinal survey was not conducted.

(a) and (b) are anomalies created by the statey they have no authentic origin in community praxis, and so can be corrected without gqualm.

The term â\200\230minorâ\200\231 in (d) is an unfortunate common-law rendering of the womanâ\200\231's actual position in customary law that has failed capture to nuances possible under that regime.

This is admittedly a sensitive issue, and although change was recommended by the Law Commission, it should be reconsidered. There is evidence that chiefsâ\200\231 courts are less rigid in their adherence to 'traditionalâ\200\231 customary law, and are prepared to allow women to sue for support. There is no reason why commonâ\200\2241aw institutions should not follow suit.

At present customary law probably favours the age of puberty, a rule that might conflict with childrenâ\200\231's rights.

Because, technically, the wife is not party to the marriage agreement in customary law, and because women are 'perpetual minorsâ\200\231, their guardians may obstruct the formation of a customary union. Inclusion of a clause on marriage in the Bill of Rights would have the effect of improving the womanâ\200\231's position.

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proviso, horizontal application of the Bill (both direct and indirect) and & more imaginative approach to choice of law.

(1) The repugnancy provisac

The Rill of Rights can be implemented ad hoc, on a case by case basis, via the repugnancy proviso contained in s 1(1) of the Law of Evidence Amendment Act.*Â® It must be remembered that recognition of customary law has always been subject to this proviso, and that some practices, auch as forced marriage and trafficking in children, have already been aexpunged through its application.** The courtsâ\200\231 reading of the Fepugnancy proviso will now obviously be informed by the Bill of Rights. In this manner any new practices that happen to evolve may be tested against what are considered to be national standards of behaviour.

(2) Horizontal application aof the Rill

(a) Direct (unmitteibare Drittwirkung)

A technigque that allows the courts a measure of discretion in deciding whether the ï¬\201ill should be applied, as particular Cases Occur, }5 Dritfwirkung {or horizontal apblicÃ©tions. In Germany-and the Unitedâ\200\231 States it has been held that state inÃ©titutions cannot apply rules or practices thÃ©f are in conflict witï¬\201 the fundamental norms of the constitution.. Thus state courts and bureaucratic agencies can respond

to specific issues as and when they arise. Certain problems in

10 45 of 1988. Courts may apply customary law, ’Frovided that indigenous law shall not be opposed to the principles of public policy or natural justice: Frovided further that it shall not be lawful for any courts to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principlesâ\200\231.

11 The courts were, however, reluctant to adopt a interventionist role, with the result that the full potential of this proviso has never been realized.

customary law are amenable to direct horizontal application of the-Bill of Rights. For instance, freedoms of movement and expression, whan read with the gender equality clause, are not contentious and may completely override the few restrictions imposed by customary law.,

But the ambit of the Eill of Rights is not limitless, even if horizontal application is assumed. For example, would it be correct to construe the gender equality clause as giving women powers that they lack in customary law? For purposes of this argument three examples may be considered. The first is relatively straightforward. Given the commonâ\200\224law rule that women may not be forced into marriages against their will,*Â® there could be no objection to giving wives the power to sue for their own divorces (and for related matters such as maintenance and custody).*Â®

The second example â\200\224 womenâ\200\231's proprietary capacity - is more complex. The term 'proprietary capacityâ\200\231 includes a personâ\200\231s power to acquire property, the freedom to use and dispose of it, and the right to vindicate it. Women already have firmly established rights and freedoms regarding property of a ritual natuwre in customary law; the question is whether they should be allowed to acquire and control wages/salaries and other more prosaic acquisitions. The gender and

property clauses in the Bill could easily be read to allow women the

same right to vindicate and protect their property as men have; but do

these clauses mean that women now have the same power to acquire

property that men have?

12 Applied in customary law via the repugnancy proviso.

h e That is, both the procedural power (locus standi) to argue the matter in court, and the substantive power to change status relationships.

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This will depend on the way in which the EBill of Rights is drafted and interpreted. The traditional construction of bills of rights, the liberal western approach, is to regard them as a means of protecting existing rights. Albertyn, on the other hand, sees human rights as a means to â\200\230grant people access to power and releaÃ©e them to participate meaningfully in the development of the new orderâ\200\231.*? Under her interpretation the Bill would empower women to acquire property:; under the traditional interpretation specific legislation would have to be introduced to achieve this.

In the third case, even if Albertynâ\200\231's interpretation is accepted, would the Bill create rights (not powers) that previously did not

vist? For instance, would the RBill give a widow the right to inherit portion at least of her deceased husbandâ\200\231's estate, a right that widows currently do not enjoy under customary law? I would suggest that rather than stretch the meaning of the gender and property clauses into a distortion, both proprietary capacity and inheritance should be dealt with by legislation.

Guardianship of minor children poses a problem similar to the widowâ\200\231's right to inherit; it seems more amenable to legislation than application of the Bill of Rights. An even further extension of the rule of gender equality might allow a woman to sue for damages for her

own seduction,*Â® or to sue a co-respondent for damages for adultery

14 Faragraph 3. Her idea of empowering people to change the existing asystem of customary law, suggests that social and economic rights should be given priority in the Bill, because until people are materially â\200\230empoweredâ\200\231 they are in no position to act on such issues as equality.

15 And conclude their own marriages without payment of bridewealth. See in this regard the Zimbabwe case kKatehkwe v Muchabaiwa SC 87/1984.

committed by her husband. Again this would appear to be an over-â\200\224

extension. Neither delict was conceived to be in the interests of the

WOMA . If she should want to sue for seduction or adultery, common-law

remedies could be used.?tÂ®

(b)Y Indirect (mittelbare Drittwirkung)

The German qualification ˜ mittelibare Drittwirftung (indirect horizontal

application) - could be relevant in deciding the cirumstances in which

horizontal application of the Bill of Rights should be allowed.

According to this principle, norms of the constitution prevail over

rules of private law only if the private-law rules are openâ\200\224textured

(abstract and general in their wording), ambiguous/vague, or

contradictory. Mittelbare Drittwirkung could be used to great effect

in modifying customary law, a system that is by nature vague and

Amorphous .

The following are examples where the RBill of Rights could
indirectly influence a courtâ\200\231’s finding in a particular case:

(a) the rule that payment of bridewealth determines guardianship of
children. This is seldom applied strictly, and in any case is
subject to whatever agreement the families concerned have reached.
A court could in these circumstances make an order reflecting the
childâ\200\231’s best interests and the motherâ\200\231’s right to her off-spring.

{b) Under customary law, the natural father has a right to reclaim his
child against payment of a paternity fee. This rule may be in
conflict with the motherâ\200\231’s husbandâ\200\231s right to all children she
bears. Given the contradiction here, the court could give effect
of the motherâ\200\231’s and childâ\200\231’s interests.

(c) Rules regarding a womanâ\200\231’s proprietary capacity are still in the
process of being formulated, and are therefore vague. If this

issue is not resolved by legislation,*â\200\235 the courts could intervene
in favour of women.

Although it seems perverse to allow an action for adultery when
the delict has all but disppeared from the common law.

As was recommended by the SA Law Commission Report on Marriages
and Customary Unions af Rlack Persons.

(d) Where a discretion is involved, such as whether a husband chastised his wife meoderately or whether he managed family assets reasonably, the courtâ\200\231s finding would be determined by the Bill.

(Z) Choice of law

While in principle every person should have the choice whether to remain bound by a system of personal law, it is facile to suggest that parties should be bound by customary law only if they have voluntarily opted for the system. Aside from the problem of those persons (such as

children) who are in no position to exercise an informed decision, how

is a court to respond to cases involving one party who has opted out of

customary law and another who is still bound by it?*Â® Judicious application of choice of law rules may assist in specific contexts to am@liorate the position of individuals: if it is clear that a hardship will be involved in a particular case, the common law could be applied

instead of customary law.2*?Â®

There are very few decisions on this problem in South Africa (see Bennett A Scurcebock of African Customary Law 129), and they are not especially helpful. Fresumably a litigant would not be permitted to upset acquired rights, in the sense that a defendant would be not entitled to renounce customary law on the eve of litigation so as to defeat the plaintiff’s claim.

The present unhappy position of women is attributable in part to the sarlier courtsâ\200\231 refusal to apply common law as opposed to customary law. See Bennett op cit 1146 and 120,