

LEGAL PLURALISM AND THE FAMILY IN SOUTH AFRICA: LESSONS FROM CUSTOMARY LAW REFORM

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INTRODUCTION: THE COLONIAL AND APARTHEID PAST

Understanding South Africa's laws on cultural and religious diversity requires understanding its colonial and apartheid past. The most convenient date at which to begin such an inquiry is 1652, when the Dutch East India Company established a revictualling base at what is now Cape Town.¹ Roman-Dutch law was taken to be the basic law of the territory, and it still regulates most aspects of South African private law. In 1814, however, the Netherlands ceded the Cape to Britain, and English law was then imposed in all public and commercial matters.²

During the course of the nineteenth century, Roman-Dutch and English laws were merged gradually into a single legal system that has come to be considered the "common law" of South Africa.³ The two systems of law nevertheless remained markers of political difference, which, in the first half of the twentieth century, sparked a spirited *bellum juridicum*, when purists called for preservation of the Dutch legal heritage.⁴ Today, however, these differences have been forgotten, and, since the birth of a new constitutional era, attention has shifted to South Africa's many systems of customary and religious law.

In the early days of colonization, Holland and Britain refused to recognize any of the indigenous systems of law in the Cape.⁵ Later, however, when Natal and the Transkeian territories were annexed, the British government had to

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¹ François du Bois & Daniel Visser, *The Influence of Foreign Law in South Africa*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 593, 595 (2003).

² TW BENNETT, *CUSTOMARY LAW IN SOUTH AFRICA* 35 (2004) [hereinafter BENNETT 2004].

³ *Id.* at 34. The term "common law" as it relates to South Africa is generally used for purposes of distinguishing customary law, thereby denoting both English and Roman-Dutch laws, together with subsequent statutes, precedents, and authoritative writings. *See id.*

⁴ *See* du Bois & Visser, *supra* note 1, at 614–15.

⁵ BENNETT 2004, *supra* note 2, at 35.

rethink its policy.⁶ These annexations caused the colonial administration to become overextended, leading the British to co-opt the judicial and administrative services of traditional rulers and give the courts authority to apply local customary laws.⁷ Transvaal, the trekker republic in the hinterland, adopted a similar policy.⁸

After the Anglo-Boer War (1899–1902), the government of the new Union of South Africa (the state created out of the former British colonies and trekker republics) devised a uniform policy for the indigenous African population.⁹ Under the Black Administration Act of 1927,¹⁰ customary law was made applicable nationwide, but on strictly racial grounds and only in a special system of courts presided over by traditional leaders and native commissioners.¹¹ These courts had jurisdiction over blacks only, and only blacks could be subject to customary law.¹² Traditional leaders and native commissioners now became responsible for nearly all African civil, and minor criminal, litigation.¹³

While traditional leaders could apply only customary law, the commissioners' courts, together with their Appeal Court, were given a discretionary power to apply the common law when the circumstances of the case required.¹⁴ Magistrates' courts and the Supreme Court had jurisdiction over both race groups, but they had no authority to apply customary law as a matter of law. Instead, the courts were obliged to treat the customary law as fact, to be proven in each case as if it were a foreign law or a species of common law custom.¹⁵

⁶ *Id.* at 36–37.

⁷ *Id.* at 37–38.

⁸ *See id.* at 39.

⁹ *Id.* at 40–41.

¹⁰ Black Administration Act 38 of 1927.

¹¹ *Id.* §§ 9–10; BENNETT 2004, *supra* note 2, at 41–42.

¹² BENNETT 2004, *supra* note 2, at 41–42.

¹³ *See* TW BENNETT, THE APPLICATION OF CUSTOMARY LAW IN SOUTHERN AFRICA: THE CONFLICT OF PERSONAL LAWS 47–49 (1985) [hereinafter BENNETT 1985].

¹⁴ *See* Black Administration Act § 11(1).

¹⁵ BENNETT 2004, *supra* note 2, at 44–45. Prior to reforms implemented in 1986, South Africa's court system was divided on racial grounds; the courts of traditional leaders and native affairs commissioners catered exclusively to African litigation, with appeal to the magistrates' courts and the Supreme (now High) Court. *Id.* at 139. The latter courts also catered, as courts of first instance, largely to civil litigation amongst whites and criminal prosecutions, regardless of the race of offenders. *Id.* at 140, 148. Racial distinctions were removed in 1986, and the courts of native commissioners were abolished. Special Courts for Blacks Abolition Act 34 of 1986; BENNETT 2004, *supra* note 2, at 141. Their jurisdiction was transferred to the magistrates' courts. BENNETT 2004, *supra* note 2, at 138–41.

The year 1948 ushered in a new government committed to instituting the structured system of racism that came to be known as apartheid. As far as customary law and the courts were concerned, this policy called for few changes to the existing system. The foundations for segregation had already been laid and the government only needed to tighten up on the laws and their enforcement. In the process, racial and ethnic classification became all important. Based on language, culture, and birth, Africans were assigned to one of eight (later nine) ethnic groups.¹⁶ Each was assigned a *bantustan* (later called a “homeland”) in an area set aside under the 1913 Land Act¹⁷ and fell under the jurisdiction of that unit.¹⁸

As criticism abroad grew, the government embarked on a process of internal decolonization in what was designed to appear as a gratuitous grant of self-determination. In 1976, the government gave the Transkei homeland independence, soon to be followed by Bophuthatswana, Venda, and Ciskei.¹⁹ Thereafter, any charge that the country’s African population was oppressed by white rule could be countered by pointing to their freedom to live in their own self-governing territories.²⁰

The homelands had full power to determine the personal laws applicable to their citizens, including customary law. Within South Africa itself, the system established under the 1927 Black Administration Act remained in force until it became apparent, in the mid-1980s, that the apartheid scheme was failing.²¹ The government then began to reconsider its position.²² In 1986, the commissioners’ court system was abolished,²³ and any mention of race was removed from the terms for recognizing customary law. Customary law was now potentially applicable to any person, regardless of race, and by any court in the country.²⁴ By 1989, however, the significance of these reforms was

¹⁶ BENNETT 2004, *supra* note 2, at 110.

¹⁷ Black Land Act 27 of 1913; BENNETT 2004, *supra* note 2, at 110.

¹⁸ BENNETT 2004, *supra* note 2, at 110 (citing Promotion of Bantu Self-Government Act 46 of 1959).

¹⁹ *Id.*

²⁰ See TW BENNETT, A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA 35 (1991) [hereinafter BENNETT 1991] (quoting Hilgard Muller, Minister of Foreign Aff. (Republic of S. Afr.), Ambassador & Permanent Representative of S. Afr. to the United Nations, Address at the General Assembly of the United Nations (Dec. 21, 1964)).

²¹ BENNETT 2004, *supra* note 2, at 42.

²² The government began to rethink its position following, inter alia, the fifth report of the Hoexter Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court. BENNETT 1991, *supra* note 20, at 81.

²³ *Id.* at 82 (citing Special Courts for Blacks Abolition Act 34 of 1986).

²⁴ *Id.* at 119 (quoting Law of Evidence Amendment Act 45 of 1988 § 1).

eclipsed by the unbanning of opposition parties and plans for a democratic election.²⁵

I. THE NEW CONSTITUTION

The Interim Constitution of 1993²⁶ did more than pave the way for democracy. It also introduced a fully justiciable Bill of Rights and a new era of nondiscrimination, with uniform standards for all people. The cynosure of both the Interim Constitution and the 1996 Constitution was a guarantee of equality. Under the 1996 Constitution, any unfair discrimination, whether direct or indirect, is prohibited on grounds including, but not limited to, “race, gender, sex, . . . ethnic or social origin, colour, sexual orientation, age, . . . religion, conscience, belief, culture, language and birth.”²⁷ Because this provision applies both horizontally and vertically, courts and lawmakers were presented with the prospect of overhauling the entire legal system.

A. *Horizontal Application of the Bill of Rights*

Perhaps the most noteworthy feature of the Bill of Rights is its scope of application. When negotiations about the document started, it was generally assumed that fundamental rights would be applicable only vertically, i.e., to relations between citizen and state.²⁸ In the Interim Constitution, however, the rights were also, in certain instances, applicable horizontally to relations between individuals.²⁹

The 1996 Constitution cleared up certain ambiguities in the Interim Constitution and carried horizontality even further. Section 8(2) makes the Bill of Rights binding on natural persons “if, and to the extent that, [a right] is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”³⁰ The 1996 Constitution gives equal treatment specific mention in this regard. Section 9(4) provides that no person may

²⁵ Gilian Slovo, *South African Special*, TELEGRAPH (London) (Apr. 17, 2010, 7:00 AM), <http://www.telegraph.co.uk/culture/books/7597415/South-African-special.html>.

²⁶ S. AFR. (INTERIM) CONST., 1993.

²⁷ S. AFR. CONST., 1996 § 9(3).

²⁸ *See Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) at 877 para. 45.

²⁹ *See, e.g., Mthembu v. Letsela* 2000 (3) SA 867 (A) at 801–83 paras. 31–40.

³⁰ S. AFR. CONST., 1996 § 8(2).

unfairly discriminate against another person on any of the proscribed grounds, notably age, sex, or gender.³¹

Section 8(3) obliges the courts to “develop” the common law³² to achieve constitutional aims, if legislation does not already give effect to the rights in question.³³ This section was read as an endorsement of the ultimate form of horizontality, what is termed “direct” horizontality, namely, the use of a constitutional right as the sole ground for one individual’s claim against another in the absence of a statutory, common law, or customary law basis.³⁴

The all-encompassing scope of the Bill of Rights invited an across-the-board examination of every aspect of the law, whether public or private. Unlike some of South Africa’s neighbors, which exempted customary law from the rule of nondiscrimination,³⁵ no part of the South African legal system escaped scrutiny.

B. *Protection of Culture*

The cultural or ethnic pluralism of the past was not a popular option with drafters of the new constitution, largely because of its association with apartheid.³⁶ Even so, the right to culture found a place in the Final Constitution.³⁷ Section 30 provides, “Everyone has the right to use the

³¹ *Id.* § 9(4); see also BENNETT 2004, *supra* note 2, at 94. Constitutional provisions will be given added weight when all sections of the Promotion of Equality Act come into force. See generally Marius Pieterse, *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final Nail in the Customary Law Coffin?*, 117 SALJ 627 (2000).

³² S. AFR. CONST., 1996 § 8(3). Although, for complex reasons, customary (indigenous) law was not mentioned, it too must be developed in accordance with the Bill of Rights. *Bhe v. Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) at 656–57 paras. 215, 219–20.

³³ S. AFR. CONST., 1996 § 8(3). The section on interpretation, Section 39(2), further strengthens the role of the Bill of Rights by providing that, when the courts are interpreting common or customary law, they “must promote the spirit, purport and objects of the Bill of Rights.” *Id.* § 39(2).

³⁴ All other forms of horizontal application are then “indirect.” It was argued, however, that the distinction between direct and indirect horizontal application is negligible. *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) at 891–92 paras. 72–73. *But cf.* Chris Sprigman & Michael Osborne, *Du Plessis Is Not Dead: South Africa’s 1996 Constitution and the Application of the Bill of Rights to Private Disputes*, 15 SAJHR 25, 36–37 (1999).

³⁵ See, e.g., CONSTITUTION, § 23(3)(b) (1979) (Zim.); see also BENNETT 2004, *supra* note 2, at 77.

³⁶ In consequence, culture was given no more than a passing mention in the two bills of rights proposed before the Interim Constitution. BENNETT 2004, *supra* note 2, at 76 (citing SA Law Commission Interim Report 58 Group and Human Rights ¶¶ 679–80 (1991)).

³⁷ See S. AFR. CONST., 1996 § 30. Constitutional Principle XI in Schedule 4 of Act 200 of 1993 required the drafters of the final instrument to protect cultural diversity and to encourage conditions for its promotion. BENNETT 2004, *supra* note 2, at 78.

language and to participate in the cultural life of their choice.”³⁸ Section 31(1) goes on to provide that

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.³⁹

These sections, however, must be read subject to an “internal” limitation clause appearing at the end of these two sections, that no one exercising these rights may do so “in a manner inconsistent with any provision of the Bill of Rights.”⁴⁰ This clause was inserted to thwart attempts to “privatise” offensive practices or to protect domestic relationships from constitutional review.⁴¹

Because of both horizontal application and the internal limitation clause, systems of cultural and religious law were made especially vulnerable to review. The African tradition of reserving power and authority to senior males, in particular, was in direct conflict with the constitutional requirement of equal treatment.

C. *The Position of Customary Law*

Notwithstanding this threat, the 1996 Constitution did much to enhance the status of customary law. Until the 1990s, although customary law had been recognized on fairly generous terms,⁴² the common law was still taken to be the basic law of the land. Customary law was very much a subordinate element.

³⁸ S. AFR. CONST., 1996 § 30.

³⁹ *Id.* § 31(1).

⁴⁰ *Id.* § 31(2). The internal limitation clause is so named because it prefigures a more general and detailed limitation provision in Section 36(1), which provides that any law violating the Bill of Rights may pass constitutional review if it “is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” *Id.* § 36(1). The section continues to list additional factors that must be taken into account in the inquiry, such as the nature of the right, the importance of the limitation, its nature and extent. *Id.*

⁴¹ *Christian Educ. S. Afr. v. Minister of Educ.* 2000 (4) SA 757 (CC) at 773 para. 26.

⁴² Subject, however, to the repugnancy provision. BENNETT 1991, *supra* note 20, at 119 (quoting Law of Evidence Amendment Act 45 of 1988 § 1). This provision precluded application of customary law when it violated Western ideas of justice or public policy. BENNETT 2004, *supra* note 2, at 67.

Constitutional change prompted talk of “Africanizing” the legal system,⁴³ but this idea was soon forgotten. Nevertheless, in the Final Constitution, customary law was singled out for special treatment. Section 211(3) provides that the courts are obliged to apply it when it “is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”⁴⁴ Because of this provision, customary law now enjoys a special status in South Africa as an equal partner to common law.⁴⁵

D. Persons Bound by Customary Law

In addition, the 1996 Constitution brought about an implicit change in the grounds for recognizing and applying customary law. Formerly, it had been applied only to persons designated as “Black,”⁴⁶ and had been recognized at the state’s discretion. Now, however, customary law—and other systems of personal law—is recognized on the basis of a cultural or religious affiliation,⁴⁷ for such systems of law are derived from the right to culture or religion. By implication, individuals may not be compelled to submit to customary law; they are always entitled to opt out.⁴⁸

These changes to the basis for recognizing cultural and religious laws had obvious consequences for the rules governing their application, i.e., the conflict of personal laws. Legal pluralism inevitably leads to situations where litigants may contest the law applicable to a dispute. Through application of choice of law rules, the courts must then determine the most appropriate law for the particular case.

In South Africa, in matters of civil or Christian marriage, intestate succession, and administration of estates, the prior choice of law rules were statutory and most of the criteria for deciding whether to apply customary or common law were racial.⁴⁹ In other situations, the courts devised choice of law rules on a case-by-case basis.

⁴³ See *S v. Makwanyane* 1995 (3) SA 391 (CC) at 514 paras. 364–65.

⁴⁴ S. AFR. CONST., 1996 § 211(3).

⁴⁵ This is especially true when Section 211(3) is read in conjunction with such other sections of the constitution, such as Section 39(2). See *Makwanyane*, 1995 (3) SA at 514 para. 365.

⁴⁶ The Black Administration Act defines “Black” as “includ[ing] any person who is a member of any aboriginal race or tribe of Africa.” Black Administration Act 38 of 1927 § 35.

⁴⁷ This follows from the prohibition on racial discrimination in Section 9 of the 1996 Constitution.

⁴⁸ See TW BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW: UNDER THE SOUTH AFRICAN CONSTITUTION 23–25 (1999) [hereinafter BENNETT 1999].

⁴⁹ See Black Administration Act §§ 22–23; Intestate Succession Act 81 of 1987 § 1(4)(b).

A conflict of laws is only one problem presented by legal pluralism. Courts that are socially distanced from the communities in which disputes arise have no direct knowledge of the rules applicable in the various cultural and religious systems at play. In South Africa, for instance, magistrates' courts and the High Court are probably not conversant with customary law. They may take judicial notice of it,⁵⁰ but custom is constantly changing, and may therefore require proof.⁵¹

Thus, for reasons of race, the vagueness of the choice of law rules, and uncertainty about the law itself, the Law Reform Commission undertook to investigate the conflict of laws. In 1999, the commission produced a report,⁵² but no action has been taken on it.

Because Parliament was so slow in taking action, private litigants, assisted by public interest attorneys, took the matter of constitutional reforms to the courts.⁵³ Race was the first issue presented to the Constitutional Court, and it had no hesitation in striking down the statutory choice of law rules that prescribed application of customary law to "blacks" in cases of administration of deceased estates⁵⁴ and intestate succession.⁵⁵ In the case of marriage and divorce, the Recognition of Customary Marriages Act⁵⁶ forestalled a similar debacle. If parties chose to marry by customary law under that act, customary law governed the formalities and certain consequences (notably the husband's right to take more wives).⁵⁷ Marriage, according to civil or Christian rites, provided the basis for applying the common law. Race became irrelevant to choice of law.

⁵⁰ BENNETT 1991, *supra* note 20, at 119 (quoting Law of Evidence Amendment Act 45 of 1988 § 1(1)).

⁵¹ Hence, to bring greater certainty to customary law, there has been a constant call for codifications or, at least, restatements. SA Law Commission Report 90 Customary Marriages §§ 2.2.10–13 (Aug. 1998) [hereinafter Report on Customary Marriages]. The commission, however, refused to entertain this request, saying, *inter alia*, that a restatement would inevitably lag behind social practice, and would become yet another "official" version of customary law. *Id.* § 2.2.12–13.

⁵² SA Law Commission Report 90 Conflicts of Laws (Sept. 1999) [hereinafter Report on Conflicts of Laws].

⁵³ Section 38 of the 1996 Constitution permits individuals acting in their own interest, or acting on behalf of the class of persons or even the public interest, "to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened." S. AFR. CONST., 1996 § 38.

⁵⁴ See *Moseneke v. Master of the High Court* 2001 (2) SA 18 (CC).

⁵⁵ See *Bhe v. Magistrate, Khayelitsha* 2005 (1) SA 580 (CC).

⁵⁶ Recognition of Customary Marriages Act 120 of 1998.

⁵⁷ BENNETT 2004, *supra* note 2, at 239.

These judicial and statutory interventions resolved most of the conflict of laws problems. For other cases, the courts were left to their own devices,⁵⁸ guided by a store of precedents created by their predecessors.⁵⁹ Implicit in all these judgments was the question: given the circumstances of the particular case, what law would a reasonable person consider most appropriate?⁶⁰

Litigants were normally allowed to select the law that best suited their purposes,⁶¹ but explicit arrangements were rare. In practice, the courts inferred an implicit agreement. Thus, in most cases, it was apparent on the face of a plaintiff's summons that, by seeking a certain remedy or quantum of damages, customary or common law was contemplated.⁶² Courts could infer acquiescence to the application of customary law if the defendant did not contest this choice.⁶³ Where a defendant did contest the plaintiff's choice of law, however, the court could then investigate the parties' conduct prior to instituting action, and, from the words and deeds out of which the claim arose, seek to discover a common expectation.⁶⁴

The final problem—determining the content of customary law—remains unresolved. While eager to promote the conception of a dynamic, “living” customary law,⁶⁵ the courts have made no attempt to clarify its mode of ascertainment.⁶⁶ Instead, they have usually opted for a customary law drawn from the existing “official code” of rules.⁶⁷

⁵⁸ The only statutory rule relevant to the question, is a rule of recognition rather than choice of law. See BENNETT 1991, *supra* note 20, at 119 (quoting Law of Evidence Amendment Act 45 of 1988 § 1(1)).

⁵⁹ These guides were based on earlier legislation that had made application of customary law a matter of judicial discretion. See Black Administration Act 38 of 1927 § 11(1).

⁶⁰ See BENNETT 2004, *supra* note 2, at 51–53; BENNETT 1985, *supra* note 13, at 105–06.

⁶¹ It was only where there happened to be a mandatory choice of law rule, such as the rules contained in the former Black Administration Act, that party autonomy was denied. BENNETT 2004, *supra* note 2, at 53–54.

⁶² *Id.* at 54.

⁶³ *Id.* In cases where estoppel was invoked, for example, courts inferred acquiescence to the choice of law rule. See *id.* at 54 n.157.

⁶⁴ *Id.* In many cases, a choice of law was inferred from the nature or form of the cause of action. Transactions typical of customary law, such as bridewealth and loans of cattle, for example, suggested application of customary law. *Id.* at 55. A culturally distinctive form, such as marriage by Christian rites, led to application of the common law. Otherwise, the courts delved deeper into the background of the dispute to discover a general cultural orientation. See, e.g., *id.* at 55–56.

⁶⁵ See *infra* Part II (explaining this term, and its counterpart “official” law).

⁶⁶ *Shilubana v. Nwamitwa* 2009 (2) SA 66 (CC) at 83–84 para. 54. Although, the problem has been complicated since the Constitutional Court decision in *Shilubana v. Nwamitwa*. Formerly, the common law methods for proving custom were used for customary law, but the Constitutional Court held that the concepts of custom and customary law must now be kept separate. *Id.*

⁶⁷ See, e.g., BENNETT 2004, *supra* note 2, at 197, 315.

E. Protection of Religious Rights

In South Africa, culture is taken to be the basis for recognizing customary laws. The association of customary law with traditional African religions is rarely mentioned. In other words, beliefs and ritual practices are assumed to reflect culture, rather than religion.

Not only the courts and legislature, but also the people themselves, are responsible for the elision of religion. The reasons go back to colonial times. Early travelers and missionaries regarded Africans as so backward that they could have no “religion” in the accepted European sense.⁶⁸ For the evangelical Christian, religion required, at the very least, belief in and worship of God (or even gods) or, more broadly, a belief system explaining the existence and meaning of humanity.⁶⁹ Moreover, unlike Judaism, Christianity, and Islam, African beliefs did not lay claim to universal validity, nor did they pose ultimate issues in the contest between sin and virtue, or justification in a final judgment and the possibility of eternal salvation.⁷⁰

In these circumstances, it was hardly surprising that traditional religions compared unfavorably with the monotheisms. They were found wanting in both matters of content and form.⁷¹ They had no canons of belief, no clerical institutions, and, even more to the point, no sense of different, specific forms of knowledge. The traditional religions lacked a theology,⁷² and even, in many cases, a specific term for religion;⁷³ Africans had no need to distinguish between the sacred and the secular.⁷⁴ So began a tendency to treat all

⁶⁸ See, e.g., A.A. BALKEMA, LUDWIG ALBERTI'S ACCOUNT OF THE TRIBAL LIFE & CUSTOMS OF THE XHOSA IN 1807, at 47 (William Fehr trans., 1968); E. CASALIS, THE BASUTOS; OR, TWENTY-THREE YEARS IN SOUTH AFRICA 238 (1861).

⁶⁹ See *Christian Educ. S. Afr. v. Minister of Educ.* 2000 (4) SA 757 (CC) at 779–80 paras. 36–37.

⁷⁰ See, e.g., GANANATH OBEYESEKERE, MEDUSA'S HAIR: AN ESSAY ON PERSONAL SYMBOLS AND RELIGIOUS EXPERIENCE 82–83 (1981).

⁷¹ The issues enumerated here are derived from Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. LEG. PLURALISM & UNOFFICIAL L. 37, 49–50 (2002).

⁷² W.D. Hammond-Tooke, *World-view I: A System of Beliefs*, in THE BANTU-SPEAKING PEOPLES OF SOUTHERN AFRICA 318, 319 (W.D. Hammond-Tooke ed., 2d ed. 1974).

⁷³ WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA 413 (2d ed. 2006).

⁷⁴ See *id.* at 419 (quoting Anthony N. Allott, *African Law*, in AN INTRODUCTION TO LEGAL SYSTEMS 131 (J.D.M. Derrett ed., 1968)).

indigenous African beliefs as no more than an aspect of culture; they were interesting, but only as collectable exotica.⁷⁵

Occasionally, certain traditional African practices may be described as religious—usually when sacrifices are being made to the ancestors⁷⁶—but, generally speaking, they are said to be cultural. A good example of this attitude was the approach of the Law Reform Commission in its project on the customary law of marriage. While the commission might well have viewed the wedding as religious—as in Christian theology, where it is considered sacramental—the ceremony was treated as mere “custom.”⁷⁷

In South Africa, systems of religious law, notably those associated with the country’s Muslim, Hindu, and Jewish minorities, have attracted surprisingly little attention. Even so, they are not ignored, because these communities stand to benefit from Sections 15 and 31 of the 1996 Constitution. The former secures “the right to freedom of conscience, religion, thought, belief and opinion,”⁷⁸ (and makes a specific provision for legislation recognizing marriages and systems of personal or family law according to any tradition or religion),⁷⁹ while the latter permits religious communities to practice their religions and maintain religious associations.

Before the 1990s, only the mainstream Christian religions enjoyed full and formal recognition under South African law.⁸⁰ Particular casualties of this policy were marriages celebrated in accordance with the religions that permitted polygamy.⁸¹ Now, however, the constitution requires equal treatment for all religions and their related legal institutions.⁸²

⁷⁵ Jewel Amoah & Tom Bennett, *The Freedoms of Religion and Culture Under the South African Constitution: Do Traditional African Religions Enjoy Equal Treatment?*, 24 J.L. & RELIGION 1, 1–2, 5 (2008–2009).

⁷⁶ See, e.g., *Smit v. Kabhekuzulu* 2009 ZAKZPHC 75 (KwaZulu-Natal H.C.), <http://www.saflii.org/za/cases/ZAKZPHC/2009/75.html> (noting the recent bull slaughter at the Zulu First Fruits ceremony); Amoah & Bennett *supra* note 75, at 1.

⁷⁷ Report on Customary Marriages, *supra* note 51, paras. 4.4.5, 4.4.8. In this respect, the commission was following a pattern of thinking that was already well established in the courts. BENNETT 2004, *supra* note 2, at 214.

⁷⁸ S. AFR. CONST., 1996 § 15(1).

⁷⁹ *Id.* § 15(3)(a).

⁸⁰ Cornell W. du Toit, *Religious Freedom and Human Rights in South Africa After 1996: Responses and Challenges*, 3 BYUL. REV. 677, 677 (2006).

⁸¹ See BENNETT 2004, *supra* note 2, at 188. In this regard, special mention should be made of the African Independent Churches, which, until recently, were given only grudging recognition. DAVID WELSH, *THE ROOTS OF SEGREGATION: NATIVE POLICY IN COLONIAL NATAL, 1845–1910*, at 309–10 (1971). See generally

As a result, the Muslim community, through the South African Law Reform Commission, is claiming formal recognition of its law. Although the commission submitted a report and a draft bill to the Minister of Justice in 2003,⁸³ no progress has been made toward achieving final legislation. Instead, the question of gender equality has been fought out in the courts, with notable successes for women.⁸⁴

II. THE NEW PERCEPTION OF CUSTOMARY LAW

Even before the arrival of the 1996 Constitution, thinking about the nature of customary law in South Africa had been changing. Both legal pluralism and, for want of a better term, deconstructionism had set out to debunk the predominant theory of legal positivism, which had acquired an unhappy reputation during the apartheid era through its use as a justification for the regime.⁸⁵

Customary law had been a particular casualty of positivism. From this perspective, only state law was true law, and customary normative orders failed to qualify.⁸⁶ Anthropologists, however, with their predisposition to question official laws, contested such thinking, and they produced abundant evidence to show that positivist theory was not realized in reality. People did not accept formal legal systems as the primary sources of regulation in their

Johan W Claasen, *Independents Made Dependents: African Independent Churches and Government Recognition*, 91 J. THEOLOGY FOR S. AFR. 15 (1995).

⁸² BENNETT 2004, *supra* note 2, at 192; *Daniels v. Campbell* 2004 (5) SA 331 (CC).

⁸³ SA Law Commission Report 59 Islamic Marriages and Related Matters (July 2003) [hereinafter *Islamic Marriages and Related Matters*]; *see also* Christa Rautenbach et al., *Law of Marriage, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA* 162–65 (J.C. Bekker et al. eds., 2d ed. 2006).

⁸⁴ *See Daniels*, 2004 (5) SA 331 (CC) at 349 para. 37. The court extended the meaning of “spouse” in the Intestate Succession Act and of “survivor” in the Maintenance of Surviving Spouses Act, to a woman married under Muslim rites. *Id.* at 349–50 para. 40; *see also Amod v. Multilateral Motor Vehicle Accident Fund* 1999 (4) All SA 421 (A) (allowing the spouse to claim for loss of support for death of a bread winner). The court recognized de facto polygynous Muslim marriages for purposes of intestate succession and duty of support between spouses. *Hassam v. Jacobs* 2008 (4) All SA 350 (W. Cape HC) at para. 23, <http://www.saflii.org/za/cases/ZAWCHC/2008/37.html>; *accord Govender v. Ragavayah* 2009 (3) SA 178 (Kwa-Zulu Natal HC) at para 44, <http://www.saflii.org/za/cases/ZAKZHC/2008/86.html> (monogamous Hindu marriage). *But cf. Singh v. Rampersad* 2007 ZAKZHC 1 (KwaZulu-Natal HC), <http://www.saflii.org/za/cases/ZAKZHC/2007/1.html> (denying an order seeking recognition of a Hindu marriage, although it was de facto monogamous).

⁸⁵ *See, e.g., Karin van Marle, Law's Time, Particularity and Slowness, in LAW, MEMORY, AND THE LEGACY OF APARTHEID: TEN YEARS AFTER AZAPO V PRESIDENT OF SOUTH AFRICA* 25–26 (Wessel le Roux & Karin van Marle eds., 2007).

⁸⁶ *See* BENNETT 1985, *supra* note 13, at 18. *See generally* ROBERT B. SEIDMAN, *THE STATE, LAW AND DEVELOPMENT* 31–34 (1978) (accounting the implications of positivism for colonial rule).

lives.⁸⁷ They turned, rather, to customary and other, unofficial normative systems.

Pluralist research therefore rejected the idea that “law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions.”⁸⁸ The positivist notion of law was denounced as ideology, “a myth, an ideal, a claim, an illusion.”⁸⁹ By showing that people observed a whole range of normative orders generated in semi-autonomous social fields, pluralism claimed that these orders should be taken as seriously as state law.⁹⁰

Pluralists were prepared to concede that most colonial and postcolonial states enforced indigenous systems of law,⁹¹ but this form of pluralism was state-controlled. In its place, a call went out for “strong” pluralism, namely, acceptance of various independent but related legal orders, each authoritative in its own terms.⁹²

Deconstructionists made free use of pluralist research, and their broad aims generally coincided with those of the pluralists.⁹³ Nevertheless, this school of thought was more concerned with ideology than with the day-to-day life of the legal subject. It asked why people accept a normative regime that appears to work to their disadvantage. Customary law might seem to present something of an exception, because states have generally been prepared to recognize it. Through examination of legal and other texts, however, it could be shown that this ostensibly tolerant gesture toward cultural self-determination in fact worked more to the benefit of the state rather than the legal subjects.⁹⁴

⁸⁷ Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 20 (1981).

⁸⁸ John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 3 (1986).

⁸⁹ *Id.* at 4.

⁹⁰ *See id.* at 38.

⁹¹ *See* Gordon R. Woodman, *Ideological Combat and Social Observation: Recent Debate About Legal Pluralism*, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 21, 22–29 (1998).

⁹² *See* Griffiths, *supra* note 88, at 5; Gordon R. Woodman, *Unification or Continuing Pluralism in Family Law in Anglophone Africa: Past Experience, Present Realities, and Future Possibilities*, 4 LESOTHO L.J. 33, 43 (1988) (referring to this as “deep legal pluralism”).

⁹³ The two schools of thought, however, employed very different methodologies. Pluralism grew out of legal anthropology, and lent in favor of empirical fieldwork, whereas the methods of deconstruction were eclectic, drawing on cultural studies, revisionist historiography, and the critical legal studies movement. Research was generally by way of textual analysis.

⁹⁴ Thus, Peter Fitzpatrick remarked that colonialism took existing social relations, reconstituted them in terms of its demands “and then, as it were, [gave them] back to the people as their own. In this, history was denied and tradition created instead.” Peter Fitzpatrick, *Is It Simple to Be a Marxist in Legal Anthropology?*,

From works such as these, it appeared that much customary law in South Africa was an “invented” tradition.⁹⁵ The implications were serious. All systems of custom are based on social practices that the communities in question accept as binding. Hence, the key test for the validity (and legitimacy) of customary law is how widely and deeply it is rooted in the community.⁹⁶ If the rules appropriated by officialdom were not fully accepted in reality, they are not only invalid, but any claim to legitimacy through democratic origins in community tradition is also a sham.

In short, both legal pluralism and deconstructionism claimed that the customary law applied in state courts was unlikely to be the law actually being observed by its subjects.⁹⁷ The law most commonly used by the legal profession—the “official code”—bore the brunt of the charge that customary law was a distortion of an authentic, indigenous practice. Opposed to this version are ethnographic texts, which more accurately describe the cultures of selected African peoples, and, in so doing, come closer to revealing a true customary law. Finally, there was the “living” law, the system actually accepted and lived by the people.⁹⁸

The differences between the official and living laws were freely acknowledged,⁹⁹ and the Constitutional Court declared that the constitution protects only the living version.¹⁰⁰ Lawmakers, too, accepted the living version

48 MOD. L. REV. 472, 479 (1985) (reviewing KATHERINE S. NEWMAN, *LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIAL SOCIETIES* (1983)).

⁹⁵ S.B. Burman, *Use and Abuse of the ‘Modern’ Versus ‘Traditional’ Law Dichotomy in South Africa*, 12 VERFASSUNG & RECHT IN ÜBERSEE [FOREIGN & CONSTITUTIONAL LAW] 129 (1979) (Ger.); Robert Gordon, *The White Man’s Burden: Ersatz Customary Law and Internal Pacification in South Africa*, 2 J. HIST. SOC. 41, 46 (1989). See generally MARTIN CHANOCK, *THE MAKING OF SOUTH AFRICAN LEGAL CULTURE 1902–1936: FEAR, FAVOUR AND PREJUDICE* (2001).

⁹⁶ See IAN HAMNETT, *CHIEFTAINSHIP AND LEGITIMACY: AN ANTHROPOLOGICAL STUDY OF EXECUTIVE LAW IN LESOTHO* 10 (1975).

⁹⁷ Which is, in fact, a truism about any form of custom accepted as law. Whenever a court or legislature pronounces a custom as normative, it is forever cut off from its origin in social life. Anthony N. Allott, *The People As Law-Makers: Custom, Practice and Public Opinion As Sources of Law in Africa and England*, 21 J. AFR. L. 1, 5 (1977).

⁹⁸ AJGM Sanders, *How Customary Is African Customary Law?*, 20 CILSA 405, 405 (1987).

⁹⁹ *Alexkor Ltd. v. Richtersveld Cmty.* 2004 (5) SA 460 (CC) at 479–80 para. 52; *Bhe v. Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) at para. 152.

¹⁰⁰ In *Re Certification of the Constitution of the Republic of S. Afr.* 1996 (4) SA 744 (CC) at para. 197; see also Chuma Himonga & Craig Bosch, *The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?*, 117 SALJ 306, 316 (2000).

of customary law as the law to be protected. The Law Reform Commission, for example, used the living law as its inspiration for statutory reform.¹⁰¹

For all the reasons given above, it is evident that there was much to be said for recognizing only the living version of customary law. Indeed, it had the merit of appealing to the full spectrum of political opinion. Pluralism and deconstructionism worked to the benefit of any group whose voice had been silenced, for these theories had the “subversive power [to discover] suppressed discourses.”¹⁰²

Official law, on the other hand, was criticized by “[t]raditionalists seeking to redeem the past, and modernizers attempting to discredit it.”¹⁰³ For both groups, “customary law as it stands is corrupted, inauthentic and lacking authority. It is a foreign imposition, a stranger in Africa.”¹⁰⁴

III. APPLICATION OF THE CONSTITUTION: LEGISLATIVE REFORMS

With the realization of democratic government in South Africa, customary law presented an immediate target for law reform, not only because it violated fundamental human rights, but also because the official version was lagging far behind social practice. Hence, as soon as the Interim Constitution came into force, litigation began.¹⁰⁵ The courts, however, could not be expected to engage in all-purpose lawmaking.¹⁰⁶ A comprehensive program of law reform was a task for the legislature.

¹⁰¹ See Report on Customary Marriages, *supra* note 51; Report on Conflicts of Laws, *supra* note 52; SA Law Commission Discussion Paper 93 Customary Law [hereinafter Report on Customary Law] (Sept. 2000). The living law is constantly in the process of being investigated and recorded in the collaborative research of lawyers and social scientists, often for the specific purpose of producing evidence for court cases. See, e.g., *Tongoane v. Minister of Agric. & Land Affairs* 2010 (6) SA 214 (CC). The series of works is published by the NGO Women and Law in Southern Africa, which has undertaken extensive research on the legal position of women in various southern African countries. WOMEN AND LAW IN SOUTHERN AFRICA, <http://www.wlsa.org.zm> (last visited Aug. 14, 2011).

¹⁰² Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1443 (1992). Those working in gender studies were particular beneficiaries. See Ambreena S. Manji, *Imagining Women's 'Legal World': Towards a Feminist Theory of Legal Pluralism in Africa*, 8 SOC. & LEGAL STUD. 435, 439–40 (1999).

¹⁰³ Anthony Costa, *The Myth of Customary Law*, 14 SAJHR 525, 534 (1998).

¹⁰⁴ *Id.*

¹⁰⁵ Suits were brought to question, inter alia, a husband's marital power over his wife. See BENNETT 2004, *supra* note 2, at 96.

¹⁰⁶ See *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) at 895 paras. 80–81; BENNETT 2004, *supra* note 2, at 96.

The South African Department of Justice began by reconstituting a Special Project Committee of the Law Reform Commission,¹⁰⁷ which had been working on customary law since 1984.¹⁰⁸ The committee adopted a new working method. The start of each project was announced by publication of a brief Issue Paper, in which the committee set out its view of a problem, together with possible solutions. After receiving comment, the committee then published a more comprehensive Discussion Paper, and invited the public to explore the details more fully. Based on comments received to this document, the committee then prepared a report and draft bill for submission to Parliament.

A. *Marriage and Divorce*

In 1996, the Project Committee tackled the customary law of marriage and divorce.¹⁰⁹ This subject was the first on its agenda because customary marriages had never enjoyed full recognition in South Africa, due not only to an abiding colonial prejudice against polygyny,¹¹⁰ but also to the fact that the official version of customary law no longer represented the views and practices of those who lived it.¹¹¹ The committee was therefore instructed to draft a bill that would ensure respect for African cultural traditions, effect a thoroughgoing reform of marital relations, and bring the law into line with the Bill of Rights.¹¹²

Two years later, the Recognition of Customary Marriages Act was promulgated.¹¹³ In drafting this act, the Project Committee was quite prepared to give immediate recognition to customary marriages. Despite the constitutional prohibition on gender discrimination, and urgent submissions by women's lobbies, it was even persuaded to accept the practices of polygyny and the giving of bridewealth (or *lobolo*, the lingua franca term adopted in the act).¹¹⁴ Other cultural practices, however, were ultimately superseded by more practical concerns.

¹⁰⁷ The Special Project Committee is a body established by the South African Law Reform Commission. South African Law Reform Commission Act 19 of 1973 para. 7A.

¹⁰⁸ SA Law Commission Report 90 The Harmonisation of the Common and Indigenous Law (Sept. 1999).

¹⁰⁹ Report on Customary Marriages, *supra* note 51; BENNETT 2004, *supra* note 2, at 193.

¹¹⁰ BENNETT 2004, *supra* note 2, at 188.

¹¹¹ *See id.* at 192–93.

¹¹² *Id.* at 193–94.

¹¹³ Recognition of Customary Marriages Act 120 of 1998; BENNETT 2004, *supra* note 2, at 188.

¹¹⁴ *See* BENNETT 2004, *supra* note 2, at 220.

The Project Committee was keenly aware of the need to give immediate effect to social and economic changes in African family relationships, and it noted that many of these were shared by all South Africa's social and cultural groups:

People from all communities, whatever their personal law or the type of marriage they contracted, experience spousal violence, they dispute about custody of children and they seek to claim financial support. Our search should be for an effective means of remedying these problems¹¹⁵

It therefore recommended application of existing rules of statutory law,¹¹⁶ which, although usually associated with civil or Christian marriages, had been designed to cater to typical modern family forms.

In attempting to accommodate culture and, at the same time, to protect women and children, the act gives the parties freedom to engage in certain culturally significant practices, while, at certain strategic points, demanding state intervention.¹¹⁷ Two such cultural practices are *lobolo* and wedding rituals.¹¹⁸ The latter did not prove contentious and the Project Committee recommended that no legal significance be attached to them.¹¹⁹

Lobolo, on the other hand, was a much more serious matter, because it is regarded as the keystone of customary marriage.¹²⁰ Debate ranged between two extremes: from outright prohibition—because the giving of cattle or cash degraded the status of women—to making *lobolo* compulsory for all customary marriages.¹²¹ The lobbies in favor of prohibition or regulation, however, received virtually no public support.¹²² Hence, the committee recommended, in cases where parties wanted to give *lobolo*, they should be

¹¹⁵ Report on Customary Marriages, *supra* note 51, para. 2.1.24.

¹¹⁶ See Divorce Act 70 of 1979; Matrimonial Property Act 88 of 1984.

¹¹⁷ See Recognition of Customary Marriages Act § 4.

¹¹⁸ See *id.*

¹¹⁹ For a discussion on wedding rituals, see Report on Customary Marriages, *supra* note 51, para. 4.4.10.

¹²⁰ The Recognition of Customary Marriages Act defines *lobolo* as “the property in cash or in kind, . . . which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage.” Recognition of Customary Marriages Act § 1.

¹²¹ Report on Customary Marriages, *supra* note 51, paras. 4.3.3.1–2; BENNETT 2004, *supra* note 2, at 234–35.

¹²² See M.W. Prinsloo et al., *Perceptions of the Law Regarding, and Attitudes Towards, Lobolo in Mamelodi and Ateridgeville*, 31 DE JURE 72, 92 (1998) (noting that women did not consider *lobolo* demeaning or insulting).

free to do so, with the rider that failure to pay would have no effect on the spouses' marital status or on their rights to children.¹²³

The act, accordingly, makes no mention of wedding rituals or *lobolo* in the section dealing with the requirements for customary marriage.¹²⁴ Nevertheless, to distinguish such marriages from purely informal unions, the act stipulates that the former had to be negotiated and celebrated in accordance with the customs and usages traditionally observed in indigenous communities.¹²⁵ By implication, therefore, a paradox was achieved: wedding rituals and *lobolo* are now essential for typifying a marriage as customary.¹²⁶

The act requires state intervention in the marriage relationship in three situations: for purposes of registering the union, for sanctioning polygynous unions, and for obtaining a divorce. Under customary law, a marriage is a private affair arranged principally by the spouses' families. The relationship develops gradually over time as the husband and wife mature and bear children. They are considered only definitively married once they have fulfilled their roles.¹²⁷

To clarify the spouses' status and make it easier to prove, the Project Committee proposed registration of customary unions, although only as an optional formality.¹²⁸ After consulting the public, however, it appeared that many people—women in particular—wanted registration in order to make their unions “more certain.”¹²⁹ Largely in response to this request, the act stipulates registration of marriage as a mandatory requirement.¹³⁰

Past experience, however, had shown that people seldom comply with such state-imposed formalities, not least because they have little or no access to the necessary officials.¹³¹ What is more, there are no appropriate sanctions to

¹²³ Report on Customary Marriages, *supra* note 51, paras. 4.3.3.14–15.

¹²⁴ Recognition of Customary Marriages Act § 3; BENNETT 2004, *supra* note 5, at 236.

¹²⁵ Recognition of Customary Marriages Act §§ 1, 3(1)(b).

¹²⁶ See, e.g., *Fanti v. Boto* 2008 (5) SA 405 (W. Cape HC), <http://www.saflii.org/za/cases/ZAWCHC/2007/78>.

¹²⁷ BENNETT 2004, *supra* note 2, at 188.

¹²⁸ Report on Customary Marriages, *supra* note 51, para. 4.5.18; see also BENNETT 2004, *supra* note 2, at 217–19.

¹²⁹ Report on Customary Marriages, *supra* note 51, para. 4.5.17.

¹³⁰ Recognition of Customary Marriages Act § 4.

¹³¹ BENNETT 2004, *supra* note 2, at 218–19.

induce compliance.¹³² As a result, the act contains an anomalous provision that failure to register has no effect on the validity of a marriage.¹³³

An even more contentious issue was the husband's right to take as many wives as he wishes.¹³⁴ Long condemned by Western churches and colonial administrations, polygyny was now under attack for discriminating against women.¹³⁵ This was the general view of the public,¹³⁶ and while the Project Committee sympathized, it felt that polygyny on its own was not the cause of women's oppression.¹³⁷ Rather, polygyny was only one factor contributing to the patriarchal nature of marital relations.¹³⁸

For this and other reasons—the impossibility of enforcing an outright ban on polygyny and the apparent obsolescence of the practice¹³⁹—the committee recommended that husbands in customary marriages be permitted to take more than one wife.¹⁴⁰ The act followed this recommendation,¹⁴¹ but with a significant qualification in deference to the parliamentary gender lobby. A husband wishing to take a second or subsequent wife must apply for a court order to approve a written contract dividing the matrimonial estate between the wives concerned.¹⁴² In this way, it was hoped that an equitable distribution of property could be guaranteed.¹⁴³

Traditionally, under customary law, the concerned families privately dissolved the marriages.¹⁴⁴ The Project Committee, however, recommended that marriages should henceforth be terminable only by decree of a competent

¹³² Report on Customary Marriages, *supra* note 51, para. 4.5.14. To rule that unregistered unions are void would work great hardship for the spouses and would deprive many existing unions of potential validity. BENNETT 2004, *supra* note 2, at 219.

¹³³ Recognition of Customary Marriages Act § 4(9).

¹³⁴ BENNETT 2004, *supra* note 2, at 246.

¹³⁵ See Felicity Kaganas & Christina Murray, *Law, Women and the Family: The Question of Polygyny in a New South Africa*, 1991 ACTA JURIDICA 116 (1991).

¹³⁶ Report on Customary Marriages, *supra* note 51, para. 6.1.13.

¹³⁷ BENNETT 2004, *supra* note 2, at 246.

¹³⁸ Report on Customary Marriages, *supra* note 51, para. 6.1.9.

¹³⁹ *Id.* paras. 6.1.13, 6.2.25.

¹⁴⁰ *Id.* para. 6.1.25.

¹⁴¹ Hence, existing polygynous marriages are expressly recognized as valid. Recognition of Customary Marriages Act 120 of 1998 § 2(3).

¹⁴² *Id.* § 7.

¹⁴³ Under the act, if the first marriage was in community of property (i.e. owned jointly by the spouses), or was owned separately during the marriage, but subject to an accrual regime (whereby the estate, on divorce or death, is massed together), the court must terminate the property system and effect a division of the property. *Id.* § 7(7)(a)(i).

¹⁴⁴ BENNETT 2004, *supra* note 2, at 266.

court to protect wives and children and to ensure the regular application of rules governing division of the marital estate, maintenance, custody, and guardianship.¹⁴⁵ The act therefore provides that customary marriages may now be dissolved only by court order.¹⁴⁶

B. Succession and Administration of Estates

The Project Committee's approach to the customary law of succession was similar to that in the marriage project. While aware of the issue of culture, it set out to find rules that would address the basic social problem: securing the material needs of those most closely related to a deceased person and counteracting the disruptive effect of death on the integrity of a family unit.¹⁴⁷ Thus, although the committee acknowledged African legal heritage—which theoretically involves primogeniture in the male line¹⁴⁸—it recommended far-reaching changes to abolish any rules discriminating on grounds of sex, gender, age, or birth. These changes involved the application of a modified version of the Intestate Succession Act,¹⁴⁹ which normally applies only to persons subject to the common law.

In 1998, the committee published an Issue Paper addressing the right of succession.¹⁵⁰ However, during this process, the Department of Justice submitted a draft bill to the legislature, recommending the virtual elimination of customary laws of succession in favor of the Intestate Succession Act; when traditional leaders became aware of this, they protested, and the bill was hastily withdrawn.¹⁵¹ The topic was then returned to the Project Committee, which, reverting to its usual procedure, went ahead with publication of a Discussion Paper in 2000.¹⁵²

Eventually, because the pace of reform had been too slow, the matter was brought to the Constitutional Court and in a landmark decision, *Bhe v. Magistrate, Khayelitsha*,¹⁵³ the rule of male primogeniture was struck down.

¹⁴⁵ Report on Customary Marriages, *supra* note 51, para. 7.1.21; *see also* BENNETT 2004, *supra* note 2, at 267.

¹⁴⁶ Recognition of Customary Marriages Act 120 of 1998 § 8(1).

¹⁴⁷ Report on Customary Law, *supra* note 101, para. 1.12.

¹⁴⁸ *But cf.* BENNETT 2004, *supra* note 2, at 341–45 (discussing the living version of customary law succession).

¹⁴⁹ Intestate Succession Act 81 of 1987.

¹⁵⁰ BENNETT 2004, *supra* note 2, at 359

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 2005 (1) SA 580 (CC).

As an interim measure, the court ordered application of the Intestate Succession Act to estates devolving according to customary law.¹⁵⁴ Four years later, Parliament promulgated the Reform of Customary Law of Succession Act.¹⁵⁵

Again, Parliament had to resort to an awkward compromise to balance culture and gender equality. Following the lead set earlier by the Law Commission and Constitutional Court, the act subjects the estates of those dying without wills to the Intestate Succession Act,¹⁵⁶ a somewhat heavy-handed method for protecting women and children. Cultural sensibilities are addressed through modifications to the act that make special provisions for polygynous unions,¹⁵⁷ including even the rare cases of “seed raiser unions” and women-to-women marriages.¹⁵⁸

Parliament ignored more serious questions. These include the advisability of dividing small estates amongst widows and children, the most effective means of ensuring support for female-headed households, the relationship of widows with a husband’s patrilineal kin and regulation of the family’s administration of the estate. One sensible provision was to give the Master of the High Court authority to settle disputes about heirs and estates, with the power, where necessary, to refer such matters to a magistrate or traditional leader for further inquiry.¹⁵⁹ In this way, costly litigation may be avoided.

The administration of estates was handled somewhat differently. Before 2002, the race of a deceased person had determined the manner in which an intestate estate was to be administered. The Black Administration Act provided that, if the deceased were black and if the estate devolved by customary law, the same system would apply to administration.¹⁶⁰ In practice, therefore, the deceased’s family would gather at a ceremony for laying his spirit to rest, and here a conclave of elders would determine debts and liabilities, confirm the identity of the heir, and then distribute assets.¹⁶¹

¹⁵⁴ *Id.* at 663 para. 240; Intestate Succession Act 81 of 1987.

¹⁵⁵ Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

¹⁵⁶ *Id.* § 2(1).

¹⁵⁷ *Id.* §§ 2(2), 3(1).

¹⁵⁸ *Id.* §§ 2(2)(b)–(c).

¹⁵⁹ *Id.* § 5. In South Africa, the master’s office has responsibility for the administration of deceased estates.

¹⁶⁰ Black Administration Act 38 of 1927 § 23(7).

¹⁶¹ See BENNETT 2004, *supra* note 2, at 332–35.

State officials did not intervene in this process unless an estate contained immovable property, devolved under the common law,¹⁶² or the family could not agree upon an heir.¹⁶³ In these situations, a magistrate could hold an inquiry and then give directions as to the distribution of the estate. In the case of the estates of whites, however, the Master of the High Court supervised winding up and distribution under the Administration of Estates Act.¹⁶⁴

In *Moseneke v. Master of the High Court*,¹⁶⁵ the Constitutional Court intervened to declare that the different means of administering estates constituted unfair racial discrimination. Two years later, an amendment was made to the Administration of Estates Act¹⁶⁶ providing that estates governed by customary law were to be administered by the same system,¹⁶⁷ whereas estates governed by common law were to be administered under the supervision of the master.¹⁶⁸ To give effect to the new regime, “service points” were to be set up throughout the country, where officials acting on behalf of and under the direction of the master could assist families, hold meetings of beneficiaries, and deal with the formalities necessary to obtain the transfer of assets.¹⁶⁹

The Law Reform Commission published a Discussion Paper on the Administration of Estates in 2005. Following the decision in *Bhe*, the commission recommended a uniform system for administering all estates under the master’s supervision. Beneficiaries were to be allowed to choose whether to report an estate to the master or a service point, but estates of those who died leaving a will or immovable property had to be reported.¹⁷⁰ This regime is still in force pending legislation.

¹⁶² *Id.* at 367 (citing GN R200/1987).

¹⁶³ *Id.* (citing GN R200/1987).

¹⁶⁴ Administration of Estates Act 66 of 1965 § 4.

¹⁶⁵ 2001 (2) SA 18 (CC).

¹⁶⁶ See Administration of Estates Amendment Act 47 of 2002.

¹⁶⁷ Administration of Estates Act 66 of 1965 § 4(1A), amended by Administration of Estates Amendment Act 47 of 2002, § 2. *But see* Reform of Customary Law of Succession and Regulation of Related Matter Act 11 of 2009 § 5 (superseding Administration of Estates Act 66 of 1965 § 4(1A)).

¹⁶⁸ See BENNETT 2004, *supra* note 2, at 367. In keeping with *Moseneke*, magistrates no longer supervise administration. Section 3 of the Administration of Estates Act therefore abrogated Section 23(7)(a) of the Black Administration Act. See Administration of Estates Act § 3.

¹⁶⁹ Administration of Estates Act 66 of 1965 § 2A, amended by Administration of Estates Amendment Act 47 of 2002 § 1.

¹⁷⁰ SA Law Reform Commission Discussion Paper 110 Administration of Estates (Oct. 2005).

C. Circumcision and VirginitY Testing

Another area of legislative intervention concerns circumcision and virginitY testing. South African common law had always protected the right to bodily integrity. Thus, any practice that occasioned serious harm to an individual's person was subject to criminal prosecution, notwithstanding the victim's consent or the justification of a cultural tradition.¹⁷¹ As could be expected, the Bill of Rights also protects the right to bodily integrity.¹⁷²

Male circumcision provided a much-publicized occasion to give effect to this right. Although circumcision is considered, in general terms, unobjectionable, the media drew attention to the many deaths and permanent injuries that were resulting from badly executed operations.¹⁷³ Provincial legislatures then enacted special statutory measures to minimize the risks.¹⁷⁴

An even more controversial ritual has been the reemergence of virginitY testing, a practice associated with the high price placed on female virginitY. In order to protect this valuable bargaining chip in marriage negotiations, young girls were traditionally obliged to undergo regular inspections. Although the practice had fallen into disuse,¹⁷⁵ it was recently resumed, mainly to reinstate the importance of premarital chastity, but also to combat the spread of HIV/AIDS.¹⁷⁶

In the past, mothers or senior kinswomen within the confines of the family usually performed virginitY testing,¹⁷⁷ but it has now become a public ritual.¹⁷⁸ In the Zulu kingdom, for instance, it is associated with two major national events, the First Fruits' Festival¹⁷⁹ and the Royal Reed Dance.¹⁸⁰

¹⁷¹ BENNETT 2004, *supra* note 2, at 303.

¹⁷² S. AFR. CONST., 1996 § 12(2).

¹⁷³ See, e.g., Luyolo Mkentane, *Ruined Lives, Suicide and the Trauma of Shame*, E. PROVINCE HERALD (Port Elizabeth, S. Afr.), July 15, 2010, at 8.

¹⁷⁴ Requiring the presence of medical practitioners and certification of those conducting the ritual. See, e.g., BENNETT 2004, *supra* note 2, at 304.

¹⁷⁵ Children's Inst., Univ. of Cape Town, *VirginitY Testing and the Children's Bill 5* (Oct. 11, 2005) (unpublished manuscript), available at <http://www.ci.org.za/depts/ci/plr/docs/VirginitY%20Testing%20Discussion%20Paper%2010%20Oct%202005.doc>.

¹⁷⁶ Fiona Scorgie, *VirginitY Testing and the Politics of Sexual Responsibility: Implications for AIDS Intervention*, 61 AFR. STUD. 55, 57, 69, 71 (2002).

¹⁷⁷ Virginia van der Vliet, *Growing up in Traditional Society*, in THE BANTU-SPEAKING PEOPLES OF SOUTHERN AFRICA 211, 236–37 (W.D. Hammond-Tooke ed., 2d ed. 1974).

¹⁷⁸ Erika R. George, *VirginitY Testing and South Africa's HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities*, 96 CALIF. L. REV. 1447, 1455 (2008).

¹⁷⁹ Suzanne Leclerc-Madlala, *VirginitY Testing: Managing Sexuality in a Maturing HIV/AIDS Epidemic*, 15 MED. ANTHROPOLOGY Q. 533, 538 (2001).

Notwithstanding arguments that inspection violates constitutional provisions on equality,¹⁸¹ human dignity,¹⁸² bodily integrity,¹⁸³ and the child's best interests,¹⁸⁴ traditional leaders—and even President Jacob Zuma—encourage girls to participate.¹⁸⁵

The legislature, however, took a definite stance opposing the practice. The Children's Act therefore prohibits virginity testing of children under the age of sixteen, and provides that older children must consent in a prescribed manner and must receive proper counseling.¹⁸⁶ In addition, the results of the test may not be disclosed without the child's consent.¹⁸⁷

While enactments such as these attempt to enforce basic health and human rights standards, both traditional leaders and those responsible for conducting the inspection procedure openly ignore the requirements.¹⁸⁸ In fact, traditional rulers object to the interference of outsiders in their subjects' right to pursue cultural traditions.¹⁸⁹

IV. THE COURT SYSTEM

A special system of courts, sympathetic to the cultural or religious affiliations of the litigants, is a vital component in any policy of legal pluralism, because it can give full and proper expression to their beliefs and practices. In this respect, the judicial function of traditional rulers has always provided a critical adjunct to recognition of customary law.¹⁹⁰

¹⁸⁰ At this occasion, young girls celebrate their chastity before the king, who is then free to choose a bride from amongst their number. Children's Inst., *supra* note 175, at 5.

¹⁸¹ Under the 1996 Constitution, boys are generally exempt, although it is claimed that their virginity can also be reliably tested. S. AFR. CONST., 1996 § 9; Antony Kaminju, *South Africa's Virginity Testing*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/6677745.stm> (last updated May 22, 2007, 8:14 AM).

¹⁸² S. AFR. CONST., 1996 § 10.

¹⁸³ *Id.* § 12(2).

¹⁸⁴ *Id.* § 28(2).

¹⁸⁵ See Luxolo Tyali, *Zuma Takes a Stand on Virginity Testing*, MAIL & GUARDIAN ONLINE (Sept. 23, 2004, 11:01 AM), <http://mg.co.za/article/2004-09-23-zuma-takes-a-stand-on-virginity-testing>.

¹⁸⁶ Children's Act 38 of 2005 § 12.

¹⁸⁷ *Id.* § 12(6); see also TW Bennett et al., *Virginity Testing: A Crime, a Delict or a Genuine Cultural Tradition?*, 2010 TYDSKRIF VIR DIE SUID-AFRIKAANSE REG [J. S. AFR. L.] 254, 256.

¹⁸⁸ See, e.g., Lucinda Le Roux, *Harmful Traditional Practices, (Male Circumcision and Virginity Testing of Girls) and the Legal Rights of Children 65* (Nov. 2006) (unpublished LL.M. thesis, University of the Western Cape) (on file with University of the Western Cape).

¹⁸⁹ See George, *supra* note 178, at 1483.

¹⁹⁰ The traditional rulers are the self-appointed guardians of customary law. At the time of the constitutional negotiations, they were a force to be reckoned with: 800 "chiefs," supported by 13,000 headmen, ruled eighteen million people or about forty percent of the South African population. BENNETT 2004, *supra*

Magistrates' courts and the High Court may, of course, apply customary law,¹⁹¹ but for them, the relevant law generally must be proved specially. What is more, their alien procedures and language,¹⁹² not to mention prohibitively high costs, put them well beyond the reach of most litigants.¹⁹³ As a result, traditional leaders continue to cater to people in rural areas.¹⁹⁴ Traditional leaders offer an affordable means for resolving disputes according to a familiar language, procedure, and law.¹⁹⁵

Principally for reasons of expediency, the 1996 Constitution contained an express provision for retaining traditional courts.¹⁹⁶ It was argued, however, that, by combining both executive and judicial functions of government in one person, the judicial role of traditional leaders violated the precept of separation of powers. Moreover, as judges, they were said to be neither independent nor impartial as required by the constitution.¹⁹⁷ Other issues concerned a long-standing prohibition on representation before the courts, together with gender bias and the old racial criteria determining jurisdiction.

These objections suggested such differences in the administration of justice that African litigants were suffering unfair discrimination.¹⁹⁸ Nevertheless, these various deficiencies were all, in essence, violations of first-generation human rights. They had to be weighed against the second-generation right of access to justice. The Special Project Committee of the Law Reform Commission was therefore given a mandate to overhaul the entire system of

note 2, at 111; DEPT. OF PROVINCIAL AND LOCAL GOV'T, A DISCUSSION DOCUMENT TOWARDS A WHITE PAPER ON TRADITIONAL LEADERSHIP AND INSTITUTIONS 14–17 (2000).

¹⁹¹ Law of Evidence Amendment Act 45 of 1988 § 1(1).

¹⁹² Although the 1996 Constitution recognizes eleven official languages and, of course, various systems of indigenous customary law, the magistrates' courts and the High Court operate according to common law procedures and generally only in English or Afrikaans. S. AFR. CONST., 1996 §§ 6(1), 211(3). Interpreters are supposed to take care of the problem of language, but cases indicate that the problem is far from solved. *State v. Damoyi* 2003 ZAWCHC 65 (W. Cape HC) at paras. 6, 14, <http://www.saflii.org/za/cases/ZAWCHC/2003/65>.

¹⁹³ See Raymond Koen, *The Language of Racism and the Criminal Justice System*, 11 SAJHR 102 (1995).

¹⁹⁴ Notwithstanding various objections to their courts, traditional leaders probably have the support of most of their subjects. SA Law Commission Discussion Paper 82 Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders 10–11 (May 1999) [hereinafter Discussion Paper on Traditional Courts].

¹⁹⁵ SA Law Commission Report 90 Traditional Courts and the Judicial Function of Traditional Leaders (Jan. 2003) paras. 2.1.1–5.

¹⁹⁶ S. AFR. CONST., 1996 sched. 6, § 16(1).

¹⁹⁷ See *Id.* § 165(2). Some courts dismissed this objection on the ground that the usual common law tests are not applicable. BENNETT 2004, *supra* note 2, at 127. A court's judgment, however, should be confined to the subject matter of the dispute. See *id.* at 127–28.

¹⁹⁸ *Id.*

traditional courts, and, at the same time, to consider establishing similar, informal tribunals in urban areas where no traditional authorities existed.¹⁹⁹

After a long delay, the government put a Traditional Courts Bill before Parliament in 2008,²⁰⁰ although with no reference to the Law Commission's work. The bill confirmed, in modified terms, the courts' existing civil and criminal jurisdiction and excluded any mention of race. Strongly voiced protests immediately appeared arguing that the wide powers enjoyed by traditional rulers during apartheid were simply being perpetuated.²⁰¹ The bill has since been shelved and the existing courts continue functioning.

Although a much-delayed commission on Islamic law is seeking the formal recognition of courts to cater to the Muslim community,²⁰² no other state-recognized tribunals are specially adapted to meet the needs of religious or cultural minorities.

CONCLUSION

Over the last fifteen years, South Africa has produced an abundance of new laws and decisions on the family relationships governed by customary law. At first, the reform initiative was taken by the state through the offices of the Law Reform Commission. Proposals were preceded by a thorough investigation of the relevant problems and consultation with the public—a novel procedure that had been made obligatory in terms of a new constitutional provision requiring public participation in the legislative process.²⁰³ Compliance with this requirement has no doubt contributed to whatever efficacy is now enjoyed by the ensuing laws.²⁰⁴ In the last decade, however, the commission's role has diminished, leaving specific government departments and public interest lawyers to maintain the impetus for reform.²⁰⁵

¹⁹⁹ See Discussion Paper on Traditional Courts, *supra* note 194, paras. 5.3–4; SA Law Commission Discussion Paper 87 Community Dispute Resolution Structures (1999) para. 4.2.

²⁰⁰ Traditional Courts Bill, 2008, Bill 15-2008.

²⁰¹ See Aninka Claassens & Sindiso Mnisi, *Rural Women Redefining Land Rights in the Context of Living Customary Law*, 25 SAJHR 491, 510–11 (2009).

²⁰² Islamic Marriages and Related Matters, *supra* note 83, at 6–7.

²⁰³ S. AFR. CONST., 1996 § 59(1)(a).

²⁰⁴ Recently, a major enactment, the Communal Land Rights Act, was declared invalid for failure to consult. *Tongoane v. Minister of Agric. & Land Affairs* 2010 (6) SA 214 (CC) at 255–57 paras. 104–10.

²⁰⁵ Judicial intervention deserves special mention. In the ordinary course of events, constitutional issues would never have reached the courts, because few of the potential litigants, especially women and children, were financially able to institute action, but South Africa is in the fortunate position of having highly active public interest litigants to take up class suits, notably the Legal Resources Centre and the Women's Legal

The constitutional transformation in South African law recalls the changes instituted elsewhere in Africa during the 1960s and 1970s.²⁰⁶ In South Africa, however, there have been certain significant differences. For a start, the lawgivers, whether courts or Parliament, were determined to give maximum effect to fundamental human rights, and, in this regard, they were heavily influenced by international law,²⁰⁷ together with constitutional jurisprudence from the more mature democracies (notably, Canada, Germany, and the United States).

The emphasis on equality and uniform standards, however, did not necessarily mean that customary law was regarded as the nemesis of human rights. To the contrary, it commands considerable respect in the new constitutional order as an equal partner with the common law. Not only has awareness of its inherent value been growing,²⁰⁸ but customary law also has the backing of entrenched rights to culture and religion. While these rights are formally subject to other provisions in the 1996 Constitution,²⁰⁹ recognition of customary law has, for the first time, found secure legal support.

Respect for the customary law also stems from the understanding that people will not obey laws that depart too far from their traditional norms. The Law Reform Commission, for example, was acutely aware that the more radical reforms in post-independence Africa had only limited effect.²¹⁰ Hence, legislation in South Africa has generally been predicated on the need to secure social acceptance.²¹¹

Centre. See LEGAL RESOURCES CENTRE, <http://www.lrc.org.za/> (last visited Aug. 13, 2011); WOMEN'S LEGAL CENTRE, <http://www.wlce.co.za/> (last visited Aug. 13, 2011).

²⁰⁶ During this period, independence often went hand in hand with programs to eradicate the dualism of the colonial era. See René David, *La refonte du code civil dans les états africaine*, 1962 ANNALES AFRICAINES [AFR. J.] 160.

²⁰⁷ In this respect, those preparing the 1996 Constitution were influenced by South Africa's accession to a wide range of international human rights instruments, notably, the 1976 International Covenant on Civil and Political Rights; the 1981 Convention on Elimination of Discrimination Against Women; the 1990 United Nations Convention on the Rights of the Child; and the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. Not only does Section 39(1)(b) of the 1996 Constitution expressly oblige the courts to take international law into account when interpreting the Bill of Rights, but Sections 231(4) and 232 also deem it to be part of South African law. S. AFR. CONST., 1996 §§ 39(1)(b), 231(4), 232.

²⁰⁸ See, e.g., Child Justice Act 71 of 2008 (exemplifying the move to "restorative justice").

²⁰⁹ S. AFR. CONST., 1996 §§ 30–31, 36.

²¹⁰ The Côte d'Ivoire laws on marriage and divorce completely ignored customary law in favor of French civil law. Report on Customary Marriages, *supra* note 51, para. 2.1.14

²¹¹ See *id.* paras. 2.1.14–20.

Yet the South African Bill of Rights, unlike others in Africa (Malawi excepted), stipulates an ambitious degree of horizontal application, thereby penetrating deep into the private sphere.²¹² Parliament handles a prime area of contention—marriage—with modest success, by early legislation. Whether the same can be said for the more recent enactments on succession and administration of estates remains to be seen.

The reforms in South Africa have in many ways been revolutionary, although attempts to preserve customary law as a cultural right and simultaneously implement individual rights have at times been tortuous, to say the least.²¹³ Sections of the Recognition of Customary Marriage Act prescribing state intervention in the creation and dissolution of marriage are prime examples. The provisions of the act have little likelihood of being observed,²¹⁴ although non-observance (as in the case of divorce) will result in a nullity.²¹⁵

Even so, overambitious reform is perhaps justifiable where the aim is to give assistance to vulnerable parties in family relationships. Indeed, the Special Project Committee was well aware that few women (and even fewer children) would be able to act on proposed reforms, because of financial, educational, and other social disadvantages.²¹⁶ Nevertheless, the committee felt that options should be made available for a time when people would be better placed to realize their rights.²¹⁷

It is much more difficult, however, to justify laws that are being frustrated by the inadequacies of state infrastructure. To preempt this problem, the Special Project Committee of the Law Reform Commission suggested that,

²¹² This move that has been complemented by far-reaching legislation designed to protect women and children. Domestic Violence Act 116 of 1998; Prevention of Family Violence Act 133 of 1993; Children's Act 38 of 2005.

²¹³ And, on occasion, too timid, such as failing to bring the proprietary system of marriages concluded before the Recognition of Customary Marriages Act into line with those concluded after the Act. *Gumede v. President of the Republic of S. Afr.* 2009 (3) SA 152 (CC).

²¹⁴ For example, in the ten-year period since the act came into force, the courts have considered only three of the property contracts that are necessary to validate polygynous marriages. THOMAS W. BENNETT, THE POSITION OF INDIGENOUS CUSTOMARY LAW IN SOUTH AFRICA'S NEW CONSTITUTIONAL ORDER, CONFERENCE ON GUIDING PRINCIPLES IN CONSTITUTIONAL JUSTICE: THOUGHTS ON THE NEW CONSTITUTIONAL COURT OF BOLIVIA 7 (July 7–8, 2011), available at [http://www.venice.coe.int/docs/2011/CDL-JU\(2011\)014-e.pdf](http://www.venice.coe.int/docs/2011/CDL-JU(2011)014-e.pdf).

²¹⁵ Recognition of Customary Marriages Act 120 of 1998 §§ 7(6), 8(1).

²¹⁶ See BENNETT 1999, *supra* note 48, at 82–83.

²¹⁷ The committee also considered that, although particular married couples might wish to continue living according to patriarchal traditions, women should be entitled to appeal to new standards of equality. Report on Customary Marriages, *supra* note 51, para. 6.2.2.22.

before divorce actions could be instituted in the family courts, traditional rulers should be given the opportunity to attempt a reconciliation of the spouses, which is the traditional method for handling marital disputes.²¹⁸ In the act, this proposal was realized by a section stipulating that none of its provisions should be construed as limiting the customary role of any person, including a traditional leader, in the mediation of marital disputes.²¹⁹

Nevertheless, master's offices, family advocates, and family courts are still concentrated in towns and urban centers, to the obvious disadvantage of the rural population.²²⁰ Even more serious is the fact that these facilities are grossly understaffed and quite unprepared to assume responsibility for implementing new legislation.²²¹

Given its turbulent political past and its racial and ethnic antipathies, South Africa has tolerated a remarkable degree of cultural and religious diversity. Currently the country is a leader in thinking about law, diversity, and human rights in Africa, and much of its success in these areas—although this is obviously an extraordinarily difficult concept to measure—can, ironically, be attributed to its apartheid past.

Apartheid fostered an acute awareness of difference, primarily differences of race and ethnicity. The gross inequalities of wealth and opportunity produced by this regime, however, focused attention on equal treatment. The call for equality is heard most often in the public sphere, where there is competition for resources. Thus, matters of race and class have dominated debates about access to health care (notably antiretroviral drugs and the HIV/AIDS pandemic),²²² transport,²²³ and education.²²⁴

²¹⁸ *Id.* paras. 7.1.18–19, 7.3.10.

²¹⁹ Recognition of Customary Marriages Act § 8(5). Section 8(3) therefore incorporates the Mediation in Certain Divorce Matters Act. *See* Report on Customary Marriages, *supra* note 51, annexure A, at 149.

²²⁰ Traditional leaders, however, have authority to register marriages in terms of Section 11(1)(a)(iii) of the Recognition of Customary Marriages Act, as read with the regulations promulgated under the act. Government Notice (GN) R1/2000 in GG217000 of 1 Nov. 2000, *amended* by GN R395/2003 in GG25023 of 14 Mar. 2003.

²²¹ Unfortunately, empirical research is not available to verify these allegations, but they are supported by abundant anecdotal evidence.

²²² *Minister of Health v. Treatment Action Campaign (No.1)* 2002 (5) SA 703 (CC).

²²³ *Rail Commuters Action Grp. v. Transnet Ltd.* 2005 (2) SA 359 (CC).

²²⁴ *Head of Dep't, Mpumalanga Dep't of Educ. v. Ermelo* 2010 (2) SA 415 (CC); *W. Cape Minister of Educ. v. Governing Body of Mikro Primary Sch.* 2005 (3) All SA 436 (A), <http://www.saflii.org/za/cases/ZASCA/2005/66.html>.

Questions of culture and religion obviously emerge more often in family relationships. In this regard, however, social and political integration has been slow in coming, and so people of different racial and cultural groups seldom meet and interact in ways that might impinge on the domestic sphere. Thus, because South Africans are still living with the tangible legacy of apartheid segregation, their family relationships, and hence cultures, are remarkably self-contained.

As it happens, there are surprisingly few reported cases about culture,²²⁵ and those that have arisen are often argued in combination with religion.²²⁶ The most dramatic cases have involved such public rituals as virginity testing, circumcision, the slaughter of livestock, and witchcraft, with the related “smelling out” of witches.²²⁷ (This does not necessarily mean, of course, that constitutional standards are being implemented in people’s lives.)²²⁸

The truth of this may be gauged by the fact that both judges and lawmakers have been prepared to accept not simply formal pluralism, but the “strong” pluralism advocated by legal anthropologists. In other words, they have not been content simply to recognize indigenous and other laws, but have sought to model new laws and decisions on the way that people are actually living out their culture.

This policy is most clearly evident in the Law Commission and courts’ acceptance of the “living” customary law.²²⁹ As a product of grassroots democracy,²³⁰ it is free from state regulation, and may well be more compliant

²²⁵ But see *Mhleka v. Head of the W. Tembuland Reg’l Auth.* 2001 (1) SA 574 (E. Cape HC) at 629–30.

²²⁶ See, e.g., *S. v. Lawrence* 1997 (4) SA 1176 (CC) (sabbath observance and liquor laws); *Christian Educ. S. Afr. v. Minister of Educ.* 2000 (4) SA 757 (CC) (corporal punishment in private schools); *Prince v. President, Law Society* 2002 (2) SA 794 (CC) (right of Rastafarians to smoke marijuana); *MEC for Educ.: KwaZulu Natal v. Pillay* 2008 (1) SA 474 (CC) (right to wear a nose stud at school); *Nkosi v. Bührmann* 2001 ZASCA 98, <http://www.saflii.org/za/cases/ZASCA/2001/98.html> (right to bury family members on another’s property); *Smit v. Zwelithini* 2009 ZAKZPHC 75 (KwaZulu Natal HC), <http://www.saflii.org/za/cases/ZAKZPHC/2009/75.html> (slaughter of a bull at a First Fruits’ ceremony).

²²⁷ The legislation on witchcraft is in the process of being amended to take better account of belief in its harmful effects. See generally Mpumalanga Witchcraft Suppression Bill of 2007 (Draft), available at <http://www.pagancouncil.co.za/node/66>.

²²⁸ See, e.g., *Smit* 2009 ZAKZPHC 75 at para. 15.

²²⁹ *Bhe v. Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) at 620 para. 89; *Shilubana v. Nwamitwa* 2009 (2) SA 66 (CC) at 84 paras. 56–57.

²³⁰ See Gordon Woodman, *Some Realism About Customary Law—The West African Experience*, 1969 WIS. L. REV. 128, 141. In fact, however, the creation of custom is usually far from democratic. New rules are more likely to result from the dominance of an elite group. See HAMNETT, *supra* note 96, at 15.

with human rights than official customary law.²³¹ In this way, the courts have been able to sidestep certain constitutional challenges to customary law by arguing that the rule in conflict with the Bill of Rights derives from the official, not the living version.²³²

²³¹ This is a requirement of Section 36(1) of the 1996 Constitution, the limitation section. S. AFR. CONST., 1996 § 36(1).

²³² See, e.g., *Fanti v. Boto* 2008 (5) SA 405 (W. Cape HC); T.W. Bennett, *Re-introducing African Customary Law to the South African Legal System*, 57 AM. J. COMP. L. 1, 10–11 (2009).