Reflection

Human rights and customary law under the new Constitution

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My paper was written in 1992 and published in Transformation 22 (1993) on the eve of the appearance of South Africa’s new Constitution. The legal future was unsettled. A bill of rights was to be enacted imposing a rule of equal treatment for all people in the country regardless of their race, sex or gender. At the same time, however, the freedom to practise a culture of choice was to become a guaranteed right. In other words, the stage was set for a head-on confrontation between traditional African cultures, long associated with gender discrimination, and the equality clause.

Culture and fundamental rights in the Interim and Final Constitutions

The new dispensation did nothing to resolve the conflict. The Interim Constitution (200 of 1993) introduced a fully justiciable bill of rights, with a provision prohibiting unfair discrimination on grounds including, but not limited to, race, gender, sex, ethnic origin or culture. This clause was retained as the highlight of the final 1996 Constitution as Section 9(3). In spite of reservations expressed about culture during the constitutional negotiations, the Interim Constitution required those responsible for the final instrument to protect cultural diversity (Constitutional Principle XI, Schedule 4 Act 200 1993). Culture therefore found a place in ss 30 and 31 of the Bill of Rights, although subject to strict limitations: ‘No one exercising [the right to culture] may do so in a manner inconsistent with any provision of the Bill of Rights’. This clause was inserted to prevent any attempt to ‘privatize’ offensive practices or to protect domestic relationships from constitutional review. Nevertheless, the drafters of the Final Constitution were obliged – mainly in deference to a lobby of traditional leaders – to elevate customary law to
the same footing as the common law. Until the 1990s, although this law had been recognised on fairly generous terms, the common law was taken to be the basic law of the land. But now the courts are specifically required to apply customary law (although, like all other law, subject to the Bill of Rights). As a result, customary law has a guaranteed status, one that is underscored by a right to culture.

That the final Constitution would contain these provisions could probably have been predicted in 1992; less likely was the scope of application given to the Bill of Rights. When constitutional negotiations had started, the public generally assumed that fundamental rights would be applicable only vertically (ie to relations between citizen and state). The Interim Constitution, however, allowed for horizontal application (ie between individuals), but only in certain circumstances – which prompted a burst of speculative litigation. The final Constitution cleared up these ambiguities, and carried horizontality even further: the Bill of Rights was made 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’ (Section 8.2). In this regard, equal treatment was given specific mention: section 9(4) provided that no person may unfairly discriminate against another person on any of the proscribed grounds.¹

Subsequent developments: customary law under attack
In the early 1990s, there was talk of ‘africanizing’ South African law, but, with the exception of ubuntu jurisprudence, this idea soon faded away. In fact, far from becoming a greater force in the legal system, customary law was presented as a choice target for reform, not only because it violated fundamental human rights but also because the version used by the courts was lagging far behind social practice. Hence, as soon as the Interim Constitution came into force, litigation was instituted to question such issues as a husband’s position as head of the household, the standards of justice in traditional courts, a woman’s right to inherit from a man and the validity of polygynous marriages. In most cases, the courts came down in favour of the Bill of Rights, but judges could not be expected to engage in comprehensive law reform. In their hands, the pace of reform would be too slow, the changes ad hoc and facilities needed to canvas opinion unavailable. In any event, the legislature soon took the initiative.

The legislative reforms
The Department of Justice began by reconstituting a Special Project
Committee of the Law Reform Commission that had been working on customary law since 1984. This Committee adopted a new working method in line with a constitutional requirement that the public was to be fully involved in the legislative process. As a result, the start of each project was announced with publication of a brief Issue Paper, in which the Committee set out its view of a problem, together with possible solutions. After receiving comment on the scope and overall approach, the Committee then published a comprehensive Discussion Paper, and invited members of the public to explore the details more fully. Based on the response to this document, the Committee then prepared a report and draft bill for submission to Parliament. Through these means, the Department of Justice then launched projects on the customary law of marriage and divorce, succession and administration of estates, application and ascertainment of customary law, the status of children and the composition and procedure of traditional courts. The Departments of Justice and Land Affairs were responsible for the powers of traditional leaders and customary land tenure, respectively.

Few of these projects could be considered a success – although, admittedly, judging the success of legislation is always a speculative exercise. Notable failures were the Communal Land Rights Act (11 of 2004) and the Traditional Courts Bill (B15-2008). The former was declared unconstitutional and the latter provoked such determined opposition that it was shelved. The Law Commission’s proposals on application and ascertainment of customary law received no attention, and the Traditional Leadership and Governance Framework Act (41 of 2003) attracted widespread criticism, both from traditional rulers and those opposed to the system of hereditary authority.

After a lengthy period of consultation and preparation, a Children’s Act (38 of 2005) and Child Justice Act (71 of 2008) appeared. Both introduced ambitious reforms, aimed at bringing the common and customary law into line with international norms on child welfare. It will take some years to determine how effectively the state is able to implement their provisions. In the case of succession and administration of estates, the Law Commission’s investigation was so slow that it was overtaken by a suit in the Constitutional Court. Statutory rules were struck down (Mose neke and others v The Master and another 2001[2] SA 18 [CC] (administration of deceased estates) and Bhe and others v Magistrate Khayelitsha and others 2005[1] SA 580 [CC] (intestate succession) and, until Parliament took action, interim measures drawn from the common law filled the resulting lacuna. Four years later, the
Reform of Customary Law of Succession and Regulation of Related Matters Act (11 of 2009) was promulgated.

The most successful piece of legislation was concerned with the customary law of marriage and divorce. The Law Commission placed this project 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, but also to the fact that the courts’ version of customary law no longer represented the views and practices of those who lived it. The Special Project Committee was instructed to draft a bill that would ensure respect for African cultural traditions, would effect a thorough-going reform of marital relations and would bring the law into line with the Bill of Rights. Two years later, the Recognition of Customary Marriages Act (120 of 1998) appeared.

This Act perhaps best represents the government’s attempt to reconcile culture and the Bill of Rights. On the one hand, the Committee sought to find ways of solving a problem experienced by all cultural groups: securing the material needs of the most vulnerable parties in domestic relationships. On the other hand, it had to counteract patriarchal tendencies in customary law. Three examples in the Act can show how these aims were achieved.

Under customary law, a marriage is gradually strengthened and confirmed over time. If, during this process, the spouses’ relationship is called into question it can be proved only by reference to the performance of wedding rituals, payment of lobolo and evidence given by members of the community. In order to simplify proof, the Committee proposed that couples could, if they wished, have their unions registered. After consulting the public, however, it appeared that most people – women in particular – wanted registration to be mandatory, in the belief that it would make customary unions as binding as their civil or Christian counterparts. Largely in response to this request, the Act makes registration of marriage compulsory. Unfortunately, past experience had shown that people seldom comply with such state-imposed formalities – not least because they have little or no access to the necessary officials – and there are no appropriate sanctions to induce compliance. As a result, the Act contains an anomalous provision that failure to register has no effect on the validity of marriage.

An even more contentious issue was the husband’s right to take as many wives as he wishes. Long condemned by mainstream churches and colonial administrations, polygyny was now under attack for discriminating against women. This was the predominant view of the public, and, although the
Project Committee sympathised, it felt that polygyny on its own was not the cause of women’s oppression. Rather, it was only one factor contributing to the patriarchal nature of gender relations. For this and other reasons – the impossibility of enforcing an outright ban on polygyny and the gradual obsolescence of the practice – the Committee recommended that husbands in customary marriages be permitted to take more than one wife. The Act followed this recommendation 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 regulating the future matrimonial property system. In this way, it was hoped that an equitable distribution of property could be guaranteed.

It appears, however, that, in the ten year period since the Act came into force, the courts have endorsed only three such contracts. Non-observance of this provision – and, what is even more important, those requiring divorce actions to be processed by the family courts – will defeat a core policy of the Act: state intervention to protect vulnerable parties in family relationships.

A similarly awkward balancing of culture with gender equality is evident in Parliament’s management of succession. Following a lead set earlier by the Law Commission and Constitutional Court, the Act on the Reform of the Customary Law of Succession subjects the estates of those dying without wills to the Intestate Succession Act. In effect, this Act imposes a common-law regime. Some consideration is given to cultural sensibilities through elaborate modifications of this law to accommodate polygynous unions, (Sections 2.2 and 3.1) even the rare cases of seed raiser unions and women-to-women marriages (Sections 2.1b and c).

Whether there will be compliance with these provisions is, of course, uncertain. Even so, over-ambitious reform is perhaps justifiable where the aim is to assist women and children. Indeed, the Law Commission 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. Nevertheless, it felt that options should be made available for a time when people would be better placed to realise their rights. It is much more difficult, however, to justify laws that are being frustrated by the inadequacies of state infrastructure. Master’s offices, family advocates and family courts are still concentrated in urban centres to the obvious disadvantage of the rural population. Even more serious is the fact that these facilities are grossly understaffed and quite unprepared to assume responsibility for implementing new legislation.
The new vision of customary law

This disappointing catalogue of statutory reforms is offset to some extent by a dramatically different approach to customary law. Even before the arrival of a new Constitution, thinking on the topic had begun to change. Both legal pluralism (a specialist outgrowth of legal anthropology) and, for want of a better term, deconstructionism had set out to debunk the predominant theory of legal positivism.

During the apartheid years, due in large part to positivism, customary law was considered an inferior normative order. Because positivism deemed only state law as true law, customary regimes failed to qualify. Anthropologists, of course, could be relied on to contest such thinking, and they produced abundant evidence showing that positivist theory was not realised in reality. People did not accept formal legal systems as the primary sources of regulation in their lives. Legal pluralism therefore rejected the idea that law was and ought to be the law of the state, ‘uniform for all persons, exclusive of all other law, and administered by a single set of state institutions’. The positivist notion of law was denounced as ideology, ‘a myth, an ideal … an illusion’ (Griffiths 1986: 12).

Deconstructionists made free use of this research, and their broad aims generally co-incided with those of pluralism. Nevertheless, deconstruction was more concerned with ideology than with the day-to-day life of the legal subject. It appeared that much customary law in South Africa was an ‘invented’ tradition. All systems of custom are based on social practices which 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 community behaviour. If the rules appropriated by the state are not fully accepted, they are not only invalid, but any claim to legitimacy through democratic origins in a community tradition is also a sham.

The law most commonly used by the legal profession – the ‘official code’ – bore the brunt of this attack. Opposed to this version were 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.

For the first time in Africa, law-making agencies began to acknowledge the differences between official and living laws. The courts declared that only the latter deserved constitutional protection, and the Law Reform Commission used it as the basis for statutory reform. The living law had the
Human rights and customary law under the new Constitution

merit of a more democratic base. Official law, on the other hand, was condemned by ‘[t]raditionalists seeking to redeem the past, and modernisers attempting to discredit it’. For both, ‘customary law as it stands is corrupted, inauthentic and lacking authority. It is a foreign imposition, a stranger in Africa’ (Costa 1998: 34).

The growth of ubuntu jurisprudence

A parallel development was the emergence, for the first time in South Africa, of an indigenous jurisprudence. Since the colonial conquest, African customary laws had been treated as inferior. At best, they were tolerated, although always subject to such monitoring devices as the repugnancy clause. There was, of course, a constant traffic of ideas between the two systems but always from the received Roman-Dutch law to customary law. This process has been reversed by increasing reference to ubuntu and a related cluster of concepts (imbizo, pitso, lekgotla) in statutes and judgments.

Ubuntu entered the law in a small but telling ‘postamble’ to the Interim Constitution. The deeply divided society that emerged from apartheid bore a ‘legacy of hatred, fear, guilt and revenge’. These divisions were to be resolved by recognition of ‘a need for understanding not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation’. With no solid legal foundation, apart from this aspirational clause, ubuntu was then absorbed into mainstream legal discourse by a series of judgments in the Constitutional and High Courts. By this means, ubuntu has been given the function of a metanorm, one that can be used in particular factual situations where strict application of the usual rule works a substantial injustice. Its less obvious function has been to introduce a distinctively African spice to the legal system. Although the Bill of Rights ostensibly reflects universal values, it has very little that is clearly ‘African’. Ubuntu, however, forms ‘a cohesive, plural, South African legal culture’ (Keep and Midgley 2007:30), one characterised by the ideals of reconciliation, sharing, compassion, civility, responsibility, trust and harmony.

Note

1. Notably age, sex or gender. Constitutional provisions will be given added weight when all sections of the Promotion of Equality Act 4 of 2000 come into force.

References
