

A Comparative Assessment of the Constitution and Customary Law

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*as part of the South Sudan Constitutional Research Project
for Catholic Relief Services, South Sudan*



Prepared with the support of



THE PROGRAM ON
CONSTITUTIONAL STRUCTURE
of Notre Dame Law School

October 8, 2013

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A COMPARATIVE ASSESSMENT OF THE CONSTITUTION AND CUSTOMARY LAW

By Christine Venter*

*It would be helpful to recall that the First Synodal Assembly for Africa spoke of the need for an in-depth study of African traditions and cultures. The Synod members noted a dichotomy between certain traditional practices of African cultures and the specific demands of Christ's message. In her concern for relevance and credibility, the Church needs to carry out a thorough discernment in order to identify those aspects of the culture which represent an obstacle to the incarnation of Gospel values, as well as those aspects which promote them.***

*The Church deplores and condemns, to the extent that they are still found in some African societies, all 'the customs and practices which deprive women of their rights and the respect due to them'. It is recommended that Episcopal Conferences establish special commissions to study further women's problems in cooperation with interested government agencies, wherever this is possible.****

EXECUTIVE SUMMARY

Customary law (the custom and tradition of the peoples of South Sudan) is an integral part of the legal system of South Sudan and is commonly utilized by people, particularly in rural areas. It is a useful form of dispute resolution because it is informal, accessible, relatively fast and inexpensive, with an emphasis on restorative justice. Many of its provisions, however, are discriminatory towards women, and these would appear to run afoul of gender equality provisions in the Transitional Constitution (TC). However, the language of the TC that affords protection for women's rights and appears to favor these rights over cultural practices, is not as strong as it could be. Redrafting some provisions in the Permanent Constitution (PC), using language from Zimbabwe's Constitution as a model, would help to clarify which rights should be preferred in the cases where the rights appear to conflict. Efforts will also have to be made from a practical standpoint to ensure that customary law enables women to enjoy their constitutionally protected rights. The community will have to be educated that child and forced marriages are unconstitutional. It is recommended that traditional authorities be encouraged to apportion land to women. The issue is obviously a culturally sensitive one, and will require close cooperation with the local chiefs.

The TC considers customary law a source of law, but the relationship between state courts and tribal courts is not spelled out in the Constitution; experience in Zimbabwe and South Africa counsels that this should be addressed in the PC. Similarly, the role and functions of traditional authorities should be clarified in the PC.

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** Pope Benedict XVI, *Africæ Munus* [2011], 36.

*** Pope John Paul II, *Ecclesia in Africa* [1995], 121.

This paper will discuss the provisions in the TC that refer to customary law and cultural practices, and suggest where there is any conflict between protections afforded these rights and guarantees of gender equality that gender equality prevail. The paper will then compare similar provisions in the Zimbabwean and South African Constitutions, and examine the requirements of international human rights law, since one of the guiding principles of the TC is that it accord with international human rights law. The paper will conclude by suggesting that language from these constitutions be incorporated in the PC. The paper will also suggest that the role of traditional authorities be clarified in the PC, and that the relationship between customary law courts and state courts be clarified, again following the experience in South Africa and Zimbabwe.

BACKGROUND

Customary law is considered a source of law in South Sudan, as evidenced by Article 5 of the Transitional Constitution (TC) which provides:

- The sources of legislation in South Sudan shall be:
- (a) this Constitution;
 - (b) customs and traditions of the people;
 - (c) the will of the people; and
 - (d) any other relevant source.

Article 33 guarantees the right of ethnic and cultural communities to freely enjoy and develop their particular cultures. Moreover, respect for customs and traditions is one of the guiding principles in the Guiding Objectives and Principles for Political Objectives articulated in Article 36(2)(c). The TC also specifically recognizes the “institution, status and role” of traditional authority in Articles 166 and 167, although the actual parameters of the role remain undefined by the TC. (Article 167(2) provides that “Legislation at the National and State levels shall provide for the establishment, composition, functions and duties of councils for Traditional Authority leaders.”)

It is clear that custom and customary law courts will be used by the people, especially in the rural areas, as traditional authorities and customary law courts are an accessible, informal and inexpensive form of dispute resolution that retains much credibility with the people. Customary law is a key aspect of cultural identity. The importance of customary law was recognized in the 2005 Peace Accords which provided in Article 39 that ethnic communities shall have the right to practice their beliefs, use their language and develop their cultural identity. The operation, role, and function of customary law is recognized by other statutes in South Sudan subject to certain caveats. Section 5 of the Sudanese Civil Justice Act of 1983¹ provides that if a matter deals with succession, inheritance, wills, marriage, divorce or family relations, customary law may be used to decide the issue, as long as it is “reasonable and in accordance with justice, equality and good conscience.” Section 7 of the Chiefs’ Courts Ordinance lays down the caveat that customary law may not be applied if it is “contrary to justice morality or order.”

Three of the main problems that are likely to arise with respect to customary law are:

- 1) Its conflict with the gender equality provisions of the Constitution;
- 2) Determining actual customs and practices and enforcing these consistently and uniformly in accordance with the Constitution;
- 3) The relationship between tribal courts or traditional authorities and the state courts recognized in the Constitution.

DISCUSSION

I. Gender Equality and Customary Law

A. The TC and Customary Law Practices that Violate Gender Equality

As noted, Article 5 of the TC recognizes the “customs and traditions of the people” as a source of law. At the same time, Articles 14 and 16 of the TC guarantee equality and full equal dignity for women, including the specific right to own property. Article 16(4)(b) also calls on the State to “enact laws to combat harmful customs and traditions which undermine the dignity and status of women.” The TC is silent with regard to how to proceed in the event of a conflict between customs, traditions and women’s legal rights. It should however be noted that equality is not listed as one of the guiding principles and objectives articulated in Articles 35 and 36 of the TC, although “understanding, tolerance and respect for customs, traditions and belief” is recognized as a guiding principle by Article 36(2)(c). Article 35(2) does however require that the TC “be interpreted and applied to advance the individual dignity and address the particular needs of the people by dedicating public resources and focusing attention on the provision of gainful employment for the people, and improving their lives by building roads, schools, airports, community institutions, hospitals, providing clean water, food security, electric power and telecommunication services to every part of the country.” This seems to imply that dignity is best served through economic and social services, and not necessarily through the enforcement of civil and political rights or gender equality. (Rights of women are also discussed in part 2 of Carozza’s paper, “Fundamental Rights, Objectives, and Guiding Principles”).

Among the customary practices² that directly conflict with women’s rights are:

- The prohibition on women inheriting (succession)
- The prohibition on women owning land
- Women’s lack of full legal capacity (locus standi)
- Child and forced marriage
- Using women or children to pay off debts or provide compensation
- Abduction of women and children for the purpose of marriage, and/or to profit from brideprice
- Compelling women to marry their rapist if he is prepared to compensate her family
- Tolerance for marital rape and domestic violence
- Lack of equality during marriage and lack of equality on dissolution of marriage even in cases of abuse
- Awarding child custody automatically to the husband on termination of the marriage

This paper will examine the mandates of international human rights law with regard to cultural practices, and look at examples from the constitutions of other African countries as an example

of how the language in the PC might be phrased to protect women’s rights. The South African and Zimbabwean Constitutions have been invoked for comparative purposes as they have both grappled with issues raised by customary law conflicting with equality. South Africa provides an example of a constitutional court modifying customary law to comport with equality provisions, while Zimbabwe provides of example of a state that made significant changes to the constitutional provisions pertaining to customary law customary law in its 2013 Constitution because the provisions in its earlier constitution did not sufficiently clearly prefer equality over customary law.

B. International Human Rights

By way of background, it is useful to highlight international human rights positions on customary law and practices. CEDAW, the Convention on the Elimination of All Forms of Discrimination Against Women, specifically calls on all states parties to eliminate harmful customs and traditions which discriminate against women. It requires modification of “cultural patterns of conduct” in its Article 5(a) and modification of “customs” and “customary . . . practices” that prejudice women’s equality. This stance is echoed by the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (hereinafter the Maputo Protocol)³ which calls for states to “modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”

Article 5 reads:

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

- a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;
- c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

Harmful practices are set out in Article 5; this Protocol condemns FGM⁴ and calls for monogamy rather than polygamy to be the preferred form of marriage,⁵ and provides a minimum age for marriage of 18 years.⁶ As discussed in endnote 3, the Maputo Protocol’s

provision asserting a human right to abortion would be highly problematic for many key actors in South Sudan. (See discussion at part 1.(b) in Carozza's paper.)

C. Constitutional Provisions in South Africa and Zimbabwe

1. South Africa

South Africa has a similar constitutional provision that respects cultural rights, but it explicitly makes these subject to the gender equality provisions of the Constitution. Art 31 of the South African Constitution provides that:

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community
 - a. to enjoy their culture, practise their religion and use their language; and
 - b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

The South African Bill of Rights therefore makes the right to enjoy cultural practices subject to the proviso that it not conflict with any provision of the Bill of Rights – one of those provisions is gender equality.

The South African Constitutional Court has been activist in reinterpreting customary law to comply with the provision of the Bill of Rights. For example, in 2008 the Constitutional Court ruled that customary provisions that reserved inheritance to chieftainships solely to males were unconstitutional. The Court permitted Ms. Shilubana to assume the chieftainship.⁷ Although it acknowledged that customary law favored men as chiefs, the Court found that customary law should be developed to acknowledge the principle of gender equality. Similarly, in Botswana, Mosadi Seboko, a woman, has been recognized as paramount chief of Botswana's Balete people.⁸ It should also be noted that in May, 2013 the Lesotho Constitutional Court⁹ upheld the Chieftainship Act – an Act which denies girls the rights to inherit the chieftainship. The South African Constitutional Court has also found that customary law practices which prevent women from inheriting are discriminatory and unconstitutional.¹⁰ This stands in contrast to the *Magaya*¹¹ case in Zimbabwe, where in 1999 a woman was prevented from inheriting because of her gender. The South African Court has also found that even women who were married outside of the community property regime are entitled to a share of the marital estate after dissolution of marriage.¹²

2. Zimbabwe

The old Zimbabwean Constitution of 1980 created some problems for the courts with regard to customary law and gender equality, as no guidance was provided by the courts when discriminatory cultural practices conflicted with women's rights. This allowed for cases like the *Magaya* case to be decided. (In that case, the Court essentially decided to uphold the customary law practice of not permitting women to inherit. This resulted in the impoverishment of the

woman petitioner, as she was evicted from her home.) The new Constitution of 2013 now clearly affords preference to women's rights over cultural rights in several articles.

Article 16(c) of the 2013 Zimbabwean Constitution provides that:

- (1) the State and all institutions and agencies of government at every level must take practical measures to ensure that women have access to resources, including land, on the basis of equality with men.
- (2) The State must take positive measures to rectify gender discrimination and imbalances resulting from past practices and policies.

26 Marriage

The State must take appropriate measures to ensure that—

- (a) no marriage is entered into without the free and full consent of the intending spouses;
- (b) children are not pledged in marriage;
- (c) there is equality of rights and obligations of spouses during marriage and at its dissolution; and
- (d) in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses.

Section 46(2)

When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.

Section 56 (2)

Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, *cultural* and social spheres (emphasis added).

63 Language and culture

Every person has the right— (a) to use the language of their choice; and (b) to participate in the cultural life of their choice; but no person exercising these rights may do so in a way that is inconsistent with this Chapter.

The most direct preference for gender equality over cultural practices is found in Section 80 which provides:

Section 80

- (1) Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.
- (2) Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.
- (3) *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 (emphasis added).¹³

II. The Relationship between Tribal courts, Traditional Leaders and the State Courts

Section 132(1) of the TC provides that: “The establishment, composition, competences and procedures of County and other courts at lower levels shall be determined by law.” It thus appears that the TC contemplates additional laws being passed to clarify and define the relationship between the customary law courts and the other courts. The PC can make additional clarifications providing that the Supreme Court is the court of final appeal and has competence on all issues including the determination and application of customary law. Section 123(1) of the TC states as follows:

Judicial power is derived from the people and shall be exercised by the courts in accordance with the customs, values, norms and aspirations of the people and in conformity with this Constitution and the law.

While this is a broad and general statement, because of the reference to “customs,” it could be construed to imply that customary law has some kind of pre-eminence. It is thus recommended to include language in the PC that reflects the language of the Civil Justice Act that states that customary law must be “reasonable and in accordance with justice, equality and good conscience” and will only be applied when it meets these criteria.

It is also important to define the relationship between the courts and customary law courts in terms of the appeals process from chiefs’ courts to the state courts. This could be done by legislation to minimize the possibility of forum shopping in legal actions (i.e., filing an action in a state court or customary law court because the outcome would be more favorable).

The role of traditional leaders could be clarified in the PC, as was done in the South African constitution stated thus:

211. Recognition

1. The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
2. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
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.

212. Role of traditional leaders

1. National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
2. To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law:
 - a. national or provincial legislation may provide for the establishment of houses of

- traditional leaders; and
- b. national legislation may establish a council of traditional leaders.

The South African Traditional Leadership and Governance Framework Act¹⁴ provides guidance on the role of traditional leaders, setting out when they may be removed from office, and limiting their roles as follows:

- 18.** (1) National Government or a provincial government, as the case may be, may, through legislative or other measures, provide a role for traditional councils or traditional leaders in respect of—
- (a) arts and culture;
 - (b) land administration and agriculture;
 - (c) health and welfare;
 - (d) the administration of justice;
 - (e) safety and security;
 - (f) the registration of births, deaths and customary marriages;
 - (g) economic development;
 - (h) environment and tourism;
 - (i) the management of natural resources; and
 - (j) the dissemination of information relating to government policies and programmes.

The Act also creates a Commission on Traditional Leaders which resolves disputes among leaders with regard to customary law.¹⁵

In contrast, based on its own experiences, Zimbabwe decided to define the role and function of traditional leaders in its 2013 Constitution, and not pass later legislation clarifying that role:

281 Principles to be observed by traditional leaders

- (1) Traditional leaders must—
 - (a) act in accordance with this Constitution and the laws of Zimbabwe;
 - (b) observe the customs pertaining to traditional leadership and exercise their functions for the purposes for which the institution of traditional leadership is recognised by this Constitution; and
 - (c) treat all persons within their areas equally and fairly.
- (2) Traditional leaders must not—
 - (a) be members of any political party or in any way participate in partisan politics;
 - (b) act in a partisan manner;
 - (c) further the interests of any political party or cause; or
 - (d) violate the fundamental rights and freedoms of any person.

282 Functions of traditional leaders

- (1) Traditional leaders have the following functions within their areas of jurisdiction—
 - (a) to promote and uphold cultural values of their communities and, in particular, to promote sound family values;
 - (b) to take measures to preserve the culture, traditions, history and heritage of their communities, including sacred shrines;

- (c) to facilitate development;
 - (d) in accordance with an Act of Parliament, to administer Communal Land and to protect the environment;
 - (e) to resolve disputes amongst people in their communities in accordance with customary law; and
 - (f) to exercise any other functions conferred or imposed on them by an Act of Parliament.
- (2) Except as provided in an Act of Parliament, traditional leaders have authority, jurisdiction and control over the Communal Land or other areas for which they have been appointed, and over persons within those Communal Lands or areas.
- (3) In the performance of their functions, traditional leaders are not subject to the direction or control of any person or authority, except as may be prescribed in an Act of Parliament.

In South Africa, the government conducted a study on traditional leaders and created a Department of Traditional Leaders in order to facilitate communication, strengthen collaboration and generally coordinate policies with the leaders. In 2009, it passed the National House of Traditional Leaders Act to clarify the powers and duties of traditional leaders, and to make all interactions between traditional leaders and the government uniform. The Act also provides that one third of the House of Traditional Leaders must be women. In 2010, the government decided to reduce the number of traditional kingdoms, in part because of rivalry and tensions among some of the leaders.

III. Using Customary Law as a Mechanism for Reconciliation

One of the most attractive aspects of customary law is its focus on restorative justice and restoring harmony to the community. This aspect could be put to use in addressing some of the conflicts over land, cattle, abductions, and other crimes committed during the civil war. Rwanda modified and reconstituted its traditional courts, the *gacaca* courts, and empowered them to deal with crimes that were committed during the genocide. The government may explore whether it would be possible to train judges to use customary law mechanisms to adjudicate both civil claims and low level criminal prosecutions arising out of South Sudan's civil war. These courts offer fairly quick access to justice and are cost efficient in a country with limited resources and infrastructure. However, procedural rights must be closely observed and protected, especially if these courts are used to pursue criminal prosecutions.

CONCLUSION

The Zimbabwean and South African Constitutions offer examples for affording preference to women's rights and gender equality when these come into conflict with customary law practices. The strategy adopted by the Ministry of Justice in South Sudan is commendable for the codification of customary law and takes into account the issue of gender and equal rights.

Once peace has been accomplished, the government could explore the possibility of using the customary law courts as a means of accountability and reconciliation. The role of traditional leaders could be clarified and the PC may draw inspiration from the provisions of the

Zimbabwean Constitution. Procedures which permit the removal of traditional leaders should be considered and the relationship between the customary law courts and the regular courts be delineated; legislation could clarify how appeals may be taken and the hierarchy of authority among customary law courts and the regular court system.

¹This statute has not been repealed Many other African countries follow the general rule that customary law governs in these areas of law.

²Other practices include Female Genital Mutilation (FGM). The issue of payment of brideprice while generally not violating women's rights has the impact of fuelling the cattle raiding practice in order to meet exorbitant charges. - Additional problematic traditions and customs include male primogeniture with regard to succession to chiefdoms and titles, lack of formal support mechanisms for abandoned wives, levirate marriage particularly where the widow does not freely choose but is compelled to marry her deceased husband's brother, widow cleansing (the practice of compelling a widow to be cleansed-often through sexual intercourse with a healer- before she can retake her place in society). This last practice exposes women to HIV/AIDS and is degrading. Polygamy when imposed on women is also a negative cultural practice because the women may have difficulty in proving they were married and thus entitled to the protections of marriage. Moreover, if the polygamous husband dies, a number of people will have claims against his estate and women may be impoverished. Polygamy also exposes women to the risk of HIV/AIDS.

³African Union, The Protocol on the Rights of Women in Africa, July 2003. Accessed at: <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>. It is controversial because it provides a right to abortion under circumstances articulated in Article 17(2)(c). It is the only international treaty to assert a human right to an abortion. So far 28 countries have signed and ratified it, 18 countries have signed but not ratified it, and 8 countries (including South Sudan) have not yet signed it. It would be possible to enter a reservation to objectionable articles. (A reservation is a legal statement which purports to exclude or modify the legal effect of certain provisions of a treaty).

⁴Id, Article 5.

⁵Supra, Article 6(c).

⁶African Union, The Protocol on the Rights of Women in Africa , July, 2003. Accessed at: <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>. Article 6(b)

⁷Shilubana and Others v Nwamitwa ,Constitutional Court of South Africa, CCT 03/07, 2008. Accessed at: <http://www.saflii.org/za/cases/ZACC/2008/9.html>.

⁸IRIN News, "Botswana: First Female Paramount Chief Welcomed", September 3, 2013. Accessed at: <http://www.irinnews.org/report/45918/botswana-first-female-paramount-chief-welcomed>.

⁹Senate Gabasheane Musapha v. Senior Resident Magistrate of the Subordinate Court of Berea et al, High Court of Lesotho, May 3, 2013. <http://www.lesotholii.org/category/caselaw-keywords/chieftainship-act>

¹⁰Bhe and Others v. Khayelitsha Magistrate and Others, Constitutional Court of South Africa, (CCT 49/03) [2004]. Accessed at: <http://www.saflii.org/za/cases/ZACC/2004/17.html>.

¹¹Magaya v. Magaya, Supreme Court of Zimbabwe, February 16, 1999. Available at: <http://jurisafrica.org/docs/lawreports/Magaya%20v%20Magaya.judgment.pdf>

¹²Gumede (born Shange) v President of the Republic of South Africa and Others, Constitutional Court of South Africa, CCT 50/08, 2008. Accessed at: <http://www.saflii.org/za/cases/ZACC/2008/23.html>.

¹³This may be viewed in light of observations regarding customary law made by the South Sudan National Women's Conference, which are:

- That the age for marriage should be specified as 18 years;
- That no human being should be used as a form of compensation;
- That Article 5 should clearly specify which customs and traditions violate women's rights; and
- That the customary laws of each state should be reviewed to ensure they conform with the Constitution.

South Sudan Women Constitutional Conference Recommendations, May 12, 2013. Accessed at; <http://nationalwomenconferencesouthsudan.wordpress.com/>

¹⁴Government of the Republic of South Africa, The Traditional Leadership and Governance Framework Act. Accessed at; <http://www.info.gov.za/view/DownloadFileAction?id=66634>.

¹⁵Id, Article 19.