

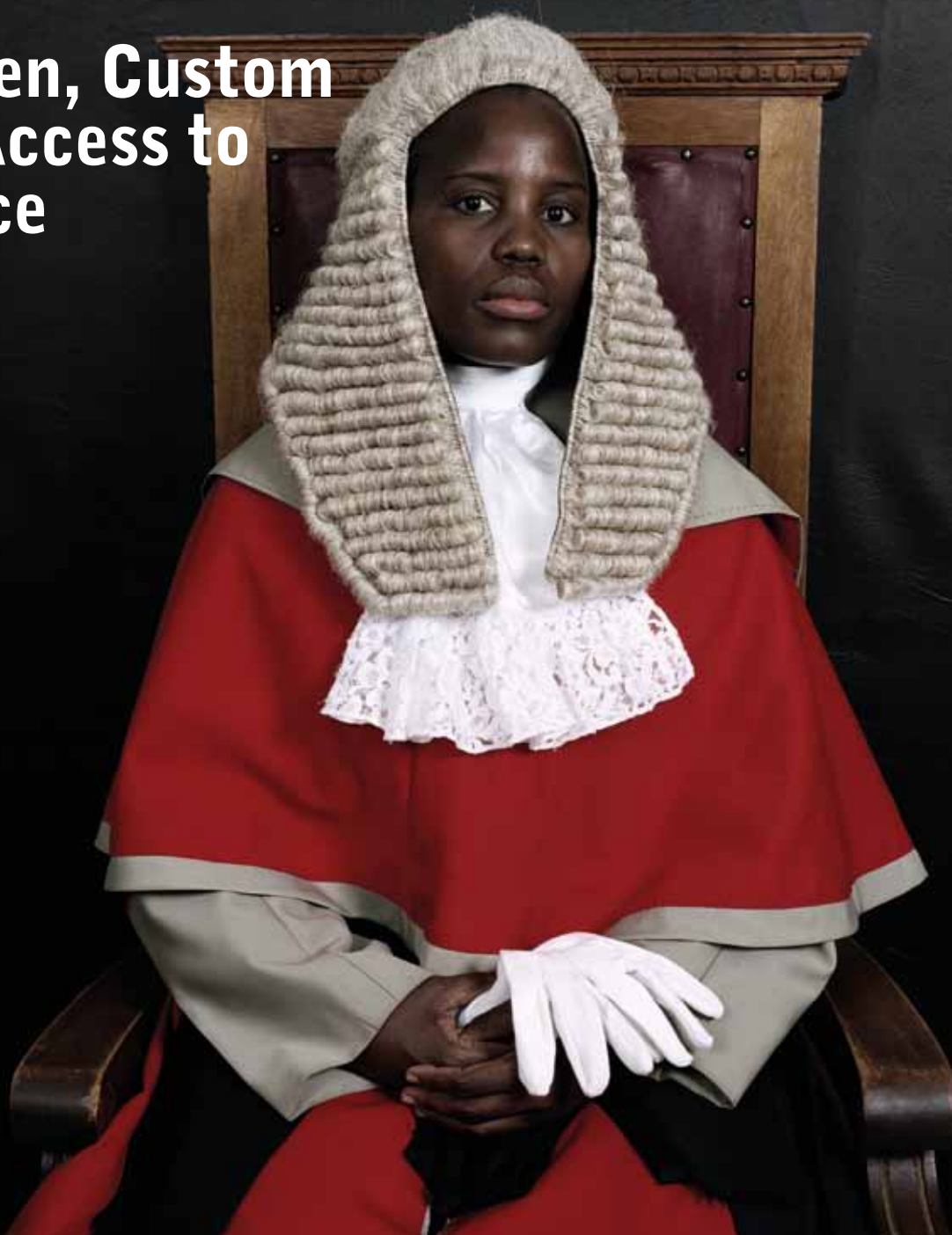
# perspectives

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POLITICAL ANALYSES AND COMMENTARY

## AFRICA

### Women, Custom and Access to Justice



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## Heinrich-Böll-Stiftung

The Heinrich Böll Foundation is a publicly funded institution that is affiliated with but intellectually independent from the German Green party. From our headquarters in Berlin and 30 overseas offices, we promote civic participation in Germany, as well as in more than 60 countries worldwide. Our work in Africa concentrates on promoting civil society, democratic structures, gender democracy and global justice. Together with our partners, we work toward conflict prevention and search for solutions to the challenges of environmental degradation and the depletion of resources. To achieve these goals, we rely on disseminating information, creating a deeper understanding between actors in Africa and Europe, and supporting global dialogue.

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# Editorial

Custom and tradition are at the core of common understanding and the dispensation of justice in great parts of African societies. The right to customary practices is enshrined in a number of constitutions in sub-Saharan Africa. As a matter of fact, traditional court systems remain an important, if not crucial, vehicle for dispute resolution in most African settings where the state law and legal practice institutions are socially, economically and geographically inaccessible for the great majority of citizens, and women in particular. Efforts to ensure access to justice and to protect and defend human rights must acknowledge, reconcile and integrate a country's statutory and customary justice systems, as well as international human rights standards. This is a complex undertaking especially considering the divergent tenets of the different legal systems. Custom, the foundation for customary law, regulates communal and social relations and resolves disputes on the basis of recognised practices. It is assigned members of these communities themselves who are mandated to uphold, interpret and implement the custom. Statute, which determines the statutory law, centres on individual entitlements and is enacted by the legislative arm of government in order to regulate relations among citizens, and between citizens and the state.

A major difference is that customs are often unwritten, flexible, and vary according to geographical location. Unlike statutory law, which is written and often appears rigid, customary law derives from oral tradition and is hence difficult to trace. There is no uniform application of customary law, as it is determined by specific cultural practices. It therefore represents a dynamic form of law, dependent on the values and practices of a given community at a particular time.

African legislatures constantly contend with the difficulties of reconciling these two systems of law. In most cases, rather than being integrated, they co-exist side by side, thereby challenging both the constitutionally enshrined equality of citizens and the impartial administration of and access to justice and legal protection.

A particular challenge emerges when the work of interpreting and implementing customary law is limited to men, and where practices are strongly influenced by patriarchal norms. But not only are women often prevented from actively participating in codifying culture, their unequal position in society is also reflected in statutory law systems. Primary concerns in this context relate to the promotion of gender justice and women's rights within the parameters of the law as well as questions linked to women's fair and equal access to justice.

Largely based on presentations made during a symposium on "The application of customary law in the South African legal setting, traditional courts and other models: A women's rights perspective", co-hosted by the Women's Legal Centre, the Heinrich Böll Foundation and the South African law firm Bowman Gilfillan, held in Cape Town on 22 August 2013, this issue of *Perspectives* provides insight into some of the following country-specific challenges and controversies with regards to women's access to justice in selected sub-Saharan African states.

- How does customary law, and the way in which the national legislative process is used, entrench gender inequalities, affecting gendered power relations in South Africa? How do the courts determine the content of living customary law in this country?

- What choices are afforded to women trying to find their way through the myriad and complex systems of justice in Zimbabwe?
- Is the statutory law capable of delivering equity and justice? Can the traditional justice systems and customary laws be creatively employed to ensure access to justice for women in Kenya?
- To what extent has the constitutional promise of equality before the law yielded a change in the daily life of the Swazi woman?
- What are the challenges to developing customary law in line with statutory law with the aim of affording improved access to rights and equality for women in Nigeria?

While legal entitlements to equality and justice for women have been achieved over the years, a persistent gender-bias in both the formal and informal administration of justice prevents those hard-won successes from becoming a reality for the majority of African women. Incontestably, moreover, for the attainment of gender justice, legal provisions are not enough. The principles of women's emancipation and equality have to become entrenched values in social relations. This aspiration will hardly materialise through national legislation and universal human rights instruments alone.

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# Power and Custom

## Women's Rights and the Traditional Courts Bill

Aninka Claassens and Thuto Thipe

### Introduction

The problems that women face within customary systems in South Africa's former homelands (native reserves established under apartheid), and the patriarchal power relations that characterise these systems are well known. Perhaps less well known are the hard-fought improvements and changes that many rural women have struggled to achieve since 1994, particularly in relation to the allocation of land to single mothers.

Women across South Africa have resisted the Traditional Courts Bill (TCB) since it was first introduced to parliament by the Department of Justice and Constitutional Development in 2008. This resistance is largely based on the argument that, along with other recent legislation on traditional leadership, the TCB puts emergent and vulnerable processes of positive change for women at risk by reinforcing the power of traditional leaders to unilaterally define the content of custom, and lead traditional courts within ethnically delineated tribal boundaries. In the context of this legislation, this article examines how the changes underway around women gaining rights under customary law are inextricably linked with vigorous processes of debate and contestation over the content of custom, and over how to integrate custom and equality, involving a wide cross-section of people in rural areas.

It is important to clarify at the outset that most opposition to the package of new traditional leadership laws does not entail opposition to customary law. There is widespread recognition of the need for indigenous legal processes to be acknowledged and supported. The controversy relates to the distortion of customary law, and the way in which the national legislative process is being used to entrench

unilateral chiefly power and undermine indigenous accountability mechanisms, negatively impacting power relations in former homeland areas.

### Women's Experience and Views on Customary Courts

In 2008 and 2009, the Legal Resources Centre and the then Law, Race and Gender Unit, now the Centre for Law and Society, convened four two-day rural consultation meetings about customary courts and the TCB in conjunction with rural non-governmental organisations and community based organisations. These meetings were held in Qunu (Eastern Cape Province), Pietermaritzburg, Madikwe (North West Province) and Nelspruit (Mpumalanga Province). The testimonies recorded at the meetings illustrate some of the problems that women face in accessing justice in rural areas. These problems are not restricted to customary courts. Women also described serious problems in interactions with the police and in attempts to access magistrates' courts.

The testimonies show extraordinary unevenness in women's experiences with customary courts, not only between provinces, but even within adjacent rural areas. There were descriptions of a few cases of female traditional leaders presiding over customary courts and of women participating effectively in the councils that hear cases. However, this was the exception rather than the rule. In most instances described, there are no women in the councils that decide disputes, and women communicated that they were not allowed to represent themselves directly.

*A woman cannot represent herself and give input in a traditional*



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*court. She needs a male to represent her. This means she is dependent on others, and cannot raise the issues she deems most relevant. Because of male dominance in the area, most women are scared. They are only allowed in courts on sufferance and on the basis that they are submissive to the rules that oppress them.*

*The dynamics of the court silence women... women who are not supported by a male representative are denied access to justice in the traditional court. (Woman from Nongoma)<sup>1</sup>*

*In most cases only the males are consulted. If a woman has a case she reports to the chief and the chief calls his council and the woman will later be told about the outcome of the traditional court without her having had the opportunity to tell her story in person. (Woman from Bizana)<sup>2</sup>*

Male domination of traditional courts and women's exclusion renders women particularly vulnerable to crime, as a woman from Magoma village in Mqandule explained:

*The lack of representation by women in the traditional council has contributed to women being victims of rape, and the robbery of their pension money. This is because the complaints and cases of women simply fall on deaf ears.<sup>3</sup>*

The particular problems facing widows and single women were raised in all the meetings. The report of the Pietermaritzburg meet-

ing refers to a widow who was forced to accept her brother-in-law's advances after the death of her husband.

It is Zulu custom that if a man dies, leaving his wife, then his brother takes over the household and becomes a husband to his sis-

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**Because of male dominance in the area, most women are scared. They are only allowed in courts on sufferance and on the basis that they are submissive to the rules that oppress them.**

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ter-in-law. This particular woman resisted her brother-in-law and approached the police for assistance. When she tried to lay a complaint with the police officer on duty he asked her if she did not know that it is custom that her brother-in-law will now be her husband. She did not receive any assistance from that police officer.

She then approached the headman's court, which also asked her the same question. In the end she was forced to submit to her husband's family, failing which she would have had to leave her children and all her belongings and start a new life on her own.<sup>4</sup>

A woman at the Mpumalanga meeting said:

*As long as you are wearing black as a widow you cannot go into the courts; you sit outside. And the messenger then comes and asks you what you want and then he goes inside to tell them. By the time he gets there the message is distorted. He tells them what he wants.<sup>5</sup>*

Another common observation was that



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women's problems are not taken seriously by elderly male councillors, who tend to side with the man's point of view, and often deride women for having brought the problem to them.

*If a woman reports a case to the headman she runs the risk of being ridiculed or mocked by the headman. For example, if a woman reports a case of assault by her partner or husband the headman will ask her, "Why would your husband assault you without a reason? You must have provoked him for him to punish you." (Woman from Bizana)<sup>6</sup>*

A woman from Mqanduli in the Eastern Cape gave the example of a mother reporting a case of "damages" for the pregnancy of her daughter and male councillors delighting in asking her the kinds of intimate questions designed to intimidate and silence her.<sup>7</sup>

In KwaZulu-Natal, the delegates discussed the serious problem of male courts "solving" rape cases by requiring the rapist to marry the victim:

*In one case, a girl of 14 was raped by her mother's relative. It was later discovered that she was pregnant. The matter was taken to the traditional court where the men discussed the matter and then decided that the rapist must pay lobolo (bride price) and marry the girl... This particular young girl committed suicide because she felt there was no way out for her.<sup>8</sup>*

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**The problem with traditional courts is that they do not use the customary law which was agreed upon. They use whatever they are thinking at that particular time, not what was laid down or agreed upon.**

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It emerged from discussions that even in areas where women do sit as members of the court, and women are allowed to represent themselves, the problem of male bias and dominance persists. All the groups argued that unless the law requires the courts to include 50 percent women councillors there is little prospect of women being able to shift the patriarchal character of existing courts, or ensure that the problems facing women are taken seriously and addressed sensitively.

A common complaint by both male and female participants is that cases are decided according to the status of the applicants, and not according to objective criteria. This has particularly serious implications for poor women who are at the bottom of the social scale. Many delegates accused customary courts of bias, and of favouring traditional leaders and those connected to them over others. Delegates at many of the meetings complained about the arbitrary and unpredictable nature of rulings in customary courts – accusing the courts of making things up to justify biased outcomes.

*The problem with traditional courts is that they do not use the customary law which was agreed upon. They use whatever they are thinking at that particular time, not what was laid down or agreed upon... We have a problem with this. When one has a case they just tell you that you have broken a law. When you ask which law, and what the law said, and how many you have broken, they can't answer. (Local government councillor from Nkomazi)<sup>9</sup>*

Another problem raised, particularly in Mpumalanga, was the difficulty entailed in challenging the actions of traditional leaders or headmen. Examples of corrupt land "sales" and investment deals were given, and the futility of attempting to challenge such actions in courts that are composed of the perpetrators and their relatives.

In the meetings, people discussed the different ways that they use traditional and magistrate court systems. These discussions illustrated that there are significant challenges in navigating both systems and often they cannot be understood as completely separate from each other. A widow from Gcina village in the Chris Hani District of the Eastern Cape described how the local chief and headman had deprived her of land that she owned jointly with her husband after his death:

*They said that it was against customary practice for a woman to own land. I showed them my papers and they ignored them saying that I was just boasting about a piece of paper that cannot help me. They told me that as a widow I was not the correct person to inherit the land. They said my husband's brother should take over the cattle and the land and look after the household.*



*After this decision against me at the level of the headman's local committee, I appealed to the traditional council, which confirmed the decision of the headman's committee. I then approached the local magistrate's court for assistance but the magistrate told me that the land belongs to the chiefs and he had no jurisdiction to hear my case.*

*The situation existing in my area has caused a lot of difficulty for women, particularly widows... Currently my land has been allocated to people who are related to the chief and the local headman.<sup>10</sup>*

While serious challenges to traditional courts were raised in the meetings, most agreed that customary courts are better at dealing with specific kinds of disputes than state courts, particularly in instances where redress rather than punishment is the appropriate "solution". All groups said that customary courts "are here to stay" and should therefore be improved and reformed, rather than abolished. In addition to the call for equal representation by women, the meetings called for the courts to include elected councillors who have community support, and for state oversight in the functioning of courts. They said that people must be able to choose which courts they want their matters to be heard in, and that appeals from customary courts to magistrates' courts should be streamlined and facilitated.

## The Traditional Courts Bill in its Legislative Context

Instead of addressing the kinds of problems that surfaced in the consultation meetings and tackling the difficulties inherent in reconciling the multiplicity of existing court processes within the overarching legal system, the TCB focuses on the powers of traditional leaders within customary courts. Its impact on power relations, and on women in particular, can be understood only in the context of other recent legislation dealing with the role and powers of traditional leaders.

Over the past decade, there has been a package of laws dealing with the powers of traditional leaders. The core law is the 2003 Traditional Leadership and Governance Framework Act (TLGFA). Section 28 of the TLGFA deems existing tribal authorities to be traditional councils provided they comply with new com-

position requirements. The requirements are that 40 percent of the members of a traditional council must be elected and 30 percent must be women.

Section 28 also entrenches the controversial tribal authority boundaries established in terms of the Bantu Authorities Act of 1951. These were established virtually wall-to-wall throughout the former homelands and formed the basic building blocks of the Bantustan political system, functioning as the equivalent of local government in rural areas.

The Framework Act itself does not provide traditional leaders with much direct power. Instead, it entrenches apartheid traditional structures and boundaries as the "officially recognised" traditional structures and boundaries of the future. It is other laws, such as the Communal Land Rights Act (CLRA) of 2004 and the Traditional Courts Bill, that provide traditional leaders with substantive powers.

## The Content of the Traditional Courts Bill

The TCB gives individual traditional leaders far-reaching power to determine the content of customary law (Sections 5, 8, 9, 10, 11). Like the CLRA, the Bill provides no recognition of decision-making authority and dispute resolution at family, village or headman level, only recognising the court at the apex of the system. The TCB vests statutory power in the presiding officer of a traditional court, who must be a recognised senior traditional leader or his delegate. No role, functions or support is provided for the council members who, in practice, play the pre-eminent role in existing customary courts. In this respect, the TCB follows the precedent set by the Black Administration Act of 1927, except that even the Black Administration Act provided for the recognition of headmen's courts.

The TCB perpetuates many of the challenges discussed earlier in the article. It makes it an offence for people not to appear before a customary court once summoned by the presiding officer (20[c]). The decisions of the traditional court have the legal status of rulings made by the magistrates' courts. Traditional courts have the authority to order far-reaching sanctions, including unpaid labour by any person within their jurisdictional boundaries (10[2][g]). The person need not even be a party to a dispute before the court. This provision enables the court to order people to perform forced labour and is controversial given ongoing contestation about the "customary" prac-

tice of women being required to work for free in the chief's fields.

Central to much opposition to the Bill is clause 10(2)(i), which authorises the court to deprive an accused person or defendant of benefits that accrue in terms of customary law or custom. Customary entitlements include land and community membership. Effectively, the court is authorised to revoke a person's customary rights to land, and even strip a person of his/her community membership. Clause 10(1) limits the court's right to impose banishment in criminal matters but there is no such limitation in civil disputes.

## The Traditional Courts Bill and Women

While significant challenges exist in respect of women's experiences of traditional courts, as illustrated in the meetings described earlier, there have also been incremental developments through women demanding and gaining greater rights under customary law. Many women have taken advantage of the

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This is not to say that all traditional leaders are insensitive to the plight of rural women. Some have supported the processes of change that are underway, but others continue to oppose women's appointment as traditional leaders, and frown on women's attempts to speak out or represent themselves in traditional courts.

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post-apartheid political environment and its focus on the values of equality and democracy to push for more equal access to resources, in particular, for residential sites for families headed by single mothers.<sup>11</sup> They have justified these changes as consistent with the underlying customary principle that member families are entitled to land to fulfil their basic needs.

As a whole, the TCB removes the incentive for traditional leaders to accommodate countervailing views in the interpretation and development of customary law. This is not to say that all traditional leaders are insensitive to the plight of rural women. Some have supported the processes of change that are underway, but others continue to oppose women's appointment as traditional leaders, and frown on women's attempts to speak out or represent themselves in traditional courts. In this regard, traditional leaders' opposition to the

30 percent quota for women in the TLGFA is instructive.

Women's organisations have expressed concern that the new laws symbolise a shift in the government's previously unequivocal support for the principles of equality and equal citizenship rights in rural areas, which will have far-reaching implications for the balance of power within which women struggle for change at the local level.

The TCB does not require the courts to include women councillors. This arises from the fact that it provides no role for councillors of either sex. The Bill thus fails to recognise the potential contribution of respected councillors, female or male, who emerge organically from within communities at its lower hierarchical levels and have a proven track record of resolving disputes in a customary setting.

There is a general provision in clause 9(2) of the Bill that the presiding officer must ensure that the rights contained in the Bill of Rights are observed and respected, and, in particular, "that women are afforded full and equal participation in the proceedings, as men are" (9[2][a][i]). However, because the Bill as a whole does not provide a role for councillors in the proceedings of the court, the implication is that this clause refers to women's participation as litigants and accused people before the court, and not as members of the court itself.

Clause 9(3)(a) bars lawyers from traditional courts. Clause 9(3)(b) provides that a party may be represented by his or her wife or husband, family member, neighbour or member of the community, *in accordance with customary law and custom* (emphasis added). Instead of providing explicitly that women should be allowed to represent themselves if they so choose, the Bill enables the continuation of the practice of male relatives representing women "*in accordance with customary law and custom*". This is justified on the basis that men, too, may be represented by their wives: a far-fetched possibility which attempts to cloak the continuation of inequality as even-handedness.

## Conclusion

Instead of encouraging democratisation by reinforcing the role of councillors or ordinary community members in customary courts and providing for a quota of women and elected members, the TCB centralises authority exclusively in the presiding officer. Together with the CLRA and the TLGFA, it thereby tilts the balance of power in rural areas, making it

much more difficult for people in rural areas, and particularly marginalised groups such as women, to challenge abuse of power by traditional leaders and royal families, or to hold them to account.

The TCB does not engage with ways to acknowledge, support and regulate the many customary dispute resolution fora that exist in practice, most outside the ambit of the current legal framework. Instead of building on emergent and vulnerable processes of democratisation and debate in rural areas, the Bill uses the model of the 1927 Black Administration Act to prop up colonial constructs of unilateral chiefly power.

The force of the South African Constitution in relation to the TCB remains to be seen. A hopeful perspective is that the Constitution will be used to prevent this Bill being enacted, and to reconfirm the voices of ordinary rural people both in the national legislative arena and in the local fora that develop living customary law. ■■■

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- 1 Cele M, "Report of Cedara workshop with Rural Women's Movement", in *The Traditional Courts Bill of 2008: Documents to Broaden Discussion to Rural Areas*, Cape Town: LRC and LRG, 2009.
  - 2 Dolweni S, "Report of the Meeting in Qunu Eastern Cape with TRALSO", in *The Traditional Courts Bill of 2008: Documents to Broaden Discussion to Rural Areas*, Cape Town: LRC and LRG, 2009.
  - 3 *Ibid.*
  - 4 Cele M, 2009, *op. cit.*
  - 5 Charles T, "Report of Meeting in Nelspruit with Trac Mpumalanga" in *The Traditional Courts Bill of 2008: Documents to Broaden Discussion to Rural Areas*, Cape Town: LRC and LRG, 2009.
  - 6 Dolweni S, 2009, *op.cit.*
  - 7 *Ibid.*
  - 8 Cele M, 2009, *op. cit.*
  - 9 Charles T, 2009, *op. cit.*
  - 10 Dolweni S, 2009, *op.cit.*
  - 11 Claassens A and Ngubane S, "Women, land and power: The impact of the Communal Land Rights Act", in Claassens A and Cousins T (eds.) *Land Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act*, Cape Town: UCT Press, 2008.

# Women's Access to Justice

## Evidence, Custom and Equality

Jennifer Williams and Hoodah Abrahams Fayker

The transition of South Africa into a constitutional democracy brought with it one of the finest constitutions in the world. Our Constitution recognises the historical racist exclusion of customary law from our legal system in section 211 (3):

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

The incorporation of customary law into our common law is, however, like our other sources of law, subject to the supreme law of the land: the Bill of Rights enshrined in the Constitution.

Customary law is defined as the customs and practices observed among the indigenous African people of South Africa, which form part of the culture of these people.<sup>1</sup>

It is a dynamic form of law, dependent on what the practices of a community are at any particular time. This article examines some of the challenges related to proving the content of customary law in the Constitutional Court.

The main source of information about indigenous African law before colonisation comes from oral tradition, making it difficult to trace. During the colonial period, the ruling power codified or recorded "official" customary rules. This was done by consulting male elders and traditional leaders because they were presumed to be the only people who controlled important information.<sup>2</sup> They, in turn, provided an account that emphasised the privileges of senior men (whose power was under threat by colonial powers and the increased opportunities of youth and women to achieve independence from tribal structures through migrancy and wage labour).<sup>3</sup> This not only

tainted the recording of customary law but also impeded the natural evolution of customary law toward greater recognition of women rights, because the older values and principles were ossified in written form.

In the case of *Bhe*<sup>4</sup>, the Constitutional Court preferred the concept of "living" customary law to the "official" version. The *Bhe* case challenged the constitutionality of the primogeniture rule in the customary law of inheritance, which prevented daughters from inheriting from their father because they were girls and their mother and father were not married to each other. The court considered living customary law, which takes into account the current social context and is more in touch with the customs of the people, particularly women. Living law is the customary law that grows out of processes of adaptation and change that reflect the voices, views and struggles of a range of different interests and sectors in rural society. In short, it is the development of the law by those who live it.

How then do the courts determine the living customary law? We can consider the *Mayelane*<sup>5</sup> matter in this regard. *Mayelane* married her husband under Tsonga custom, but their marriage was not registered. When her husband died, it transpired that he had taken a second wife, Ngwenyama, also under custom. *Mayelane* initially challenged the validity of the second marriage on the basis that a contract regulating the proprietary rights of the spouses had not been entered into as required by the law, but when the matter got to the Constitutional Court, the court itself raised the issue of whether, according to the Tsonga customary law, the second marriage is valid when the first wife has not given consent.

*Mayelane* stated in her original application, "If any (second) marriage was concluded,



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I submit that the marriage is void *ab initio* because I never consented to such marriage.”

This allegation was bolstered by Mayelane’s late husband’s brother, who said, “The first respondent [the second wife] was never married to my deceased brother. They were just having an affair. In terms of our custom, the first wife must be consulted and consent to the marriage of the second wife.”

The Constitutional Court called on the parties to address the court on whether, under customary law, consent was required, and, if so, what the requirements for consent would be, and what the consequences would be if consent was not obtained. The court noted that authoritative sources of customary law may include writers of customary law, case law, sworn testimony from traditional leaders and other expert evidence.

For the Women’s Legal Centre (WLC), as a friend of the court, this posed quite a challenge. We could find no written authority that could be cited to evidence what Tsonga custom is presently. We approached the anthropologist Carl Boonzaaier, who was considered the only authority on Tsonga custom in academic circles, but he was already an expert witness for the respondent. We then looked to the community for evidence of the Tsonga custom. Trying to make contact with leaders in the Tsonga community was also a challenge as access to resources was a problem and the communication barrier made it difficult to reach members of the community. Finally, we obtained a sworn affidavit from an elder and submitted it to the court. In addition, the parties filed evidence from individuals married under Tsonga customary law, an advisor to traditional leaders, various traditional leaders and a customary law expert.

Three witnesses living in polygynous marriages filed affidavits. The court considered

their evidence to be of great value as an indication of the perspective of those who ordinarily adhere to customary law. Two of these witnesses said that the consent of the first wife is required and that she plays a role in both identifying the other wife and in the events leading

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to the second marriage. If she does not consent, the second marriage is invalid, but that will not affect the legitimacy of the children born of the second marriage. The third witness, a traditional healer, also said consent is necessary, but went on to explain that where consent is withheld, the elders of both families are then called in to resolve matters. If they decide there is no good reason to refuse consent, the first wife will be approached to persuade her to change her mind, which she usually does.

An elder in the community and advisor to traditional leaders stated that the “first wife may be informed, but the husband makes the decision”. The first wife only becomes involved when her daughter’s lobola is used as lobola for the subsequent wife. A commissioner from the Commission on Traditional Leadership Disputes and Claims noted that the decision to marry may come from three parties: the first wife, her husband, or his relatives. In the case of the husband and his relatives, the first wife is informed – but if she does not agree, the process proceeds without her.

According to the traditional leader, the husband must inform the first wife of his intention to marry and try to involve her in the negotia-



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tions. The first wife is always expected to agree to a husband taking a second or subsequent wife. If she unreasonably withholds consent, she would be sent to her parents homestead to reconsider. If she remains unreasonable in her refusal to co-operate, the husband may marry without consent or divorce her. Another leader said that consent of the first wife is not necessary. She would, however, be aware of the proposed second marriage due to the open lobola negotiations. He also pointed out the hugely disruptive effect that the Constitutional Court would have on existing arrangements if it invalidated marriages retrospectively.

That brings us to the experts. Professor Boonzaaier said that consent is not a requirement, relying on a case that appeared to confirm that the consistent refusal of a first wife would lead to a divorce, with lobola to be returned, but the husband would not require her consent to conclude the subsequent marriage. Dr Mhlaba, a senior lecturer in law and jurisprudence, stated that consent is a requirement, and refusal to consent would result in the families seeking to resolve the matter. He considered it uncertain whether a marriage in the face of persistent refusal of consent is valid or not, and what the consequences for children are.

The Constitutional Court viewed the differences in a positive light, stating that the difference in evidence was not a contradiction, but rather created nuance and accommodation. It expressly recognised the need to develop customary law in line with the Constitution to ensure the rights of women.

Ultimately, the Constitutional Court found that consent of the first wife is a requirement in Tsonga custom. However, it did so in three different judgments. The majority found on the evidence that consent was not a requirement in customary law and developed the customary law in line with the Bill of Rights to make it a requirement of Tsonga custom.

However, in his minority judgement, Justice Zondo argued that it was not necessary to develop the customary law. He held that the customary law was clear in the papers before the court that stated that the applicant and her brother alleged that consent is a requirement and this was not opposed. He felt that the further evidence elicited by the Constitutional Court to supplement the papers was not necessary. Justice Jafta, in a second minority judgement, found that it wasn't necessary to develop customary law because, in this particular case, the papers and the majority of the evidence before the Constitutional Court were sufficient to establish that the marriage was not valid. He

argued that it was not necessary to develop the customary law because the parties or the lower courts had not asked the Constitutional Court to do so, and the court could make a decision on the facts of the case presented without developing Tsonga custom.

Thus, ultimately, the Mayelane matter reflects that the court will decide what the custom is, and there are different ways to approach this.

Finally, the reality is that women often have little choice but to accept the second marriage for economic reasons, and they seldom have the power in the family and community to negotiate issues of consent and registration of their marriages. The Constitutional Court sought to develop the custom in line with women's rights, and managed to negotiate its way through the nuances of (seemingly) contradictory evidence on the customary law on consent. However, we submit that the court missed an opportunity to craft a remedy that takes into account the nuances of women's lived reality. By making the consequence of lack of consent an invalid marriage, the Constitutional Court did not provide any relief to the second wife.

Once the living custom is established, the courts have a duty to develop it in line with the Bill of Rights, if this has not happened naturally. We therefore asked the court to develop the living custom beyond the requirement for consent and to regulate the consequences of lack of consent. We argued that the Constitutional Court should protect all the spouses in a polygynous marriage, while maintaining consent as a requirement. One way to do this would have been to make the marriage without consent a putative marriage. This would discourage polygyny in the long term, while giving practical protection to all the wives.

Such an approach would empower women in the present, in that they would still have a remedy, while in the long term encouraging monogamy, in line with our international and regional obligations to discourage polygyny. ■■

- 1 Reform of Customary Law of Succession and Regulation of Related Matters (Act 11/ 2009), Section 1.
- 2 Curran and Bonthuys, "Customary law and domestic violence in rural South African communities", SAJHR, 2005.
- 3 Fishbayn L, Goldblatt B and Mbatha L, The Harmonisation of Customary and Civil Law Marriage in South Africa, 9th World Conference of the International Society of Family Law, Durban.
- 4 Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another 2005 (1) BCLR 1 (CC).
- 5 MF Mayelane v MM Ngwenyama & Others CCT 57/12 [2013] ZACC 14.



# Challenges to Outlawing Harmful Cultural Practices for Zimbabwean Women

Sylvia Chirawu

The new Zimbabwean Constitution, approved in a referendum on 16 March 2013, is underpinned by the values and principles of gender equality. Section 80(3) states: "All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement". This is in recognition of the fact that, despite some good laws and policies, harmful cultural practices and gender inequalities still exist in Zimbabwean society.

A number of legal provisions seek to enforce the progressive principles enshrined in the Constitution. The Domestic Violence Act (Chapter 5:16), the Criminal Law (Codification and Reform) Act (Chapter 9:23), the Customary Marriages Act (Chapter 5:07) and the Deceased Persons Family Maintenance Act (Chapter 6:03) outlaw any practices that are viewed as harmful to women, such as forced virginity testing, female genital mutilation, the pledging of women and girls for purposes of appeasing spirits<sup>1</sup>, the handing over of a person below the age of 18 years without her consent as compensation for the death of a relative or as compensation for a debt or obligation, and property grabbing at death or the dispossession of widows.

Despite this reformist approach, the women of Zimbabwe face many challenges in asserting their rights and in enforcing these legal provisions. The reasons why the Zimbabwean model has not been entirely successful are manifold, but they largely stem from the conditions of legal pluralism – most women live under some combination of customary and general law – and the strong influence of families, who make and enforce their own laws.

## Choice of Law Process

Section 192 of the new Constitution reinforces this legal pluralism. The Customary Law and Local Courts Act (Chapter 7:05) is used to determine whether a case should be decided using general or customary law. The determination is based on the particular circumstances: the mode of life of the parties, the subject matter of the case, the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, and the relative closeness of the case and the parties to customary or the general law of Zimbabwe. The court will decide based on the evidence at hand.

Although this choice of law system must be viewed as the legislature's attempt to provide an avenue to escape harmful customary law practices such as those outlined above, the seemingly neutral process is to a large extent biased towards social class. While women living in urban areas, far removed from the dictates of customary law, will usually have their cases determined by general law, most rural women are unable to "opt out" of the customary law system.

## What Choice?

Cases of unregistered customary law unions offer a clear illustration of the challenges women face in Zimbabwe. These are marriages that meet all the requirements of a customary law marriage but are not registered with the Registrar of Marriages and an official marriage certificate has not been issued. The Customary Marriages Act specifically states that a customary law union is invalid unless registered, except for the purposes of guardianship, cus-



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tody, access to children and inheritance under customary law. Major complications arise when a customary law union collapses.

Women who marry under customary law often believe, wrongly, that they have the same rights as women who are married under general law and carry marriage certificates. However, because customary unions enjoy only limited recognition, the Matrimonial Causes Act (Chapter 5:13) cannot be used to obtain a divorce. The general law uses principles of tacit universal partnership or unjust enrichment to apportion property, but litigants married under customary law have to plead a choice of law process so that their case can be dealt with under general law. If the court finds that general law should apply, general law principles will be used to divide assets acquired during the subsistence of the union. If general law does not apply, the woman will walk away empty handed except for her *mavoko* property, which she acquired through the use of her own hands, such as pottery and knitting.<sup>2</sup> Although the intention of the judiciary is noble, in the worst-case scenario, the case will be dismissed and the woman will walk away empty-handed.

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In many cases, it is the family – as a semi-autonomous social field, making and enforcing its own laws and settling disputes within the family and representing the family’s interests in the community – that deters women from exercising their legal rights.

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## The Influence of the Family

In many cases, it is the family – as a semi-autonomous social field, making and enforcing its own laws and settling disputes within the family and representing the family’s interests in the community – that deters women from exercising their legal rights. For example, although child marriage is prohibited in the Criminal Code, in the Customary Marriages Act, and is taken as a form of domestic violence in the Domestic Violence Act, it is still widely practiced in secrecy. The international human rights organisation Equality Now notes that families face strong societal pressure to either conform or face ridicule in societies where child marriages are prevalent.

In Zimbabwe, *lobola* (bride price) is often perceived as a ticket out of poverty and the girl-child becomes a source of income for her family. The remedies provided in the Domestic Violence Act include issuing a protection order

and/or criminal sanctions. While a protection order may work in cases of physical abuse, for instance, it can be absurd in the case of harmful customary law practices. If the protection order is valid for only five years and can also be varied for good cause shown, it is not clear how, for instance, it can protect a girl-child from forced marriage. Does it mean that, after five years, the marriage can go ahead? This is clearly a lacuna in the law.

Another example of the strong influence of the family as a rule maker and enforcer is the practice of pledging of women or young girls to appease a vengeful spirit, known as *kuripa ngozi* in the local Shona language (see note 1). Although prohibited by law, families in some parts of Zimbabwe are still practising it. Appeasement of spirits is considered to be in the spiritual realm and it instils fear in communities.

In the practice of “widow inheritance”, the wife of the deceased is inherited by the deceased’s brother. This is not considered an act of domestic violence that would call for a protection order or be treated as a criminal offence, at least as long as the inheritance is not “forced”. But when can a widow state with conviction that she has not been coerced?

Relatives may refuse to distribute clothing items and artefacts of the deceased and the widow has to be content with keeping these in the home. Destroying them or distributing them outside the customary norms is not an option. In Zimbabwean culture, the distribution of the deceased’s clothing and artefacts to relatives plays a major symbolic role in funeral rites. For example, the parents receive blankets to indicate that their child is no more and will not be able to look after them anymore. Traditional artefacts such as a walking stick will go to the eldest son to symbolise that he is expected to be a father figure to the family left behind.

Widows may also have trouble when it becomes time for their daughters to be married under customary law, as the deceased’s relatives may refuse to take part in marriage ceremonies for his daughters. Custom and tradition dictates that relatives from the father’s side must be present to receive the *lobola*. A widow or her maternal relatives must not play this role: if they do, the customary marriage is a nullity.

## Shortfalls of the Zimbabwean Model

Tradition and culture are very vibrant, as is recognised in the new Constitution of Zimbabwe

preamble. Millions of women in Zimbabwe and across the world live under both general and customary law, and some practices done in the name of culture are indeed harmful. In Zimbabwe, the proposed solution has been to make certain customary law practices illegal and to allow a woman to opt out of the application of customary law to her case, in the absence of a controlling statute, through the choice of law process. However, as illustrated above, this “choice” is not always easy and may not result in substantial justice. The passage of laws has clearly not led to the desired results.

This is not to suggest that the model should not be used altogether – but it should be used in conjunction with other strategies. The glaring omission in blanket prohibition lies in the failure to understand or appreciate the reasoning behind a particular rule of customary law. For instance, inasmuch as modern society abhors wife inheritance, the idea behind it was that a widow and her children should not be left to suffer due to the death of a father. Understanding the true intention behind customary law practices will enable appropriate legislation to be framed to deal with harmful practices that derive from distortions in their implementation. Often the greatest challenge is not in customary law but in the distortion of such to achieve a certain status quo. For instance, research shows that women at some stage were permitted to inherit from their fathers’ estates and that property grabbing was not allowed at all.<sup>3</sup>

The model also fails to appreciate that the greatest strength of customary law is its ability to evolve. This phenomenon may be driven by outside forces. For instance, the practices of widow inheritance and polygyny are recognised to be key drivers of HIV/AIDS infection rates. As a result, they are slowly being perceived as dying traditions. In some cultures in Zimbabwe, the wife inheritance ceremony is still held, but the widow may opt to give the traditional artefacts and dish of water to her late husband’s sister or to her son. Thus the aunt who accepts the artefacts and the dish of water becomes a symbolic “father figure” to the widow and her children. And by giving the dish of water and artefacts to her son, the widow is stating that she still wants to remain part of the family but without sexual relations with a member of the deceased’s family.

In the payment of *ngozi*, some traditional leaders have advocated using cattle instead of women or girls to compensate the murdered person’s family. This is a win-win situation because it may take time to do away with the practice completely.

## Suggested Strategies to Improve the Model

As already stated, it is commendable that aspects of harmful customary law practices have been prohibited through legislation, but this alone does not ensure that the law will be acceptable or implemented. Zimbabwe’s reformist agenda will be served by community involvement and a deliberate effort to understand (not condone) specific customary law practices. Community involvement has to involve dialogue and ultimately consensus on the need to prohibit certain customary law rules. Communities themselves need to recognise both the need for change and the flexibility and fluidity of customary law.

Understanding customary law will enable the framing of laws to address the mischief that the particular law attempts to cure. For instance, if the idea behind wife inheritance is for the welfare of the deceased’s family, what new ways can be developed to achieve the same aim without putting the wellbeing of widows at risk? Dialogue will also result

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The glaring omission in blanket prohibition lies in the failure to understand or appreciate the reasoning behind a particular rule of customary law.

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in unpacking the correct customary law, as a major part of the problem seems to come from the distortion of customary law.

Customary law is a living phenomenon and it is imperative that any efforts to eradicate its harmful aspects go beyond the passage of general laws. ■■■

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1 This is an act known as *kuripa ngozi* in Shona custom. When a person is murdered, it is believed that their spirit will come back to haunt the family of the murderer. This can result in unexplained deaths in the murderer’s family. The family of the murderer will then hand over a young girl or woman to the murdered person’s family as compensation. The girl or woman is expected to give birth so that the dead person is “replaced”. This practice is dying down and is also virtually unknown in other communities in Zimbabwe.

2 See Stewart, JE, K Dengu-Zvobgo, W Donzwa, E Gwaunza, J Kazembe and W Ncube, *Inheritance in Zimbabwe: Law, Customs and Practice*. Harare: WLSA, 1994.

3 See Stewart et al., 1994.

# Using Customary Law to Improve Women's Access to Justice

## The KELIN Cultural Structures Project

Belice A. Odamna and Allan A. Maleche

Although women in Kenya have statutory rights to own property, these rights are rarely upheld due to a patriarchal system in which male traditional leaders and government officials believe that women are not entitled to own property. This results in economic dependence on men and a power relationship in which women are unable to negotiate the terms of sex, including consent, fidelity and condom use, leading to an increasing risk of HIV contraction.<sup>1</sup> KELIN, a Kenyan organisation working to protect HIV-related human rights, initiated a project that works with cultural structures (elders) among the Luo Community in Kisumu and Homa Bay counties to provide women with access to justice in cases where widows and orphans have been disinherited.

This article discusses the use of traditional justice systems and customary laws to ensure access to justice for women and documents some of the successes and challenges of the KELIN Cultural Structures Project (CSP).



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### Kenya's Legal Framework

The Kenyan legal system is comprised of common law, which is based on English law; customary law, which differs from one community to another; and Islamic law. These legal traditions are provided for within the 2010 Constitution. The formal court system is based on common law principles.

The existence of a formal legal system in Kenya suggests that all citizens are governed by these written laws and any conflicts are resolved within this system. Customary law is

recognised in personal matters like marriage and divorce, and in certain land matters, but the operation of such customs and cultural practices is not defined. The Constitution (Article 60 (1)(f)) encourages the different communities to settle land disputes through recognised community initiatives that are consistent with the Constitution.

The concept of equal rights for men and women was introduced by the Constitution in Article 27 (3): "Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres". It further states, at Article 27(4), that the state may not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

This is read with Article 60 (f), concerning land use: Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the principles that eliminate gender discrimination in law, customs and practices related to land and property in land.

This has made it possible to review laws and policies concerning women's rights to own and inherit property. Parliament has in turn passed legislation that protects the rights of spouses, including protection of the matrimonial home and the right to inherit family property.<sup>2</sup>

Women's empowerment is a key concern in the property rights regime. The legal system can be studied and put into practice by women to enable them to take part in the political process, become economically empowered, take an active role in property dispute resolution, and advocate and lobby for the realisation of

their rights as provided for in law.

The Constitution also protects the fundamental rights of all people and prohibits any form of discrimination, including discrimination based on culture. Article 10 entrenches the principles of human dignity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. Article 2 (4) limits the application of customs and laws that violate the principles laid out in the Constitution: "Any law, including customary law, which is inconsistent with this Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

In matters relating to the right to access to justice, Article 159 (2)(c) states that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted as long as the traditional dispute resolution mechanisms do not contravene the Bill of Rights and do not contravene the Constitution.

Despite this, women still find their hands tied when the issue of property ownership arises, especially when their husbands die, whether they left a will or not. Furthermore, the patriarchal mindset dictates the nature of the will. Hence, inasmuch as the law protects women's right to own property, the patriarchal nature of society far overrides the effectiveness of the law.

## The KELIN Cultural Structures Project

KELIN's choice to work with cultural structures to facilitate alternative dispute resolution and access to justice for women was informed by

the difficulties women experienced in accessing justice through the formalised legal system. For instance, the physical location of courts and lawyers is beyond the reach of most Kenyans in the rural areas. Financial resources are required to pay court fees and for professional

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**Inasmuch as the law protects women's right to own property, the patriarchal nature of society far overrides the effectiveness of the law.**

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fees, if they are represented by an attorney. Most women cannot afford this. The adversarial nature of the litigation process also makes many women give up on their rights, as court orders are received with contempt by the relatives who are sued.

The CSP, at its inception, took account of the fact that every community has its own dispute resolution mechanisms. It sought to reconstruct the community-based "courts" and bring in the aspect of respect for human rights. KELIN works with the Luo council of elders to solve land disputes between widows and their in-laws. The council is responsible for preservation of the Luo culture and widely respected among the Luo community.

Among the Luo, dispute resolution took the form of a community court, presided over by respected elders in the community who were expected to maintain a degree of impartiality. In the traditional patriarchal culture, widows were not allowed to inherit title deeds, but rather would hold the property in trust for their family, to be inherited by their sons. However, widows were not evicted from the land, and the patriarchal system was based on a value system that involved men taking



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responsibility for the women. As Eugene Cotran observes:

*"Inheritance under Luo law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons with any unallocated portion going to the youngest son. In a polygamous household, the distribution is by reference to the house of each wife, irrespective of the number of children in it. Widows, though not entitled to an absolute share of the estate, have a right of use during their lifetime of a portion of land and certain movables. Daughters receive no share of the estate. In the absence of sons, the heirs are the patrilineal relatives of the deceased namely father, mother, full brothers, half-brothers and paternal uncles."*<sup>3</sup>

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There is need to ensure that the government, through the Kenyan judiciary, institutionalises the work of the elders in order to realise the constitutional provisions for the promotion of alternative forms of dispute resolution, including traditional mechanisms.

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The above excerpt clearly indicates that there was a system in which the widow was provided for. However, the practice has been eroded by greed to such an extent that when a man dies, his brothers send the widow away to enable them to take over the property of the deceased. The widow is then left destitute.

The project's components include training and sensitisation, mediation by the elders and reinstatement of the widows to their property. These activities are managed through the relationship between KELIN and the council of elders, which recommends specific elders to take up the mediation process.

Elders and community members are trained in human rights issues, including the Bill of Rights and relevant land laws, emphasising equal land and inheritance rights for men and women. Cultural practices that contribute to the violation of the rights of widows and orphans and expose them to the risk of HIV-infection are highlighted and denounced during the trainings.

The elders have incorporated human rights-based principles in dispute resolutions by ensuring that the needs of the most vulner-

able are taken into account. Further, the elders have begun documenting the cases they mediate, both for future reference and to be able to monitor the progress of the resettled widows.

By the end of 2012, the project had seen over 234 cases taken up, with 184 resolved successfully. The CSP is more accessible and acceptable to the women than formal courts. The mediation approach is conciliatory rather than adversarial and is beneficial to both parties.

The project's success has created increasing demand from other communities to address cultural practices that expose women and girls to a higher risk of HIV infection. This has informed the development of a tool for working with cultural structures, based on KELIN's work, which outlines simple guidelines for implementation in any community where harmful cultural practices that have a negative impact on women exist.<sup>4</sup> It can be used by any community willing to work with cultural structures to protect and promote the rights of women.

However, the CSP is not a replacement for Kenya's formal legal system. It is important to recognise that women who choose to adjudicate their property claims under customary law do not forfeit their or their children's rights to later refer their cases to court.

Notwithstanding its successes, the CSP has encountered a number of challenges. Firstly, it has been difficult to source adequate funding for the project, due to a general perception among the donor community that elders are custodians of oppressive traditions that perpetuate discrimination against women and the violation of their rights. Secondly, the elders work on a voluntary basis and are not always able to fulfil their commitment to the project because of competing priorities. Thirdly, beneficiaries of the project often expect that they will be resettled and houses constructed for them after the mediations, but this is not within the mandate of KELIN. Fourthly, widows who have already been evicted from their homes by their in-laws often end up moving from one place to another in search of greener pastures. This makes it difficult to locate them and slows down, or prematurely ends, the mediation process. Lastly, it is difficult to register land in the name of the widows where the land is ancestral and is expected to be held in trust for the next generation. As a result, the project faces hostility from the family members.

## Conclusion

A greater understanding of the key challenges to ensuring women's inheritance and property

rights is emerging. These include a cumulative denial of a number of women's other entitlements, beyond mere inequality, such as rights to housing and land; to self-determination; to live in security, peace and dignity; to not be forcibly evicted; to healthcare and other vital human rights.

The establishment of legal and policy frameworks is key, as is changing customary norms and practice to enable women to own and inherit property. We have learned during the implementation of this project that elders are the custodians of culture and have the influence to promote women's rights and access to justice. We have equally appreciated that the use of customary structures to achieve these ends is faster and more efficient, accessible and culturally appropriate to the needs of the community. It equally facilitates the use of a rights-based approach that can address all the human rights concerns of the widows.

More efforts need to be made to ensure that the elders document their cases in a way that can be adopted in the formal courts, in line with the provisions of the Constitution. There is need to ensure that the government, through the Kenyan judiciary, institutionalises the work of the elders in order to realise the constitutional provisions for the promotion of alternative forms of dispute resolution, including traditional mechanisms. ■■■

1 See: <<http://kelinkenya.org/wp-content/uploads/2010/10/KELIN-Submissions-to-the-Global-Commission.pdf>>.

2 Parliament has enacted the Land Act (2012), the Land Registration Act (2012) and the National Land Commission Act (2012).

3 Cotran E, *Restatement of African Law: Kenya Vol. II, Succession*, London: Sweet & Maxwell, 1969.

4 See: <<http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf>>.



# Women and Justice in Swaziland

## Has the Promise of the Constitution Been Fulfilled?

Thomas Masuku

Swaziland is a country heavily steeped in tradition. Cultural norms play a major role in many of the country's institutions and national life. Like many African countries, it is a patriarchal society, where the traditional role of women is one of subjugation and marginalisation. This has manifested itself in abuse: physical, mental and financial. Discrimination against women has been regarded as the norm rather than an aberration.

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In 2005, among dissenting voices, Swaziland adopted a written constitution that provides, among other things, for equal rights of women.

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provisions and assesses the extent to which their promise has yielded a change of circumstance in the daily life of the Swazi woman.

### Constitutional Provisions Relating to Women

Section 20 (1) provides that "All persons are equal before and under the law in all spheres of political, economic and cultural life and in any other respect and shall enjoy equal protection of the law". Section 20 (2) prohibits discrimination on any basis, including gender. Section 20 (3) provides for the promulgation of laws necessary for implementing policies and programmes aimed to redress social, economic or educational or other imbalances in society. This obviously includes gender imbalance.

Another relevant section is 28 (1), which provides women the right to equal treatment with men, including equal opportunities in political, economic and social activities. Section 28 (2) states that facilities and opportunities that are necessary to enhance the welfare of women and to enable them to realise their full potential and advancement shall be provided, subject to the availability of funds. Subsection (3) provides that a woman shall not be compelled to undergo or uphold a custom to which she is opposed in conscience.

In the directive principles of state policy – which are not enforceable – Section 60 (4) says that the state shall ensure gender balance and fair representation of marginalised groups in all constitutional and other bodies. There are also provisions relating to the participation of women in the legislature. Section 83 (2) provides for the equitable representation of women and other marginalised groups in parliament and other public structures. At least on

A recent report in the *Times of Swaziland* (16 August 2013) illustrates the daily abuse of women's rights in the country. A woman married by customary rites reported her husband for assault. Apparently, the husband is HIV-positive but concealed his status from the wife until a doctor advised her about what medication he was taking. When she confronted him, he assaulted her. She tested positive for HIV and was also placed on anti-retroviral (ARV) treatment. The husband refused to use condoms, insisting that when he paid dowry for her, no mention of a condom was made. He forced her to throw her ARV treatment into a pit latrine, putting her life at risk by his actions. The case came before a traditional court on an assault charge, playing down the seriousness of the case, which could have been one of attempted murder.

In 2005, among dissenting voices, Swaziland adopted a written constitution that provides, among other things, for equal rights of women. This article considers some of these



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a formal level, there is clearly an array of provisions relating directly and indirectly to women, which, if applied, would certainly serve to improve their lot.

There also have been a number of judgments that sought to enforce the rights of women where customs, laws and regulations clashed with these constitutional provisions. A number of these cases are discussed below to illustrate some of the challenges women face in their everyday lives.

## Court Enforcement of Women's Rights

There are two types of court judgments involving women's rights. In the first category, constitutional issues involving fundamental rights and freedoms are up for determination. In the second, it becomes clear from the reasoning of the Court that, although no fundamental rights are at issue in the case, the judgment is informed by certain constitutional ideals and its ethos. I shall start with the first category.

### 1. *Mary-Joyce Aphane v Registrar of Deeds and Others* [2010] SZHC 29

In this case, the applicant, a woman married in community of property, sought to have certain property owned by her and her husband registered in their joint names. She instructed her lawyers to do so, only to be advised that certain provisions and regulations of the Deeds Registry Act, 1968 did not permit it. She was informed that the property could only be registered in the name of her husband. The applicant accordingly applied to the High Court for the offensive provisions to be declared unconstitutional.

There was no question about the provisions conflicting with Sections 20 and 28 of the Constitution. The question was the nature of the remedy. The High Court decided, per Judge Mabuza, to sever and read in certain words to bring the section into alignment with the Constitution. On appeal by the attorney-general, the Supreme Court confirmed that the legislation was unconstitutional but held that

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At least on a formal level, there is clearly an array of provisions relating directly and indirectly to women, which, if applied, would certainly serve to improve their lot.

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the severance and reading-in were inappropriate and that the matter must properly be left to parliament to remedy the defects. The declaration of invalidity was upheld but suspended for a period in order to afford parliament time to remedy the defect, while simultaneously allowing the applicant and others in her position to have their property registered in the meantime.

### 2. *Nombuyiselo Sihlongonyane v Mholi Sihlongonyane* Case No. 470/13 [2013] SZHC 144

The parties in this matter were married in community of property. Their marriage was, however, on the rocks. The husband (the respondent) left the matrimonial home, leaving the wife and children to live there. The wife applied to the Court for an order removing certain persons who resided at the home at the husband's invitation, and for another preventing the respondent from allowing other persons to settle at the matrimonial home without consulting her.

The issue was whether the applicant, in view of the fact that she was married in community of property, had the lawful capacity to launch the proceedings unassisted. Predictably, the issue of matrimonial power of the husband loomed large. A full bench of the High Court dealt with that matter in light of the constitutional provisions on equality. Judge Mamba, writing for the majority, held that the common law of marital power, insofar as it barred women from suing and being sued unassisted by their husbands, was inconsistent with Sections 20 and 28 of the Constitution. He ordered that the common law was invalid, with effect from a specified date. From that date, all women married in community of property shall have the right to sue and be sued in their own names.

*3. Jennifer du Pont-Shiba v Chief Magudvulela Dlamini and Others Case No. 1342/13*

In this case, the applicant, a widow, was nominated to stand for parliamentary elections at the primary stage. Chief Magudvulela summoned a meeting of residents of his chiefdom and the applicant attended. She alleges, corroborated by others who were there, that the chief dissuaded the voters at that meeting from voting for her because, according to custom, her status as a recent widow made her ineligible to take part in parliament. He allegedly encouraged them to not vote for a person who could not be used by the king of the country. Her version of events was also reported in a local newspaper. The chief denied that he made the alleged statements.

The applicant relied on constitutional provisions, including Section 28 (3), and sought an order setting aside the primary election results because of the alleged interference by the chief, and for fresh elections to be held. The Court dismissed the application and has not, at the time of writing this paper, given reasons for the dismissal. What is clear, though, is that the Court will not tackle the constitutional part of the application. The crux of the matter, it would seem, is whether the chief said what the applicant alleged. Regrettably, no oral evidence was called to settle that live dispute.

*4. Mana Mavimbela v The Elections and Boundaries Commission (EBC) And Others Case No. 1131/13*

On 24 August 2013, Mana Mavimbela, a young woman, was nominated by her constituency to stand for the primary parliamentary elections. On the day in question, she was wearing

a pair of pants. Because of her “unacceptable” dress, the returning officer – another woman – refused to allow her name to be included in the list of nominees. Mavimbela took the matter to court, citing violations of Sections 20 and 28 of the Constitution and claiming discrimination on account of being a woman. The EBC ultimately conceded the point and her name and picture were included in the nomination list.

I will now deal with the second category of cases.

*5. Steven Gamedze v Jabu Dlamini Case No. 1053/13 [2013] SZHC 143*

The applicant was a man who had been married to a woman according to traditional rites. After two years, the marriage was failing because she could not bear children. The husband abused her, after which she refused to continue to live with him. Efforts at reconciliation failed. For 23 years, she did not live with him and told her family that she would not go back to his home under any circumstances.

When she died, her husband sought to secure burial rights because the marriage had not been dissolved. In dismissing the application, Judge Mamba reasoned:

People, dead or alive, are human beings. They have a name, reputation and dignity. They command and deserve to be treated humanely, with care, respect, compassion and deference. They should not be treated as mere chattels or mere possessions to be had and disposed of at will... In life, the deceased could not withstand the abuse by the applicant. She could not live with him. She removed herself from him. Now that she is dead, the law must not compel her to “live with him” just because her powers of resistance have been taken away from her by death.

*6. R v Sandile Shabangu Case No. 233/06, [2007] SZCH 47*

In this case, the accused was charged with the rape of a 13-year-old girl. In evaluating her evidence, the Court refused to rely on the cautionary rule that the common law applied to the evidence of women in sexual offence cases. The Court held that the rule was outmoded and discriminatory against women, regarding them as inherent liars with no rational basis for doing so.

## Traditional Courts

Swaziland operates a dual system of law, with traditional customary courts existing paral-

rel to common law courts. Customary courts have both criminal and civil jurisdiction, but only over Swazi nationals who reside within their jurisdictional areas. At a practical level, the choice of whether a criminal case should be tried before a traditional or a common law court is made by the police at the police station. Complaints have been made that the choice is normally influenced by the strength of the case. If the evidence is strong, the police may send it to the Magistrates Court. If the evidence is weak, they send it to the traditional courts, which are likely to convict on the most tenuous evidence.

Many cases are dealt with by the traditional courts, even in urban areas where people would prefer to go to the Magistrates Courts. Some cases are transferred when the accused applies to be referred to the Magistrates Court because of the legal training and adherence to basic principles of a fair trial. Others will reach the Magistrates Court on appeal or review. What is more, the right to legal representation before a traditional court is prohibited under Section 23 of the Swazi Court Act, No 80 of 1950, as read together with 21 (13) (b) of the Constitution: neither legal practitioners nor advocates may appear or act for any party before a traditional court.

The presiding officers in customary courts are all men who are highly knowledgeable in matters of custom. No women sit in these courts. It is obvious that women largely get a raw deal when they appear, as customary law in many cases regards women as second-class citizens.

In the traditional courts, the provisions in the Constitution are not known and are therefore not applied. Furthermore, with men presiding and women expected to play a submissive role, the system is heavily weighed against them. Some legal procedures for establishing the truth, such as cross examination, may not be consistent with traditional values, especially where the person cross-examined is a senior male member of the family or even the community – someone a woman is traditionally not able to debate with.

## Reality Check

Although women are appealing to provisions in the Constitution in order to improve their lot, it is clear that there are still some problems.

First, litigation is very expensive for many women. Second, many are still ignorant of their rights and need to be educated. Third, there are insufficient state programmes, pro-

jects and policies to promote women as provided for in the Constitution. Fourth, more needs to be done by the police, prosecution and the judiciary to bring cases to fora that will appreciate their complexity and enormity, and for justice to be served to the many helpless women suffering in silence. In this context, the role of the traditional courts needs to be revisited.

Fifth, there is worrisome and counterproductive jurisprudence in the Supreme Court. For example, in *Commissioner of Police and Another v Maseko [2011] SZSC 15*, the Court elevated certain customary practices above the Constitution, reasoning that “it must be stressed that the Swaziland Constitution is informed by very strong traditional values”.

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**More needs to be done by the police, prosecution and the judiciary to bring cases to fora that will appreciate their complexity and enormity, and for justice to be served to the many helpless women suffering in silence.**

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This is despite clear provisions in the Constitution that subject customary law practices to the Constitution, statute law, and the litmus test of repugnancy or inconsistency to morality, natural justice and humanity. Sixth, the commitment to applying the constitutional provisions that relate to women is very low. There appears to be a general lethargy towards applying the Constitution, pointing to a need for constitutionalism to take centre stage so that women and citizens reap its fruits. Lastly, there is a need to train the presiding officers in traditional courts in fair trial standards, and to know and apply the provisions of the Constitution when deciding the cases before them. This would help them to apply the law fairly and impartially to both men and women.

The foregoing provides ample testimony that a lot still needs to be done to elevate the status of women to the promise contained in the Constitution. It would be sad if the Constitution and its progressive clauses is nothing more than a chimera. The jury is out! ■■■

# Enhancing Women's Rights in Nigeria

## Customary Law vs Statutory Law

Onuora-Oguno Azubike

It is to be recalled that, before the advent of colonialism in what later became Nigeria by the amalgamation of 1914, customary law was the means through which communities administered justice and resolved disputes that arose between individuals and communities.<sup>1</sup> As succinctly captured by Nwabueze:

*"Customary law is the starting-point of Nigeria's legal history. Before the emergence of colonial rule, customary law held sway and enjoyed monolithic application in the geographical territory currently known as Nigeria, composed of erstwhile politically and legally independent nationalities."<sup>2</sup>*

Customary adjudication in Nigeria was based on the customs and the traditions of each ethnic community. With the coming of the British, English common law was implemented in Nigeria<sup>3</sup> and parameters were set to determine which customs of the people should be retained. The three-pronged approach was that a custom must not be repugnant to natural justice, equity and good conscience; it must not be contrary to any law in force; and, finally, it must be in conformity with public policy.<sup>4</sup>

It is reiterated that the existing customary practice before the advent of the British was not favourable to the rights of women. In particular, women were generally unable to inherit the estate of their deceased husbands, with the eldest surviving male relative having priority in the inheritance process.<sup>5</sup> The Igbos and Yoruba, two of the largest ethnic groups in Nigeria today, had several customary acts that put women on the back foot. Women were mere objects that could only be seen but never be heard<sup>6</sup> and the rights of women were tram-

pled on by the customary adjudicatory system that was in place, as decisions were based on inimical cultural practices. The emergence of the English-styled courts saw a paradigm shift towards greater protection of the rights of women and brought at least some respite to the plight of women in Nigeria.<sup>7</sup>

### Customary and Statutory Law in Perspective

Custom represents the ways a given group of people live and communicate that is acceptable to them. It regulates a community and also ensures the resolution of disputes. Disputes are resolved before members of the community who were saddled with the responsibility of upholding the custom. Among the various communities in Nigeria, particularly the Igbos and Yorubas, chiefs, obas (kings) and age grades were the custodians who decided on the punishment or otherwise to be administered against anyone for violating the custom of the people. Unfortunately, the woman was vulnerable in most circumstances, especially in succession and inheritance issues.

A statute, on the other hand, is a written law enacted by the legislative arm of government to regulate relations in a state. A statute sets forth penalties for acts of omission and commission. The major difference between a statute and a custom is the fact that customs are unwritten, flexible and vary according to geographical areas. Unlike statutory law, which is rigid and written, there is no uniform application of customary law in Nigeria.<sup>8</sup>

Consequently, customary and statutory courts are employed in the administration of both laws. Nigerian courts have found that custom is a way of life of a particular people. A



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major definition was advanced in the case of *Owoniyi v Omotosho*<sup>9</sup> when it was held that customary law is “a mirror of accepted usage among a given people”. In Obilade’s analysis, this definition meant that customary law consists of customs accepted by members of a community as binding among them... [Thus a] small town in a state may have a system of customary law different in some respects from the customary law system of a neighbouring town, even if all the indigenous inhabitants of both towns belong to the same tribal group.<sup>10</sup>

## Customary and Statutory Courts

Statutory courts are the creation of statutes made by the Nigerian legislature, with the Nigerian Constitution as the highest law that all other laws must conform with. Two categories of courts exist in Nigeria: inferior and superior courts. Courts that are not a creation of the Nigerian Constitution are treated as inferior courts. Thus, customary courts are inferior as they are pursuant of state laws, while the Customary Court of Appeal is superior as it was created by the Constitution. Customary courts in Nigeria exist at both the state and federal levels. Both the customary courts and the Customary Court of Appeal require that persons learned in customary laws alongside persons learned in statutory laws be appointed.<sup>11</sup> Appeals from customary courts go to the Customary Court of Appeal on all matters involving customary issues. This does not foreclose the challenges that are still occasioned by questions of jurisdiction.<sup>12</sup>

The applicable laws in customary courts are the customs and indigenous laws of a people and a defined procedure of adjudicat-

ing disputes was put in place with the establishment of the customary courts. However, despite the influence of the English law on customary law in Nigeria, “some bodies of customary law survived”.<sup>13</sup> This means that some decisions in customary courts still upheld inimical customary practices against women in Nigeria, especially in matters of inheritance, paternity, succession and attitudes towards the girl child. The application of some of these inimical customary practices has occasioned conflict between customary and statutory courts. As already pointed out, the application of the validity test and the supremacy of the Constitution mean that some decisions of the customary courts were overturned on appeal to the statutory courts.

In some cases, the superior courts in Nigeria in their appellate jurisdiction have taken bold steps to uphold the constitutional rights of women. In the case of *Mojekwu v Mojekwu*,<sup>14</sup> it was posited that customary law provisions that promote inequality and discrimination will not be upheld by the court.<sup>15</sup> In *Maryama v Sadiku Ejo*, the Igbira customary practice of paternity was held to be contrary to natural justice, equity and good conscience.<sup>16</sup> The conflict between custom and statutory rights was laid to rest by the Court when it found that constitutional rights should enjoy supremacy over local customs and rights.<sup>17</sup> The courts have also upheld that appeal, even on non-customary law basis, can be brought before the superior courts emanating from customary courts.<sup>18</sup> Aside from the above-mentioned cases, Nwogugu has also argued that conflicts arising from customary law practices that are contrary to statutory law are bound to be resolved in favour of the statutory laws in most circumstances. He himself subscribes to the view that case-by-case application should be

followed when determining which law should be in effect while ensuring that such customs are constitutionally valid.<sup>19</sup> The effect of these has been the elimination of several decisions that ordinarily, if hinged on customary law, would have been anti-women.

## Developing Customary Law: The Pending Challenges

Considering that the protection of the custom of a people is guaranteed under international human rights laws,<sup>20</sup> it is important to emphasise the need to develop customary laws, while strengthening women's access to justice, by adopting a pragmatic enhancement of custom to meet the requirement of human rights standards.<sup>21</sup> Consequently, finding a blend between customary and statutory laws is important.

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It is however suggested that customary laws should be codified if premised on human-rights law and the prohibition of harmful cultural practices against women.

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The development of customary law seemed to have been restrained by the advent of English-style courts and the validity test requirements. However, it is underscored that this enhanced the rights of women. Using the validity doctrines, violations of the rights of women have significantly reduced and customs have transformed. Appeals from the customary courts in recent times are occasioned more by the abuse of legal procedures in the administration of justice than by decisions violating the rights of women.<sup>22</sup> These successes, however, are not attributed to the emergence of statutes alone but also to the present composition of customary courts in Nigeria.

The blend of persons learned in the customary law practices and persons learned in statutory law is an important basis for the vital role that the customary courts play in Nigeria's legal system. This ensures that the decisions are scrutinised both on a legal basis and on the living law of a people. Where a matter specifically hinges on issues of custom, the Nigerian Constitution provides that the Court of Appeal for jurisdiction purposes must consist of "not less than three justices learned in customary law".<sup>23</sup>

While the successes of the customary courts are lauded, there are still several challenges to ensuring both its evolution and

preservation. The proof of customary law, as provided under the Evidence Act,<sup>24</sup> presents some challenges that must be overcome.<sup>25</sup> The major challenge is the fact that custom, as a flexible law, continues to vary from generation to generation and also requires some form of certainty.<sup>26</sup> Under the doctrine of *stare decisis* (precedence), a case can be grounded on the reasoning of a decision from either a court of co-ordinate jurisdiction or a superior court, but the grounding of a customary case decision is yet unsettled. The proof of customary practices before the courts continues in the nature of a pendulum that oscillates between reliance on one case (as in the case of *Cole v Akinyele*<sup>27</sup>) and reliance on more than one decision, until such custom is deemed to be judicially noticed.<sup>28</sup> Proof of customary practices can also rely on expert opinions and books. The variety of opinions expressed by different individuals also presents challenges.

The territorial application of customary law<sup>29</sup> is another challenge that has continued to inhibit the protection of rights generally, and particularly the rights of women. This also affects the issue of codification, given the multi-ethnic diversity of Nigeria. It is however suggested that customary laws should be codified if premised on human-rights law and the prohibition of harmful cultural practices against women.

## Conclusion

Custom represents the way of life of a given people and develops into a guiding law, while statutes are a creation of the legislative arm of government. Customary laws that guided decision-making in pre-colonial Nigeria were fraught with practices that were inimical to the rights of women. However, with the coming of the British and introduction of statutory laws, some inimical customs have been eliminated. Despite the supremacy of statutes, culture as a right is also important; yet it must be viewed from a women-friendly perspective even in the quest to revitalise and sustain culture. Thus, in the interest of protecting the right to dignity and numerous other rights that are enshrined in the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), among other treaties, customary law should be developed in line with statutory law.<sup>30</sup> ■■■



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- 2 Nwabueze R.N, 'The dynamics and genius of Nigeria's indigenous legal order', *Indigenous Law Journal*, Volume 1, 2002, p:155.
- 3 The English Law included the received English Laws, the Common Law, Doctrines of Equity and the Status of General Application (these were laws that were enacted on or before 1 January 1990 and English Laws made prior to 1 October 1960).
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- 10 Obilade A.O, *The Nigerian Legal System*, Spectrum Books, 1990.
- 11 Section 237 2(b) of the Constitution of the Federal Republic of Nigeria, 1999.
- 12 For a general discussion on challenges of jurisdiction of customary courts, see Makeri, note 7.
- 13 Ibeziako S.Mb, *The Nigerian Customary Law*, University of California Press, 1964, p: 14.
- 14 [1997] 7 NWLR 283.
- 15 Onuoha R.A, 'Discriminatory property inheritance under customary law in Nigeria: NGOs to the rescue', *The International Journal of Not-for-Profit*, Volume 10, Issue 2, 2008.
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- 17 (2002) 10 NWLR. (Pt.776) 472.
- 18 *Babang Golok v Mambok Diyalpwan* SC 215/1986. See also section 245 of the Constitution of the Federal Republic of Nigeria, 1999.
- 19 Nwabueze R. N, 'The dynamics and genius of Nigeria's indigenous legal order', *Indigenous Law Journal*, Volume 1, 2002, pp: 183-188.
- 20 Article 17 (2) of the African Charter on Human and Peoples' Rights guarantees every individual the right to enjoy cultural life; however, Article 5 also encouraged the abolition of harmful practices.
- 21 This argument is advanced based on the fact that some customary practices are of great importance to the identity of a people. However, there is a need to ensure that such practices that infringe of the right of peoples must not be upheld. For a general insight into some inimical cultural practices, see Ejidike O.M, 'Human rights in the cultural traditions and social practice of the Igbo of South-Eastern Nigeria', *Journal of African Law*, Volume 43, Number1, 1999.
- 22 Oba A.A, 'Islamic law as customary law: The changing perspective in Nigeria', *International Comparative Law Quarterly*, Volume 51, 2002, p: 835.
- 23 Section 237 2(b) of the Constitution of the Federal Republic of Nigeria, 1999.
- 24 Evidence Act LFN 2011, sections 16-19.
- 25 Nwabueze R.N, 'The dynamics and genius of Nigeria's indigenous legal order', *Indigenous Law Journal*, Volume 1, 2002, pp: 167-171.
- 26 *Lewis v Bankole* [1909] 1 N.L.R.
- 27 (1960) 5 F.S.C.
- 28 In the case of *Angu v Attah* [1921], the Privy Council Judgment [1874-1928] directed that custom must be proofed on a case-by-case basis until it is notoriously noted by the court.
- 29 See: *Princess Bilewu Oyewunmi & Oba Ladunni Oyewunmi Ajagunbade III v Amos Owoade Ogunesan* SC 26/1988. In the present case, a particular customary law of the Ogbomoso people was found not have a general application in the either town. This further exacerbates the challenge that the codification of customary law poses.
- 30 An interesting perspective to this conclusion is the issue as it pertains to Islamic law. Scholars have argued that Islamic law is not customary law and therefore is not subject to the various tests of statutory laws. See generally, Oba A.A, 'Islamic law as customary law: The changing perspective in Nigeria', *International and Comparative Law Quarterly*, Volume 51, 2002, pp: 817-850; and Onuora-Oguno A.C, 'Constitutionalising the violation of the right of the girl child in Nigeria: Exploring constitutional safeguards and pitfalls'. Available at: <<http://ohrh.law.ox.ac.uk/?p=2362>> (accessed November 12, 2013).





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## Pieter Hugo

Hugo was born in 1976 in Johannesburg and grew up in Cape Town, where he lives. He primarily works in portraiture and engages with both documentary and art traditions, with a focus on African communities. He has won numerous prizes, including first prize in the portraits section of the 2006 World Press Photo competition, and was the Standard Bank Young Artist for Visual Art in 2007.

Hugo's *The Judges* series presents portraits of judges dressed in official regalia. It was shot in Botswana in 2005. The series, alluding to the imperatives of authoritarian portraiture, turns lazy assumptions about racial and gender stereotypes upside down.

The cover image portrays Botswana's first female High Court judge, Unity Dow – a position she retired from in 2009, after eleven years of service. Dow earned acclaim for her stance on women's rights. In the mid-1990s, she successfully challenged the government of Botswana over the 1982 Citizenship Act, under which women married to foreigners could not pass on their nationality to their children. Tradition and precedent prescribed that nationality only descended from the father.



About the artwork:

Title: The Honourable Justice Unity Dow (2005)

Dimension: 100 x 100cm (image size), 120 x 120cm (paper size)

Material: Lambda print  
Courtesy of the artist and Stevenson Gallery, Cape Town