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LAND, PROPERTY RIGHTS AND THE NEW CONSTITUTITON

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Chapter 14

WOMEN'S PROPERTY RIGHTS UNDER CUSTOMARY LAW

Cawe Mahlati

WOMEN'S property rights under customary law can be dismissed in one sentence. They have none. One should however distinguish between 'customary law' and customary practice.

The title one of the few books on black women is: *All the Women Are White, All the Blacks Are Men, but Some of Us Are Brave* (Gloria T Hull). This title has been chosen as a point of departure to illustrate the invisibility and marginalisation of the African woman's specific experiences of discrimination in the debate about rights.

The indignation concerning racism and sexism should include outrage at the treatment of African women under customary law. The endeavour to create a non-racist and non-sexist South Africa should include liberating the African woman from a system of customary tutelage. Women married under customary law are deprived of proprietary and contractual capacity and *locus standi in judicio.*

White, Coloured and Asian women have to a large extent achieved formal equality. The abolition of the marital power in 1984, concerning non-African marriages, removed a major legal impediment to women's contractual capacity and the exercise of the right to manage their property.

African women married under civil law followed four years later in 1988. However, African women married under custom are subject to a system of perpetual tutelage. See SII(3) of the *Black Administration Act* of 1927 and equivalent statutes in the homelands.

The Transkei Marriage Act of 1978, enacted by the Matanzima regime and still in force, reintroduced polygamy within civil marriages, in the name of African custom and removed a divorced women's right to both custody and maintenance.

Anna Julia Cooper, a 19th Century feminist often criticised black leaders in the United States for claiming to speak for the race, but failing to speak for black women. Cooper said, "Only the Black women can say, when and where I enter ... then and there the whole Negro race enters with me." In our instance, only the rural African woman can say when I enter there and then the whole South African society enters with me.

Every South African will soon, with reasonable certainty, acquire formal equality through the new constitutional dispensation. The question that requires an immediate answer is whether the African women under custom will enjoy formal equality.

Rural women of South Africa need an unequivocal commitment from the democratic movement that, in a new constitutional dispensation, African women will be accorded the following:

* Majority status.
* Participation at Embizweni/Kgotla.
* Land rights and access to land, must not attach to a man. Single, divorced, or married women should be allocated land.
* Inheritance rights, including chieftainship.
* Participation in land claims. Lack of formal title should not debar them from lodging claims.
* The right to alienate matrimonial property without permission by man must be instituted .
* On divorce, matrimonial property must be divided equitably.

These demands, based on the principles of equality and non-discrimination, are but a translation of the democratic movement's struggle for a non-racial and

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non-sexist South Africa. In order for freedom from racism and sexism to be a reality for African women, the constitutional formulations being negotiated need to specifically protect women.

This paper will examine how the principles of equality and non-discrimination, i.e. international women's rights norms, can be reconciled with customary law and the means by which these can be advanced.

In some opinions, custom has served the purpose of subjugation and domination and the resulting legal dualism should be thrown into the dustbin of history. A more pragmatic view is that as customary law remains a reality, it serves no useful purpose to wish it away. A less emotional approach is to formulate proposals for reform.

This paper will attempt to reconcile custom with international norms of equality and non-discrimination. In conclusion ways in which these norms, in relation to property rights legislation, can be attained, will be suggested.

It is now fairly well documented that what is applied in many African countries as customary law is neither customary nor law (Chanock, 1991). The definition of what constitutes customary law has been influenced by recent accounts of the interaction between African custom and colonial rule. These accounts describe the shift from custom to customary law, which mainly affected family law.

In most of Africa the process involved an alliance between the colonial administration and traditional leaders. The latter, as traditional holders of power over strategic resources, namely land, cattle, women, and children, saw this power dwindling and sought to regain it by manipulating custom. Colonial administrations either misunderstood the nature of African institutions or held a view of African society that saw women as entities without rights and under the authority of men. This definition of the female role coincided with their patriarchal notions of woman as having lesser rights and capacities than man and fulfilling a primarily domestic role. The colonialist's inability to comprehend Africa's institutions was compounded by bigotry, that saw Africa as backward and uncivilised.

Whatever their different motivations, the two parties promoted the emergence of vernacular law, in the name of tradition (Robert J Gordon). In place of custom, which is dynamic, a rigid set of 'customary laws' emerged. Since then, urbanisation, influx control, commissioners courts, chief's courts and the continued creation of customary law, through the medium of apartheid courts, have all influenced the evolution of customary law in South Africa.

No attempt to analyse the position of women in African customary law, from the standpoint of human rights norms, is immune to charges that the process is inspired by Western values and is, therefore at best, irrelevant and at worst, traitorous. In this connection it is often argued that the notion of human rights is foreign to Africa and is, thus, an inappropriate standard by which to judge political and social rights on the continent.

The relativism argument holds that standards vary among different cultures and that what may violate human rights in one society may be lawful in another. Another way of stating the argument is that, even if there were agreement as to the existence of a core of substantive human rights norms, the meaning varies from culture to culture. Therefore, human rights practices that appear to be contrary to international norms are justified on the grounds that they are required by local cultural traditions.

This argument can be rejected on several grounds, two of which will suffice here. First, as the human rights discourse is a moral one, it must be conducted in terms of universality if it is to avoid self-contradiction. The relativism that would set different standards against the existence of transboundary moral standards, adopts an implausible position - one which holds that in moral matters we can pass judgement on others and make exceptions in our own favour.

There is nothing in the nature of a 'third world' woman that makes her less eligible for the enjoyment of human rights (though she may, of course, consensually waive her rights) than a woman in a Western democracy (F Teson).

This line of reasoning argues that, if a particular society has always had authoritarian practices, it is morally defensible that it continues. Condoning these practices signifies the acceptance of an extreme form of moral legal positivism of dubious validity.

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Second, and more practically, the idea that human rights are a Western construct with limited applicability to the African reality is ignorant and misleading, for the simple reason that traditional African society recognised human rights norms of many types, some of which coincide squarely with the modern international ones.

For example, the right to life appeared to have been much wider in scope in traditional African culture. It included a prohibition against killing and an obligation to assist in providing means of subsistence to needy members of the community. Therefore, to argue that a rights-based critique of customary practice is foreign is to ignore historical facts.

African legal practice also regarded imprisonment as an extreme denial of human rights. Therefore, Africa had no prisons before colonialism. We have, however, accepted imprisonment and have not expunged the practice. Prisons built during the colonial era are in full use all over Africa. If we accept this restriction on human rights, surely we can accept the extension of human rights to women. To use the argument of foreignness to deny women human rights is to apply double standards.

On 21 October 1986 the African Charter on Human and Peoples Rights came into being with the attainment of 31 ratifications from among 50 member states of the Organisation of African Unity. The Charter is intended to provide a model for human rights in an African context and constitutes the first body of norms that cannot be criticised as being foreign.

The Charter has obvious relevance in a new South Africa. Art 18(3) calls upon the states to ensure "the elimination of every form of discrimination against women", as does the African National Congress's proposed Bill of Rights Art 7: "Men and women shall enjoy equal rights in all areas of public and private life, including employment, education and within the family". Further, the Charter places a duty on the same states to be "conscious of the values of African civilisation".

The African National Congress has Contralesa's wishes and demands to contend with, therefore, given the foregoing, there is potential conflict between aspects of the Charter and the demands that are placed on the African National Congress.

What follows is a proposal for a pragmatic resolution of this contradiction in regard at least to women's property rights.

Under customary law a woman does not have a right to own land, but a man does. *Prima facie*, then, the customary law is discriminatory and goes against international women's rights norms with regard to ownership of land.

Recent research has revealed that colonial administrators transformed transgenerational, familial land rights into individual, male land rights. Thus specific rights for women have been transformed into overall rights of control by men. Therefore, it can be argued that the so-called male-only individual right to own land never existed under customary law in three ways.

First, the concept of ownership in the Western legal sense of a right to exclusive use, control and the possibility of alienation, is not consistent with customary concepts of rights regarding land. In customary law, other extended family members might have limited rights to a family's land or its produce. Land was controlled by complex rules of the larger family unit and there was no alienation of land.

Second, land rights did not exclusively belong to men. Women also had rights regarding land, although these were generally different from men's rights. Okoth-Ogendo of Kenya classifies men's rights as rights of control and women's rights as rights of access. However, in neither case did the rights amount to ownership in the western legal sense, which implies exclusivity and a right to alienate.

Third, rights to land were not individual, but belonged to a larger family unit and, as with most decisions in a customary set-up, consultation was required.

Therefore, when we 'deconstruct' the customary rule that a woman cannot own land, we may find that a man cannot own land either, in the Western legal sense, and that women did have certain well-defined rights regarding land.

We see, then, that rather than applying international women's rights norms to the current 'constructed' customary law, it is important to first 'deconstruct' these rules, to establish the real customary law.

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We might end up protecting women's rights, not by striking down customary law, but by reconstructing it and ensuring that this reconstructed customary law is that which is actually applied at the level of State courts, traditional/chief courts and if possible at the level of the family.

Similarly, customary law has through historical processes ossified into rigid rules, not unlike the rules and regulations of imported, Western legal systems. For instance, courts in South Africa apply the 'customary' rule that a woman cannot inherit the estate of her deceased husband.

Yet research currently being conducted by Women and Law in Southern Africa reveals that women are, according to living customs followed in the rural areas, being appointed by the extended family as the heirs to their deceased husbands' estates.

Whether this has always been the case or whether it is a response to new socio-economic circumstances, is not of great importance. What is significant, however, is that the current custom differs from the customary law as applied by the courts.

Similarly, in Botswana, although customary law prescribes that a woman must be represented in court by a man, and therefore a woman and a man do not have equal rights to approach the court, recent WLSA research has shown that custom is changing, presumably in response to changing socio-economic circumstances and that chiefs now allow a woman to approach the court on her own.

These two examples illustrate a second point about customary law. It should reflect current practice and outlaw outmoded custom. The means by which this could be achieved is, first, by codification of customary law, discarding practices that were imposed by colonialism and, second, by establishing a mechanism whereby the application of custom is not dependent on the whims of a particular chief.

Customs change with circumstances. Oppressive customs have always been fought by its victims. There is a great historical event that illustrates this point - the story of Cirha and Tshawe.

The First Chief of the Xhosa was Cirha and Tshawe was an ordinary commoner. One day, the Xhosa went out and caught a blue buck. Cirha became very excited. "Hlomlal", he commanded, asking for the portion that was due to him as chief.

"No", said Tshawe. "This is only a small buck. I will not give it to you." They fought until Tshawe, who was supported by the people, became chief in Cirha place. The chief was entitled to his share of only a large animal. Cirha's insistence on his share when the animal was small was seen as greedy and dictatorial and according to Xhosa political thought, Cirha's demand was unjust. Even the descendants of Cirha today agree that Tshawe was right to resist Cirha's unjust demands.

The democratic element of Xhosa political thought can be illustrated via several historical events. People supported chiefs of low birth against senior, but greedy relatives and responded to the rule of unjust chiefs in many ways. Councillors often toured homesteads, whipping up opposition to exploitative decisions.

Sometimes whole communities packed their belongings, abandoning unpopular chiefs, such as Ngqika (1795-1829), who seduced the wife of his old uncle, Ndlambe and devised different ways to acquire and dispossess his people of cattle, such as changes in inheritance laws. His people deserted him and flocked to the popular Ndlambe. Ndlambe attacked and defeated Ngqika in 1807 at the battle of Amalinde.

Democracy should have triumphed and the people gained a popular leader, but cunning Ngqika had a strategy. He called in the colonial administrators to assist him and through them was re-instated as chief. His descendants today are still chiefs.

Similar stories exist in the histories of the Zulu, Sotho, Venda and Shangaan. Western versions are the French revolution and the events that lead to the demands that were enshrined in the Magna Carta.

Democratic structures of local government must be created, which re-define the position of chiefs and headmen and thus that of customary law. In Zimbabwe, chiefs were replaced by an elected structure of local government and State-appointed judicial officials. The new Primary Courts administer a substantially changed customary law.

South Africa should adopt a similar structure, mainly due to the illegitimacy of a large number of present

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chiefs and a large-scale purge is necessary to rid chieftainship of the charges of illegitimacy.

Second, the customary law chiefs have been administering is invented. They are, therefore, not depositories of our customs. To retain them as rulers in the name of custom, or identity, would impede the establishment of democracy in a post-apartheid South Africa. Further, it would hinder the establishment of a non-sexist society, as the unequal treatment of South Africa's citizens would be entrenched, as urban or non-African rural people would be exempt from rule by the chiefs.

To conclude, the issues raised by this paper are interrelated and lend themselves to resolution by constitutional dispensation. A property rights clause should guarantee private property rights for all. Limitations should, however, be imposed to satisfy social, environmental and collective needs. Reparations for the dispossessed should be made by a future government and title to communal land should be extended to women.

In rural communities, the tribal structure should be replaced by democratic structures and local government, and the State should, in consultation with elected councils, appoint judicial officers. All South Africans, whether in urban or rural areas, should have the option of demanding that indigenous law be applied.

A post-apartheid legal system should be reformed to introduce indigenous law. Indigenous law stresses group rather than individual liability and uses this as a basis for restitutive compensatory justice rather than individual punitive justice.

Indigenous legal practice also stresses informal jurisdiction and community policing. There is much to recommend such procedures and indeed many industrialised countries are beginning to incorporate them into their systems.

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