THE ASCERTAINMENT OF CUSTOMARY LAW AND
THE METHODOLOGICAL ASPECTS OF RESEARCH
INTO CUSTOMARY LAW: PROCEEDINGS OF
WORKSHOP,
FEBRUARY/MARCH 1995

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*by M.C.L. RÜNGER, GTZ, CHIEF TECHNICAL ADVISOR, LEGAL CAPACITY BUILDING PROGRAMME*

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FOREWORD

ADV. BIENCE GAWANAS
CHAIRPERSON, LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

The LRDC Workshop on the Ascertainment of Customary Law and the Methodological Aspects of Research into Customary Law in Namibia held in Windhoek, Namibia from 28 February - 2 March 1995 was the first of its kind to be convened in Namibia. It was organised by the LRDC in response to a number of questions which have arisen as it plans to embark on a participatory and nationwide research into customary law - the foremost question being how the LRDC can carry out its mandate of harmonising customary law and other laws without knowing what it is and what research methodology to adopt.

The workshop drew together eminent scholars and researchers on the subject who served as resource persons. It provided an excellent opportunity to all those involved in the law making process as legislators, reformers, researchers and legal practitioners to better equip themselves with knowledge in dealing with those pertinent questions relating to customary law. The workshop discussed the theoretical framework and different methodological approaches in eliciting an understanding of customary law, experiences and problems encountered by researchers both in and outside of Namibia and a comparative analysis to find common strategies and objectives for research into customary law.

From the discussions that followed in the working groups concrete proposals were put forward dealing inter alia with the jurisdiction and procedures of traditional courts, objectives of customary law research, ways of ensuring that research and law reform on customary law do not disempower marginalised groups. These proposals will no doubt guide the LRDC in its task.

The workshop further stressed that law reform particular of customary law must involve a participatory process - as this is the law which governs the lives of the majority of people.

Finally, I want to thank all the participants of this important workshop for their contribution. A special thanks to Honourable V Rukuro, Attorney General (then the Deputy Minister of Justice) who officially opened the workshop, to our guest speakers, chairpersons of the sessions, staff members of the Secretariat of the LRDC, Ms M Rünger and Ms S Lorenzen for their technical input and GTZ for having funded the workshop.

My special appreciation goes to Ms M Rünger, GTZ Chief Technical Advisor and Prof Bennett, University of Cape Town for editing this Report.

This Report will no doubt serve as a valuable resource and a useful starting point in our customary law research not only to the LRDC but to anyone involved in (or contemplating on) programs, research and projects on customary law to give it its deserved status and role in the developing Namibian jurisprudence in particular and the legal system in general.
OPENING ADDRESS

ADV R V RUKORO

THE HONOURABLE DEPUTY MINISTER OF JUSTICE

Madam Chair, Your Excellencies, Honourable Ministers, Honourable Judge President and other Judges of the High Court, distinguished participants from abroad, other distinguished guests.

Thank you very much for the opportunity to address you at this occasion. First of all, I would like to convey the appreciation of the Government, and in particular the Ministry of Justice to the organizers of this Workshop, namely the Law Reform and Development Commission with the assistance of the GTZ, as implementing agency for technical co-operation of the Federal Republic of Germany, to the Legal Capacity Building Programme of our Ministry of Justice. Your efforts to obtain the participation of such eminent authorities in the field of customary law will no doubt be rewarded.

Allow me, Madam Chair, for a moment, to bring homage to a dear friend to many of us, the late Adv Fanuel Kozonguizi, who served in his capacity as Ombudsman as a member of the Law Reform and Development Commission since its establishment in 1992 and in particular as Chairperson of the LRDC’s Committee on Customary Law. When it comes to matters like those that will be debated and considered at this Workshop, the distinctive wisdom of our late friend will indeed be sorely missed.

Madam Chair, one of the objects of the LRDC, as per s 6(c) of its enabling Act, is to undertake research and to make recommendations for the reform and development of the law of Namibia with regard to the integration or harmonization of the customary law with the common and statutory law. You are therefore presenting this Workshop for a penetrating analysis of some crucial issues in a very important and very sensitive field. According to your programme, the field will be covered over a wide scope by persons who are renowned for their experience and knowledge in this regard. Moreover, you have scheduled ample time for panel and group discussions and have ensured that you have gathered here a considerable number of Namibians whose cooperation and input will be vital for the LRDC’s task. You will therefore agree with me that I should be careful not to encroach on these issues now and to avoid making this opening address a closing address.

It goes without saying that the Government is indeed committed to give practical effect to those Articles of the Namibian Constitution pertaining to customary law, viz art 19, which deals with every person’s right to enjoy and maintain his or her culture, and art 66, which keeps existing customary law in force provided that it does not conflict with the Constitution. In this regard the provisions of art 102(5), which provides for a Council of Traditional Leaders to advise on the control and utilization of communal land, is also of importance. As you will be aware, a Traditional Leaders Bill has been introduced recently in the National Assembly, and is at present being debated in the second House of Parliament, the National Council. Legislation to establish the said Council of Traditional Leaders is in the process of being prepared. My Ministry, the Ministry of Justice, envisages to introduce legislation with regard to the administration of justice by traditional authorities in the course of this year.
A vast field must still be covered, however, and this field is, of course, of great interest to my Ministry, being the Ministry responsible for the law in general. We all realize that all facets of customary law are, as it should be, very closely intertwined with each other and that it will seldom, if ever, be possible to address any of these facets in isolation. This fact necessitates a thorough knowledge of the full scope of customary law and such a full knowledge can only be achieved through comprehensive research.

Unfortunately, as you will be aware, the customary law of Namibia has never been researched to the extent that it has been done elsewhere. In the absence of an own university with a faculty of law, as well as a Government which acknowledged the importance of such research prior to Independence, this lack of research should not come as a surprise. Suffice to say that it will not serve any purpose for us to spend time on the reasons - that can be left to historians. The fact is that we now have such a University with a faculty of law, we have a Government committed, as I have stated, and, through the Law Reform and Development Commission, we have a statutory body in particular tasked to do it. Moreover, funding should be available. I hope that this Workshop will indeed bear the necessary fruits to ensure positive steps towards a very well coordinated comprehensive approach to this whole issue.

Madam Chair, at this point in time, allow me to give credit to those who have in the past, with little or no funding and with little or no recognition for their efforts, endeavoured to do such research. Our appreciation for such work must, of course, always be weighed up against the circumstances under which it was carried out.

I would further like on behalf of the Government and the Ministry of Justice to extend a hearty welcome to our distinguished participants from abroad. Thank you very much for honouring us with your presence and we wish you a very pleasant stay in our country.

Madam Chair, with these few words it is my pleasure to now declare this workshop open.
PART ONE: EXECUTIVE SUMMARY OF WORKSHOP PAPERS AND PROCEEDINGS

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A INTRODUCTION

In terms of the Law Reform and Development Commission Act 1992, the Law Reform and Development Commission (LRDC) was entrusted with the task of finding ways to integrate or harmonize customary law with the common and statutory law. To this end a number of conditions must be met, the most important of which is that all laws in Namibia must comply with the Constitution.

While it is possible, although not always easy, to ascertain the common and statutory law of Namibia, it is extremely difficult to identify the precise rules of customary law. Namibia has several different systems of customary law, determined by the various ethnic groups in the country. Most of these laws exist in oral traditions, and, although some rules have been recorded in writing, these compilations are not an adequate basis for law reform.

In the first place, the data is not always complete. In the second place, and more significantly, social developments in multicultural urban settings have yet to be documented and incorporated into customary law. There is as yet no comprehensive report on the views and aspirations of all Namibian social groups and strata, in particular of women and youth. Hence we have no indication what kind of law they think should be applicable to their circumstances.

Instead of producing mere ‘desk research’, the LRDC feels that its job is to base recommendations for customary law on participatory and nation-wide research. Such an investigation must cover all the regions and cultures and all the social strata of Namibia. It will not rely exclusively on the views (albeit important views) of one group: the traditional leaders. The LRDC’s approach to customary law acknowledges that Namibia’s democratic Constitution guarantees everyone’s freedom to develop economically, to move both socially and geographically and to choose whatever lifestyle they wish (and, in regard to these freedoms, particular emphasis is laid on the aspirations of women.) In consequence, the LRDC considers that the time and money necessary for field research would be well spent, if the people directly affected were to participate in the construction of their own future law.

The number and the range of questions involved in such a research project prompted the LRDC to arrange this Workshop. The following are some of the questions that must be
confronted. What should be deemed ‘customary law’, as opposed to custom and practice or customary law in the making? Who decides what the law of a community is? What procedures are used to determine customary law in court? Who is subject to customary law and what system of customary law is it? Can individuals choose the system of law they wish applied?

It is hoped that international, regional and Namibian experiences of field research can be shared at the Workshop, so that the LRDC will be better informed on how to devise a field research method suited to conditions in Namibia. Once the research project is complete, the LRDC will be in a position to propose recommendations for customary law.

The LRDC truly appreciates, and and is encouraged by, not only the overwhelming interest of eminent scholars and researchers, but also their support and cooperation for the new Namibia and the LRDC.

The Workshop is subdivided into three parts: the first day “Coming to Grips with Customary Law: A theoretical approach” intents to familiarize the LRDC with international experiences concerning different types of ascertainment in Africa and in the Region of Southern Africa as well as constitutional aspects having influence on the ascertainment process; the second day was to present Southern African and Namibian field research and the research methodology used for it, while the third day was reserved for workgroups and recommendations mainly, but including some highlights on the administration of customary law and some jurisprudential enlightenment.

This executive summary proposes to summarize the papers presented in the order outlined above, including a summary of the panel discussions, while the discussions and recommendations of the workgroups follow.

In order to show the complexity of the Namibian situation, Mr. Karuaihe, member of the LRDC and head of the Customary Law Committee of the LRDC, starts the legal part of the workshop with setting out the problems encountered in the field of inheritance to illustrate the Customary Law of Namibia.

Using inheritance as an example, Mr Karuaihe acquainted participants at the Workshop with the extraordinary complexities involved in applying law to ‘native Namibians’. Because of a poorly developed legal infrastructure and the inaccessibility of state courts, customary law plays a tremendously important role the daily lives of most Namibians. This reality was recognized by art 66 of the Namibian Constitution, which entrenches customary law in the legal system and elevates it to the same status as common law.

Mr Karuaihe outlined the history of recognition of customary law in the various courts of the country. Proclamation 21 of 1919 introduced Roman-Dutch law (as then applied in the Cape Province) to the territory of South West Africa. All law in conflict with the new regime was superseded, apart from customary law, which, unless specifically amended, continued to exist alongside common and statute law. Despite certain earlier judgments to the contrary, because customary law is part of the country’s legal system, it does not need to be proved as if it were foreign law.

For ‘non-native’ Namibians, succession is governed by the common law and the Succession Act (13 of 1934, as amended). These sources provide, in essence, that a deceased’s nuclear family and blood relatives inherit. For ‘native’ Namibians who die intestate, however, s 18 of Proc 15 of 1928 prescribes application of ‘native’ law and custom. According to GN 70 of 1954 (made applicable by Proc 192 of 1974) the estates of those who
married in community of property devolve as if they were Europeans (i.e. according to the common law). This provision does not apply to persons north of the ‘police zone’, namely, in the areas previously known as Kavango, Eastern Caprivi, Zipfel, Ovamboland and Kaokoland.

Hence, for purposes of intestate succession, four categories of ‘native’ Namibian must be distinguished: persons who married according to customary law; those who married under civil rites south of the police zone; those persons who married according to civil rites north of the police zone, and those who never married. The common law of intestate succession applies to people who were married by civil rites (whether they are divorced or widowed) south of the police zone. Customary law is applicable in all other cases.

Similar conflict of laws problems arise concerning the administration of ‘native’ estates and the determination of what law to apply to matrimonial property regimes and domicile. Particular difficulties are met when deciding which system of customary law to apply. A litigant may belong to two different tribes having different systems of law, which might be matrilineal, patrilineal or a system of double descent.

**B FIRST DAY: COMING TO GRIPS WITH CUSTOMARY LAW. THE THEORY**

During the first day, the aim of the Workshop was to explore the different problems experienced when ascertaining and defining customary law and conducting research into it. The first paper, *International Developments in Customary Law - the Restatement of African Law and Thereafter*, was delivered by Prof A N Allott, a former director of the Restatement of African Law project in eastern and southern African states. The project had been pursued under the auspices of the School of Oriental and African Studies of London University.

In the countries in which Restatements were undertaken, only the inferior courts recognized customary law as law. Superior courts treated it as a matter of fact, comparable with foreign law. A major disadvantage of the latter approach was that customary law had to be proved by calling witnesses, and witnesses were usually partisan and hence predisposed to giving a partial (and probably inaccurate) account of whatever rule was in question.

Judges in the superior courts were expatriates and they usually had no knowledge of customary law. For judicial purposes, the textbooks written by anthropologists were unsatisfactory, so judges tended to interpret customary law according to English common-law methods. This tendency led to a marked divergence from practised customary law and to the development of what is now called ‘judicial customary law’.

Before beginning to design a research or restatement project, a number of questions need to be clarified and thought through. Which courts should apply customary law? Should all types of law be applicable in all courts? Which classes of person and in what type of case should customary law be applied? What is customary law in general? How is a particular rule of customary law to be discovered? Which of a number of practices should be given the force of law? What period of time should be considered? Should elders be consulted or should social practices at the time in question be the focus of inquiry? What conflicts arise between general law and customary law (and within customary law itself)?

Social developments, such as education, acculturation to a western way of life, employment and urbanization, have destroyed the rigid separation between traditional African
and western institutions. Because an authentic customary law would have to take account of these vital changes, the courts have a difficult task to find the applicable rules of a current system of customary law. If they turn to authoritative sources - and textbooks are not especially useful in this regard - they discover gaps in the information.

Ultimately, courts have to look to the consumers of customary law. Decisive factors that will influence their inquiry are: the definition of consumers; the definition of the product to be developed in the legal system; the type of resources that can be mobilized; and the cost of the procedure. Various methods are available for ascertaining customary law. Questionnaires may, of course, be distributed, but they do not have the same legitimacy as fieldwork.

A restatement reproduces customary law as accurately as possible, while setting it out in a form that can be understood by judges. Restatements are neither laws nor codes; they are authoritative accounts that function as prima facie evidence and as guides for the courts. The prerequisites for a restatement project, such as those conducted by the School of Oriental and African Studies, are to secure the collaboration of the government concerned and the involvement of people being studied. All existing sources of information must be scrutinized and a full bibliographic base compiled.

Prof. M W Prinsloo of the Rand Afrikaans University reported on Selected Projects of the Codification and Restatement of Customary Law in Southern Africa. Restatement must be distinguished from codification. The former denotes an authoritative and systematic recording of customary law (or a branch thereof) for juridical purposes. While its principle aim is to provide a handbook for those who teach and apply customary law, a restatement may also be used as an indirect method of unifying a customary legal system. Cory’s book on Sukuma Law and Custom (1953) and Cotran’s Casebook on Kenyan Customary Law (1987) are examples of how customary law was indirectly unified.

Codification denotes the preparation and enactment of a major piece of legislation. It is designed to be a comprehensive statement of the customary law on a given topic and it can only be amended by the enacting legislator. South Africa’s major codification of customary law is the Code of Zulu Law. The current Codes derived from a version promulgated in 1878 and revised several times, notably in 1932 and 1967.

The merits of codifying customary law are generally outweighed by the disadvantages. Because magistrates were relieved of the task of discovering an uncertain and unwritten law, they welcomed the Code but it could only be amended by the legislature, which knew very little about customary law. The Code was originally compiled without a deep study of Zulu law: data was obtained from magistrates by way of questionnaires. Hence, in many respects, the Code is not a true reflection of Zulu law. It is frequently not observed by the people nor is it always applied by traditional courts. The current Codes - the KwaZulu Code of 1985 and the Natal Code of 1987 - were enacted with a view to enhancing the status of women and to giving better recognition to customary marriage, but they still suffer the defects of earlier versions.

The first major restatement project in southern Africa was Schapera’s Handbook of Tswana Law and Custom, a work describing Tswana legal principles. It has proved to be endurably popular with courts and laypeople alike, and it is usually held up as a model of its kind. The book was written at a time when no published works on the topic were available; given the speed with which the project finished, the research methods were exemplary.
More recent restatement projects were undertaken by UNISA’s Centre for Indigenous Law. Four projects have been completed: Myburgh (ed) *Indigenous Criminal Law in Bophuthatswana* (1980); Prinsloo *Inheemse Publiekreg in Lebowa* (1983); Myburgh & Prinsloo’s *Indigenous Public Law in KwaNdebele* (1985); and the Centre’s *Indigenous Contract in Bophuthatswana* (1990). A fifth project, dealing with Swazi customary law in the Eastern Transvaal, is still in progress.

The Centre’s method for investigating customary law relies on a memorandum that is used for field research and interviewing panels of informants. Despite criticism, the Centre maintains that this is the most efficient method available. Memoranda function as memory aids and they may be amended to reflect insights gained in the field. Each memorandum is designed to cover the research topic fully, to deal with various themes systematically (without preventing informants from volunteering information), to provide sufficient examples for interviews and to assist in verifying current literature against field data. Those who draft memoranda strive not to impose inappropriate classifications on the materials or give a false impression of a legal system.

A researcher would be required to design field research with due consideration to the research topic, available sources and all other relevant circumstances. The best results can be obtained only by combining all available methods: interviewing informants, observing trials or other juridical events and collecting data from written court reports. While interviewing panels of informants is a primary method for field research in customary law, data obtained in this manner must be checked via the other methods, and several control techniques should regularly be applied to ensure the reliability of information.

The implications of the Namibian Constitution for customary law were extensively debated. In *Customary Law in Constitutional Perspective*, Prof T W Bennett argued that recognition and enforcement of customary law were formerly considered private-law matters, thus allowing the state absolute discretion whether or not to recognize customary law. Since the promulgation of a Constitution containing a justiciable bill of rights, recognition of customary law has been shifted into the domain of public law.

Article 19 of the Namibian Constitution guarantees every person a right to the culture, language, tradition or religion of his or her choice, subject to the rights of others and the national interest. These rights find support in various international instruments providing for the right to self-determination and the protection of minorities and indigenous peoples. When applying a right to culture, it is necessary to determine whether the right and duty-bearers are individuals, groups and/or the state: can a group insist, for example, that all its members be bound by customary law or are only those adhering to the culture bound? It must further be considered what factors will determine affiliation to a specific culture.

The courts have always assumed that application of customary law depends on the personal inclinations of individual litigants, the underlying and unspoken ‘reasonable expectations of the parties’. An agreement to be bound by customary law may be inferred from transactions, conduct, choice of forum and, for want of specific cultural markers, shared lifestyles.

While art 19 of the Namibian Constitution suggests that each individual has an absolute right to participate in the culture of his or her choice, the Lovelace case suggests that all rights are in fact qualified. Groups may lay down criteria for membership in order to protect their identity and resources from outside influence, for instance. Hence a balance must be struck between the individual’s right and the group’s.
Once an individual has acquired rights under one system of law, those rights may not be upset by another person’s decision to adopt a different legal and cultural regime. Nevertheless, individuals cannot be precluded from appealing to general law of the land, including the fundamental rights contained in the Constitution, since these rights now express a national value system.

The right to culture are specifically limited by arts 19 and 66 of the Constitution, which appear to give priority to constitutional rights. However, fundamental rights are normally applicable only between a government and its citizens, not between private individuals. If this restriction on the application of fundamental rights were not maintained, most customary-law relationships would fall foul of art 10(2) of the Constitution (the equality clause), given the prevalence of patriarchy in customary law. Customary law may be adapted to constitutional standards through various techniques, notably the German doctrine of *Drittwirkung* and the judicial balancing of social, economic and political considerations against fundamental rights.

Article 19 of the Constitution provides that the right to culture shall ‘not impinge upon the rights of others’. Culturally sanctioned practices, such as initiation ceremonies, which involve corporal injury might well fall within this provision. In such instances, the courts tend to apply the national system of criminal law, on the understanding that an individual cannot be forced to participate in group rituals against his or her will.

The above limitation on the right to culture is consonant with the further requirement in art 19 that cultural rights do not infringe the ‘national interest’. Where serious harm to an individual or society is involved, neither the victim’s consent to injury nor the sanction of customary law excuses it. The concept of ‘national interest’, however, should not be treated as an equivalent of the colonial repugnancy clause. ‘National interest’ is a highly abstract concept, that must also be read in the light of a right to culture, which in turn requires tolerance of legal and cultural pluralism.

An individual’s right to culture entails the state’s duty to maintain and promote that culture. This duty could in consequence imply maintenance of a court system with procedures and laws familiar to Africans.

In *Legislating in Matters of Customary Law - Issues of Theory and Method*, Dr A Molokomme, Senior Lecturer, Faculty of Law, University of Botswana, set out requirements for research into customary law. She highlighted the need to clarify the area and subject matter of the study, its objective and its beneficiaries. Research may be a two-edged sword: while it is used to discover customary law, politicians may exploit the opportunity to further their interests and those of traditional leaders. In principle, research should not contribute to the disempowerment of groups marginalized by customary law.

The first topic explored in Molokomme’s paper was the concept of customary law. The concept must be ‘unpacked’ in the sense that different interpretations of the subject need to be isolated. A traditionalist view regarded customary law as the corpus of traditions, norms, values, habits and other principles associated with various ethnic groups. Here customary law is equated with and draws its legitimacy from the culture and tradition of a particular community. It is often an idealized version of the law and one with a political content, in that the guardians of customary law maintain their power from regularly applying it.

Lawyers’ customary law - the official version inherited by most countries at independence - while derived largely from court cases, has three sources: decrees of chiefs and other traditional authorities, rules proven in courts during the colonial period and the
precedents of those courts. Such law has undergone a process of institutionalization, since the courts view it from a common-law perspective, and, by using the repugnancy clause, they have introduced western concepts of justice and fairness.

The ‘living’ customary law is a way of life based on norms of behaviour that follow, to varying degrees, a tradition. Inevitably, the tradition has changed and adapted to new socio-economic conditions prevailing in both urban and rural areas. This law is fluid, flexible, negotiable and dynamic. Hence it is difficult to ascertain.

These different versions of customary law indicate that the field is complex and that discrepancies may well exist between the law applied in courts and the way people live their lives.

The second topic of the paper was the theoretical perspectives employed in the study of customary law. Traditionally, customary law been equated with rules and the formal institutions of dispute settlement, notably courts. The weakness of this approach is that it views non-western law through western eyes, and, in so doing, attempts to fit customary law into analogous western categories. Typical categorizations of this nature (which are evident in Isaac Schapera’s work) are the divisions of customary law into private and public law and civil and criminal law.

The theory of legal centralism - ie the state, rather than the people, is the origin of all law - encourages researchers to use techniques that will lead to an idealized version of customary law instead of the living law. The antithesis to legal centralism is legal pluralism, a perspective advanced in the writings of John Griffiths. In essence, pluralism denies the state’s monopoly on legal regulation, implying that the sources and types of regulation are multiple and that they operate outside state structures. People nevertheless treat these non-state institutions as binding both for regulating behaviour and for settling disputes.

Sally Falk Moore names the different groups and interests in society ‘semi-autonomous fields’, each has its own laws which may well deviate from state law. Molokomme found examples of semi-autonomous fields in Botswana in the structures of residence, family, age, sex and economic support, and also in cattle syndicates. These institutions have their own rules and regulations and expectations about proper behaviour and dispute resolution.

If the LRDC, as a state institution, were to legislate on customary law, it would need to be aware of these different spheres of regulation and sanction. None of them is fully autonomous, because the people constituting them are simultaneously members of other groups having different rules. Thus, although a chief, for example, may seek control over his people, he is also a member of a church holding different tenets, and he may repudiate customs, such as the ‘borrowing’ of a women before the marriage to obtain her labour for the harvest. It follows that the state is only one field of regulation and that all fields are continuously competing to regulate their members.

Molokomme reported about her own field research on statutory maintenance. She found that court orders were not complied with, because men, who are in control of the local social fields, objected to the idea of monthly payments of child support. They wanted to preserve the traditional way of doing things - making a single payment of compensation for seduction - on the ground that this practice contributed to the stability of marriage by severing all ties with women impregnated out of wedlock. Because men controlled local social fields, they interpreted customary law in a way that led to an amendment of the law on child maintenance. Fathers could shed their obligations by paying a single, small lump sum.
In summary, techniques and methods for research need a sound theoretical basis and methodological frameworks must be broad enough to take account of the different social fields in a plural society. A legislator intending to intervene in a customary-law setting must appreciate that more than one version of customary law exists.

The third topic of the paper was a Botswana case study on legislative intervention. Molokomme investigated certain statutes relating to family law: the Affiliation Proceedings Act, the Married Persons Property Act (containing new options for property arrangements during marriage) and the Matrimonial Causes Act (introducing the breakdown principle for divorce). These enactments had only patchy success, in part at least because the legislators did not pay sufficient attention to how people were actually living.

Field research in villages on the implementation of the statutory provisions governing extra-marital pregnancy revealed that, although customary practices no longer resembled the idealized, pre-colonial version of customary law, people still recounted it as prevailing law. While an interview technique would have disclosed only that version of customary law, other research methods uncovered a number of other arrangements.

The legislation did not make sufficient allowance for existing social practices, such as the preclusion of a claim twelve months after birth. The vast majority of litigants - village women who often did not know the statutory law, but had no option but to cope with an inaccessible court system alone - resorted first to the customary system. This regime entails a somewhat lengthy procedure, especially when the woman’s guardian is herding cattle and is absent for long periods of time. So the preclusion may operate before the women has exhausted the customary law system.

In conclusion, Molokomme said that, when legislative intervention in a customary setting is contemplated, policy implications must always be considered. Account must be taken of the reality of pluralism: legislation aimed at improving the lot of women may not be enforceable by them. Local communities must be consulted and researchers should be aware that the politicians involved have a tendency, when telling people what they intend doing, to distort issues.

Law reform should be treated as a lengthy process and should include legal education, ie the dissemination of information, so that people affected can make informed choices.

C SECOND DAY: RESEARCH INTO CUSTOMARY LAW

1 Namibian experience

The Legal Assistance Centre (LAC), a non-profit, public-interest law centre based in Windhoek, represented by Adv G Super, discussed Decisions Involving Traditional Authorities taken to the High Court. To foster belief in law as an instrument of justice, the LAC has isolated three broad areas of activity: legal advice and impact litigation, education and training and advocacy and policy work.

Super reported on a northern Namibian case in which, according to the LAC’s findings, the traditional authorities had violated art 12(1)(a) of the Namibian Constitution (requiring fair and public hearings by an independent and impartial court) and art 18 (requiring fair and reasonable administration). The plaintiff had been ordered to pay money and cattle for
allegedly poisoning a customer with local beer. Medical evidence showed that he had died of liver cancer but the tribal authority had apparently not understood the post mortem.

It was not clear whether the basis of the tribal council’s order was compensation for a civil wrong or punishment for the criminal act of murder (over which the council would have had no jurisdiction). The plaintiff had had no opportunity to call witnesses to testify that she was not present at the shop when the customer was present. Unfortunately, the substantive legal issues were not tested, because the High Court set aside the tribal council’s order unopposed.

Concepts of ‘western’ law were incomprehensible and inaccessible to the vast majority of Namibians, who were in consequence alienated from the justice system. The cases referred to LAC involving customary law were those where traditional procedures had been exhausted and one party felt aggrieved by the decision.

Dr H Becker from the Centre for Applied Social Sciences (CASS) discussed Questionnaires for a Qualitative Survey of Customary Law. From CASS’s research experience in northern Namibia, the use of questionnaires drafted in English appeared less than satisfactory. Where informants were not native English speakers, use of English terms and common-law concepts (such as maintenance) had to be carefully considered to avoid the possibility of confusion and misunderstanding.

After its experience with a quantitative survey based on questionnaires written in English, CASS decided that documents to be used as the basis for in-depth interviews should be translated into local languages. It also undertook to prepare a list of technical legal words in Oshiwambo. Nevertheless, grasping the connotations of concepts in different languages was not easy.

In spite of a somewhat vaguely worded affirmative action provision in s 10 (1)(g) of the Traditional Authorities Act and notwithstanding ministerial power to enact regulations to that end, few women are found in the lower echelons of traditional leaders. Highly ranked traditional authorities are evidently attempting to induct younger persons and women (probably in order to consolidate their power base), but the lower ranks are more resistant to change. Although local rulers usually said that they had no objection to female rulers, women complained that they had no access to traditional courts.

The basis of traditional leaders’ legitimacy is now obscure and it is uncertain whether their rule is generally accepted by their subjects. While people continue to use traditional courts - probably for want of a better alternative - many complaints were heard about the traditional authorities’ bias and corruption.

WLSA Botswana expressed concern about the assumption in Namibian research that traditional leaders were a source of law. To assume that such institutionalized agencies made the rules violated the principle that research should focus on how the people themselves deal with their day-to-day problems. WLSA also contended that research should not concentrate on trouble cases, which are both few and possibly not representative of community behaviour.

Prof Sandra Burman from the Centre for Socio-Legal Research said that, if the household is taken as the unit of study for research in urban areas (especially in squatter areas), patterns of household composition should not be neglected, for household size and membership may change rapidly. Different criteria, such as who is eating out of the same bowl, may be used to define households. Urban-rural linkages must also be investigated.
For research in urban areas, care should be taken to identify local leaders, because traditional as well as new forms of leadership may exist, not to mention the gangs that operate in both urban and peri-urban areas. How these different groups interact and manipulate one another should be a topic of inquiry.

Dr. Lori Ann Girvan representing the (SSD) reported that it was undertaking research into community-based resource management, which involved exploring systems of tenure and such related matters as inheritance. The project was concentrated on existing laws, with view to ascertaining rights and access to land. WLSA Zimbabwe, however, cautioned that field research should focus on problems rather than rules. It also felt that research findings should be channelled back in the legal system, whether as measures of law reform, as arguments to be used in court or as proposals to restructure the system of legal administration.

The question for customary law, therefore, should not be ‘Is a restatement needed?’ but ‘How can the legal system be made more responsive to people’s problems?’ Reformulating the matter in this way is essential, for customary law is in constant change. Hence the basic two issues are: which gateway should be taken as a starting point and what arguments should be used to define a relevant customary practice?

II Foreign experiences

Women and Law in Southern Africa (WLSA) started as a group of lawyers who wanted to influence the development of family law in southern Africa, especially to uplift the status of women. Initially it was hoped that, from various legal sources (statutory, judicial and customary), changes could be recommended and that they would be put into effect. The group began, in other words, with a legal centralist perspective, the ordinary normative approach to law. WLSA undertook to map and publish the legal position of women in southern Africa, ie, in Botswana, Lesotho, Mozambique, Swaziland, Zambia and Zimbabwe.

J Stewart, WLSA Zimbabwe, presented a paper on field research that took Women as a Starting Point. As the title suggests, this approach departed from conventional legal academic categorizations by taking women as a starting point. The issue was how to uncover, from a practical point of view, the legal and other problems women faced within their communities. Some of these problems may be open to legal solutions and some can be ascribed to the inconsistencies between the official and living versions of customary law. Because the researcher’s task is to investigate the reality of women’s lives, a multi-disciplinary framework was required.

WLSA Zimbabwe did not attempt to restate, codify or uncover the customary law, as that would have been a separate exercise. Because it was not possible to research the legal system in its entirety, in 1988-89 WLSA began (without asking women themselves) to identify issues believed to be the source of women’s problems. Under the broad principle of equality, issues of inheritance and maintenance emerged. Maintenance was selected as the first topic for research, and, with women as a starting point, the principal questions were: which women to focus on (the economically advantaged or disadvantaged?), what to find out about them? and where to conduct research (in urban or rural areas)?

To warrant a comparative approach, the method initially employed was to administer a uniform questionnaire of about a hundred questions in each of the six countries of southern African. From the findings it appeared that women knew the law and its remedies but for various reasons they might not take action or their actions might ultimately be unsuccessful. If a defendant had no income, for instance, there was little point in suing in court. It might prove
impossible to enforce a judgment in the woman’s favour. A woman’s father might be willing to support her, provided she did not sue the child’s father. Because these and other factors (such as a woman’s personal and cultural background) influence decisions, they are obviously relevant to research, and a pilot study was considered necessary to reveal them.

A study that asked why people made one choice or another could uncover further factors critical to decision-making, notably access to resources and custody of children, but such a broadly based study was liable to get out of hand. Thus, for future research, WLSA decided to adopt a clear problem-based approach. While it knew what the beginning and end points of this project were, it did not necessarily know where the intervening journey would take it.

B Donzwa Strategies for Research into Customary Law and Women’s Rights proposed a broader framework for research strategies. Customary law is clearly subject to a number of criticisms, one of them being that, because men (traditional chiefs and elders, anthropologists, judicial officers and court interpreters) controlled the sources of law, the sources were biased. The views of these people on the living law, its past and its present-day changes, could still not be discounted, but other views, including those of the young and people living in urban areas, also had to be consulted.

To establish a research framework, WLSA considered various theories - women in development, women and development, gender in development - together with the perspectives of legal centralism, normative legal theory, legal pluralism and semi-autonomous fields. All these theoretical approaches were analyzed to determine their strengths and weaknesses. Eventually, an eclectic mix was chosen that accommodated the appropriate elements of all of them.

WLSA created so-called ‘action wings’ in the various countries it investigated. Research teams collected data, while action wings repackaged and disseminated the findings. A strategy was employed for the formation of these teams. WLSA dismissed the legalistic approach that had directed its maintenance study in favour of multi-disciplinary research teams. It realized that work is initially complicated by the different perspectives each discipline brings to bear on the project, but ultimately, because customary law is largely a set of behavioural forms, the reason for certain practices must be explored from a sociological point of view.

The sampling method depended largely on the government of a particular country. In order to persuade policy-makers to carry out reforms, only certain representative methods, such as national surveys or qualitative studies, could be employed. To research inheritance WLSA chose qualitative interviews, namely, case studies and interviews, which allowed informants to explain how they perceived their problems and the eventual solutions. If surveys only are used, much valuable information may be lost.

There might be a danger of state courts not differentiating between different customary laws, and thereby may bring about hardship to the different families. The two major ethnic groups of Zimbabwe, the Shona and Ndebele, have different inheritance laws. Courts tend to apply Shona law, whereby the eldest son is appointed as heir, although according to Ndebele law all children benefit from the estate, the youngest son being allowed to retain the homestead in order to care for the surviving parent until the parent’s death. Because customary law is socially constructed to take account of gender roles, gender was an important issue in all research.
Once WLSA had decided to use women as the focal point, it sought to understand female problems and how the law addressed them, rather than looking to see how women fitted into the law. Women were thereby placed in a development perspective. To gain an holistic view of customary law and to ensure that final recommendations represented the common weal, however, samples included both men and women and cut across all social strata. In Zimbabwe, the categories chosen for sampling were large and small-scale farming communities, high-density suburbs (for the low-income earners) and low-density suburbs (for the high-income earners), mining compounds, rural resettlement areas and communal lands.

Success of the project depended on a link to government and coordination with other institutions active in similar fields. (In fact most WLSA members were also members of organizations pursuing similar interests.) It was also important to have a strategy determining use of the materials collected from research, because in order to apply pressure on policy-makers data had to be repackaged and disseminated in a suitable form. The joint appeals of NGOs are more likely to compel government to take action, and to that end workshops were organized to share experiences of similar research projects.

Research into the way that the courts applied customary law revealed a dichotomy between the courts’ version of the law and what people do. To bridge the gap, courts need to be given research findings so that they can interpret the law more realistically. In order fully to appreciate customary law, in particular the emergence of a living law, its origins must be unearthed, its application both by the people and by the courts must be analyzed and implicit power relations and the implications of human rights must be assessed.

M Bbuku-Chuulu, WLSA Zambia, Field Research on Customary Law: Method, Organisation and Problems Encountered reported on WLSA’s research into inheritance. The project began two years after Zambia promulgated a law on succession, which with a few exceptions, such as family property, had abolished customary law. The new law was clearly not working in practice, since the widely spread practice of ‘property grabbing’ from widows (and to a much lesser extent from widowers) was persisting. On the basis of WLSA findings and the recommendations it submitted to government, the law was finally amended.

Any research acceptable to policy-makers would have had to be representative. Thus WLSA’s greatest challenge was to devise a comprehensive research plan, because Zambia is a large country, containing 73 ethnic groups, with three different systems of succession: matrilineal, patrilineal and bilineal. Admittedly most groups in the country are matrilineal (although not all of them are virilocal); five groups are patrilineal and one bilineal. It was finally decided that all three systems of succession had to be covered and account had to be taken of the urban-rural dichotomy.

Because WLSA does not use research assistants, each researcher had to speak the language of her area of research. Lusaka was selected as the urban area (which for purposes of ethnicity, represents a mixed sample).

In order to obtain an holistic picture, a multi-method research approach was chosen. Both primary and secondary sources of data were used. WLSA acted as a participant observer; it conducted interviews with widows and widowers, key informants (such as community leaders) and judges and magistrates; and it observed court proceedings. The secondary sources included all the literature on the subject, whether sociological, anthropological or legal. Court records from all levels of courts were examined.

A pilot study was undertaken to test the methods. One method that merits closer scrutiny was the in-depth interview based on a check-list of prepared questions. (Although
WLSA planned 30 interviews for Lusaka and 20 for each rural area, more interviews were actually conducted.) The process of identifying informants took several forms. Some widow(er)s were already known to WLSA; others were introduced, some were discovered through initial contacts; especially in towns, some were referred by the national women’s legal clinic, the police camp, the Departments of Social Welfare and Legal Aid and by institutions such as the Red Cross.

Interviews normally lasted for two to three hours, although much time was wasted finding informants, who were often absent or not available, and setting up meetings. The actual interviews were difficult to conduct. Informants often broke down as they relived old memories; and especially in rural areas (although this problem was also true of office settings in town) privacy was a problem, since bystanders were immediately attracted to the interview.

Practical problems may not be underestimated. In 1992, the year of the research, a major drought was causing starvation. Before beginning an interview, researchers frequently had to buy food or malaria tablets. Transport was another problem, as appropriate vehicles are difficult and costly to come by in Zambia and the roads were in poor condition.

P Chileshe-Musanya, WLSA Zambia, reported on the investigation of court records between 1987 to 1992 (two years before the new succession law came into force and three years afterwards). The main purpose was to discover whether the Act had had any impact. Obtaining access to records, especially those kept by the lower courts, was difficult, because records were poorly kept, translations were often incomprehensible and handwriting was difficult to decipher. None the less, the records contained interesting information on customary law and its relationship to the general law.

WLSA also attended court hearings and funerals, both of which were time-consuming events. In local courts a day, not a specific time, was given for hearings, and, if a party did not appear, cases were adjourned. Funeral observations yielded valuable information, but strangers were not welcome at post-burial meetings, for the occasion was reserved for relatives.

Three group discussions were held at each research site, the aim being to obtain the views and attitudes of both men and women. If a man of status attended, however, people were afraid to voice their opinions, lest they contradicted him. In towns, group meetings were organized through churches and NGOs. While interviews with key informant were also conducted, with a view to balancing the views of men and women, it proved difficult to find key informants who were not male.

In Researching the Living Law in Urban South Africa, Prof S Burman reported on her field research since 1983 in Cape Town related areas. She looked at the effect of existing law on women, children and the family and how it operated in practice, with the aim of pinpointing reform for South Africa’s legal and social welfare systems. She found that a system of outreach to the community makes research results more widely available and feeds additional relevant information back into the research.

Cape Town has the longest history of urbanization and industrialization in sub-Saharan Africa, which suggests that developments in customary law in the city may well indicate the path of similar trends elsewhere on the continent. Research methods varied, depending on the nature of specific projects, but they included sampling of records, observation of formal and informal courts, in-depth interviews with judges, magistrates, lawyers, paralegal workers, court officials and other civil service and municipal bureaucrats, social workers, religious leaders and litigants.
In many projects life histories were taken of people in samples located outside these categories. This source proved most valuable for discovering facets of life not otherwise evident in the academic literature or official records. Obtaining such histories, while costlier than quick surveys, produced more reliable and textured data.

Instead of legal topics, the projects focus on issues, such as the problems arising out of the divorce process, illegitimacy and the changing shape of the family under circumstances of urbanization, migration and apartheid. Customary law was relevant to almost every study, but it was often a law bearing no resemblance to versions found in textbooks or court records.

Three types of change have occurred in customary law. First, the meanings, purposes and forms of various customary practices have changed. Research on the ambiguities of modern marriage payments, for instance, showed that people commonly marry according to two procedures and that the function of bridewealth was sometimes uncertain. It might be seen as a substantial gift, a bridewealth payment or damages for seduction (paid upon the birth of each child). Because traditional formalities have become attenuated in towns, disagreement on the meaning of these payments usually surfaced only on divorce.

Secondly, as a result of urbanization and a growing ignorance of earlier traditions, the legal consequences of customary institutions have changed. For instance, the implications of birth outside any form of marriage or customary union (accounting for some 70 percent of African births in Cape Town) are no longer what they used to be. Although such a child is legally issue of the matriline, the sons of unrecognized unions are often initiated in their paternal family, indicating a blurring of the status of legitimate and illegitimate.

Variations in practices relating to seduction damages in urban areas are further evidence of this trend. These examples show how current practices do not necessarily accord with the law manuals: on occasion they have become almost unrecognizable as 'customary law'.

People often incorporate certain civil-law ideas into township practice, and parties themselves are sometimes uncertain which law they follow. Confusion is perhaps inevitable, given the widely differing lengths of time that people have been urbanized and their differing contacts with rural areas since coming to town. Thus, any two opposing parties in a case do not necessarily work with the same version of customary law, even if they are both from the same rural area.

A pervasive problem is which law to apply, when the textbook version is patently no longer applicable to the lifestyle of either party, even when each thinks he or she is operating according to custom. Although customary law is changing so rapidly that restatements are likely to be overtaken by events, people still need some degree of certainty as to the law applicable to their problems.

There are no perfect solutions for this problem, for customary law was developed for small, homogeneous groups, in which the interests of the individual were secondary to the good of the greater whole. Local neighbourhood courts have to solve problems of mixed ethnic groups and different versions of customary law - problems that are exacerbated on appeal, because judges do not come from the communities concerned. A possible answer could be to require evidence of new practices, notwithstanding the difficulty of obtaining unbiased testimony and the tendency of elders to protect their own interests.

Another answer would be to legislate a national system of laws that does not pretend to match practice. Leaving aside the risks inherent in ‘social engineering’, this solution could
be appropriate where people are dissatisfied with a hotchpotch of small and informal community courts (that might well be operated by dictatorial individuals or gangs). Even so, if a system of law imposed on the entire country were to operate effectively, the consent and cooperation of the nation would first have to be obtained, at least at the level of community leaders.

When customary law is applied in a fast-growing and increasingly diverse society, where individualism is rapidly becoming a key value, mismatch between tradition and social practice is unavoidable. The result is an ever-growing number of anomalies and injustices. Thus it seems inevitable that, at some stage in the process of African urbanization, radical intervention is necessary to reshape the legal system.

D THIRD DAY: JURISPRUDENCE AND COURT ADMINISTRATION

WORKGROUPS AND RECOMMENDATIONS

I  JURISPRUDENCE AND COURT ADMINISTRATION

In his paper Customary Law in a Plural Setting - Some Theoretical and Methodological Observations, Prof A G J M Sanders said that jurisprudence invites us to look at law as a three-dimensional phenomenon, namely, as a construct of rules, as a living process and as a moral concern. Most people in Botswana would agree that the rule of law was preferable to the rule of man, but they would not agree on how to achieve and implement the dominion of law.

Law based on consensus is effective law, and African customary law is not only the law of a social consensus but also the moral or natural law. Hence, if customary law were to be replaced by European law, problems would arise.

Law reform is a matter for professionals. In Botswana, most of the reform statutes since Independence were passed without consulting the people. (The Customary Courts Act and the Customary Law Act, however, provide some interesting features.) To achieve the reform of customary law or its harmonization with the general law, jurisprudence, natural law and comparative law are vital areas of inquiry.

In her second paper on the Administration of Customary Law in the Court System in Zimbabwe, Ms B Donzwa explained that Zimbabwe has a single legal system in which various systems of personal law operate. Since 1890, the general law has been Roman-Dutch common law and statute. For purposes of personal status, intestate succession, marriage, divorce, legitimacy and property rights, it co-exists with traditional, indigenous systems of law. In criminal, constitutional and commercial matters, indigenous law is not applied.

The wording of colonial Charters and Orders-in-Council, which empowered the courts to apply customary law, led to inconsistent, if not contradictory interpretations of customary law and hence to a conflicting set of precedents. Parties can presently choose whether or not to be subject to customary law, and, where they have not agreed, the Customary Law and Local Courts Act 2 of 1990 provides criteria determining the applicable law.

Although successive statutes urged the courts to look to texts, oral testimony and other available sources on customary law, research has shown that these sources may
contradict one another. Thus the courts tend to draw from precedents, even if they are of doubtful authority, are irrelevant or have become outdated.

Donzwa described Zimbabwe’s court structure both before and after Independence. Since March 1993, the structure has comprised a Supreme Court, a High Court, magistrates’ courts (which have original jurisdiction and appellant jurisdiction for cases emanating from community courts), community courts (which also have original jurisdiction of $1,000 and powers to retry appeals from primary courts) and the primary courts (courts of first instance with jurisdiction limited to $500).

Under the Customary Law and Local Courts Act 2 of 1990 (which came into force in March 1993), primary and community courts are presided over by headmen and chiefs, respectively. Apart from the restrictions imposed on their jurisdiction in financial terms, neither of the local courts has jurisdiction to determine the validity of wills, dissolve marriages, determine maintenance cases or rights in respect of land or other movable property.

Magistrates have jurisdiction in both customary and general-law cases. Because the local courts are not courts of record, appeals from them to magistrates involve hearing matters afresh. Time and money are therefore saved by proceeding directly to a magistrate’s court in the first instance. Since the introduction of small claims courts, with jurisdiction of $2,000, the viability of local courts has been even further eroded.

The Customary Law and Local Courts Act recognizes the dynamic quality of customary law by defining it as ‘the customary law of the people of Zimbabwe, or of any section or community of such people, before the 10 June 1891, as modified and developed since that date’. This definition assumes that the content of law before and after this date can be readily identified, and the courts assume that a uniform system of customary law is applicable to all ethnic groups.

WLSA found clear evidence, however, of a divergence between the official law governing appointments of heirs and actual practice in both rural and urban areas. While families attempt to distribute assets in a manner most beneficial to the deceased’s family as whole (and may even go as far as appointing a widow the heir), the Supreme Court regularly insists on only the eldest son succeeding as heir. This dogmatic approach also runs against Ndebele custom, which allows the appointment of a youngest son as heir.

In certain areas, customary law has slowly given way to the general law. Grounds for divorce, for instance, are identical, regardless whether the parties married under customary law or the general law. Similarly, regardless of the type of marriage, apportionment of property on divorce is regulated by the Matrimonial Causes Act, 1985, and maintenance is governed by the Maintenance Act [Cap 35]. Moreover, since African women were freed from perpetual minority by the Legal Age of Majority Act, 1982, they can be awarded custody and guardianship of their children.

The administration of customary law is complicated by the promulgation of statutes giving no indication whether customary law is to be affected. These enactments are subsequently interpreted by the Supreme Court as overriding customary law.

While the courts should endeavour to accommodate changing circumstances in their interpretation of customary law, they are often restricted by the doctrine of precedent and the literal rule of statutory interpretation. They are trapped, on the one hand, by the positivist doctrine that law is fixed, definable and subject to amendment only by the legislature, and, on
the other hand, by the realist doctrine that judicial decisions involve policy considerations based on a society's economic, social and political conditions.

In Zimbabwe, customary law is gradually been submerged by the general law in issues of marriage, divorce, maintenance, status and custody and guardianship of children. This process, due largely to legislative intervention and judicial activism, has had the general effect of enhancing the position of women.

II WORKSHOP PROCEEDINGS

From a panel discussion involving the above contributors, a number of questions considered fundamental to research into and restatement of customary law were posed.

-Because certain provisions of customary law might be superseded by the Constitution, constitutional validity was a major issue that had to be addressed before undertaking field research or restating the rules.

-Varying degrees of urbanization have led to significant disparities between groups, even in urban areas, where some people have been urbanized for generations and others only recently.

-What rules of customary law should be deemed currently binding and what rules will be binding in future?

-What should be done in cases where the courts overrule a single rule of customary law as unconstitutional?

-Research should not disempower women and other marginalized groups. What role should researchers and the state play in ensuring that this does not happen?

-How to decide what law to apply to different ethnic/racial groups in issues such as inheritance where the setting is customary but the economic circumstances of a deceased would dictate application of common law to determine the protection of creditors and the surviving spouses and children.

Legal pluralism is not exclusive to African societies. It is a common phenomenon and, even in case of the common law, where Roman-Dutch law may be deemed an 'official' law of white people, a 'living' body of custom also exists. Until recently, racist assumptions determined the treatment of native populations as minorities and exceptions to the general law. A new way of looking at African legal systems would be to regard customary law the general (or majority) law, in which case the law of the white minority would become the exception.

The main purpose of any legislation, decision-making or dispute settlement is to balance interests. In a democratic society, political aims must be transparent and so too must be the weight attached to any interest. In a justiciable bill of 'absolute' human rights, do certain values carry greater weight? Is freedom from torture, for instance, more important than the equality of women?

Because customary courts are thought to undergo a 'self-purifying' process, it is essential that their procedures allow for the introduction of new ideas and solutions. People in Namibia are demanding change, but the Traditional Authorities Bill will entrench the positions and salaries of 95 to 99 per cent of the existing male traditional leaders. And the proposed Community Courts Bill intends using traditional leaders as judges for the community courts. While the aim of bringing justice closer to the people is laudable, issues of greatest concern to
women and children may well be decided by courts staffed almost exclusively by men, unless the Community Courts Bill guarantees the appointment of women as judges and assessors.

The process of adjusting customary law to the Constitution generates particular problems. If customary law is overridden by the fundamental rights, its guaranteed position in the Namibian legal system may be jeopardized. Customary law is itself in a stage of transition, and the possibility that its rules may be declared unconstitutional creates legal uncertainty.

From the experiences of WLSA Zimbabwe, the assumption that field researchers could ‘find’ rules of customary law and that women could be lifted out of a customary regime proved misguided. Decisions of the High Court and the community courts showed that courts were using many different versions of ‘lawyers’ customary law. WLSA discovered that communities had found their own customary solutions to many problems. In contravention of established customary rules, for instance, women were allowed to become heirs to their deceased husbands’ estates, an arrangement that families had decided would best preserve support structures. WLSA found that it is therefore essential to investigate underlying patterns of interaction, where new strategies are always being invented.

Because customary law is in a process of transition, it is difficult to know exactly what its rules are. Although lawyers might find the idea sacrilegious, the most promising way forward for research is not to frame questions on the basis of laws but rather than on problems.

Only if people involved in disputes (such as those created by the ‘greedy brother-in-law’, ie the ‘grabber’ of family assets, syndrome) understand the fundamental principles of customary law, do they have the power to negotiate. Traditional methods of research had the potential of disempowering an already disadvantaged group, and this danger will persist as long as political decisions on equality are postponed and constitutional provisions are vague. Politicians are not prepared to enact legislation that clearly empowers women, because such a step would undermine the very foundations of customary law - which, since central government has appropriated political power, is now the Zimbabwean chief’s sole source of authority.

Stress was laid on the importance of conducting research and gaining empirical knowledge before taking policy decisions. Many examples could be cited of ‘top-down law reform’ in African countries which had failed to achieve its goals.

The Namibian LRDC has always considered the constitutionally guaranteed equality of women as the government’s mandate and duty to amend all the laws of the land, be they statutory, common or customary. And the Commission takes seriously the principle that persons should not be disempowered through the assumptions on which research and reform are based. Even if legal changes are made, the success of reform will depend upon who applies and interprets customary law in the community courts, since infringement of the rule of equality is not always seen as a straightforward issue of justice.

While western-type justice is formal justice, with an emphasis on legal certainty and rules, African courts seek substantive justice, implying less concern with rules and more concern with satisfactory solutions for consumers.

The panelists were unaware of any research into the economic patterns underlying customary rules, although such studies would help to understand the relationship between socio-economic and legal change. Research into urban customary law in Cape Town, however, has revealed that people manage to live with contradictions between their values and
actual practice. For instance, although for half a century 70 per cent of African births in Cape Town townships were out of wedlock, if an unwed girl became pregnant, her family would still be extremely upset.

Can customary law be reformed to secure women’s equality, or will the system change of its own accord? WLSA Botswana recommended investigating what is actually happening in regard to specific issues of customary law, such as bridewealth, custody and property relations. When contemplating such research, it seems both necessary and fair to present informants with all the different forms of customary law, to compare these versions with the reality of daily life and to discuss the whole package. People should be encouraged to talk about change; they should be asked how they deal with issues now and how they did so in the past. Research results in ‘normal’ and conflict cases must be quantified, as solutions may vary within a community.

A question specifically posed was how Namibia should react to the ‘shrivelling’ of customary law under the influence of constitutionally entrenched human rights. Part of the answer would be to determine the extent to which existing customary law was in conflict with the Constitution, to educate chiefs to adapt customary law to the Constitution and to decide who should adjudicate issues of constitutionality. The participants decided on the following workgroup issues:

(1) **GROUP A: jurisdiction and procedure of the courts**

The Group reported that the issue was so complex that it gave rise to more questions than possible answers. At the head of the list of problems was access to the courts. Another problem was the dichotomy between general and customary law (and their continued operation alongside each other). Determining the courts’ jurisdiction in view of art 19 of the Constitution (which allows every person to pursue their own culture, tradition and practices) was especially problematic: a traditional court’s competence to apply customary law, for instance, seems to depend upon the parties’ consent. If, under the Constitution, one party is entitled to opt out of customary law, how effective would the jurisdiction of a traditional court be?

Specific questions were posed for further research. How should conflict of laws issues be resolved? What mechanisms could ensure that the ‘good parts’ of customary law be retained and the ‘bad parts’ eliminated?

The Group came to the following conclusions.

(a) Chiefs should be provided with proper education on the implications of the Constitution for customary law.

(b) A restatement of customary laws was critical to securing effective operation of the courts.

(c) Jurisdiction to apply customary law should not be confined to the courts of a particular community. If a case requiring application of customary law arose in a court incompetent to apply that law, a costly transfer would be necessary to another court. Hence all courts in the land should have authority to apply customary law.

(d) Individuals should in principle be allowed to opt out of customary law, but criteria for doing so would have to be statutorily fixed because changing status raises a variety of legal problems. According to the Traditional Authorities Bill, the jurisdiction of traditional courts will depend upon a litigant being subject to customary law (and belonging to the tribe and residing in the area where the cause of action arose) or voluntarily subjecting him or herself to
the court. Hence, once summoned, a litigant, even one who had opted out of customary law, would have to appear in order to contest the court’s jurisdiction. If the court were to overrule the plea, the party would have no choice but to appear.

(e) Traditional courts should have no jurisdiction over criminal matters and their civil jurisdiction should be limited in monetary terms. Conversely, the criminal justice system should be reformed to incorporate such customary ideas as compensation for the victims of crime (and compensation should be automatically payable).

(f) Extensive research should be undertaken into customary land tenure and criminal law.

(g) Both the High Court and the Supreme Court should be competent to decide on constitutional matters at the instance of an affected party. Because traditional courts were unlikely to raise the constitutionality of customary rules, there seemed little point in giving them the power to do so. Nevertheless, in order to avoid application of customary law, the question was posed whether litigants in traditional courts could invoke a constitutional right? It was suggested that the court should refer the issue, or the entire case, to a higher, competent court. (Much more thought had to be put into the possibilities of transferral.) Presiding officers at all levels of the judicial system should be empowered to raise issues of constitutionality mero motu. Litigants, who may not know their rights and may therefore not appeal, should not be the only parties capable of taking this course of action.

Whether customary law is compatible with the Constitution or not presupposes knowledge of existing customary law, and in this regard reference to customary law in a written form, whether by restatement or codification, would assist constitutional litigation.

Under art 66(2) of the Constitution, Parliament has the power to repeal customary law. Even traditional authorities themselves may change customary law to comply with constitutional standards. Ndonga authorities in northern Namibia, for instance, had changed customary law to give widows certain rights of succession. In any event, s 11(b) of the Traditional Authorities Bill brings the powers of traditional authorities into harmony with art 66 of the Constitution by providing that any customary law inconsistent with the Constitution or other statutory law shall be invalid to the extent of the inconsistency.

(2) GROUP B: legal pluralism and unitary systems of law; integration of customary, common and statutory law; catering for the individuals or whole communities who are at different stages of social development

Principal themes pursued in this Group were whether to adopt a problem-oriented approach to research; deciding who the beneficiaries of reform should be; how to solve the problem of securing women’s access to maintenance, inheritance, compensation in criminal and land and other natural resources.

The Group accepted that the population was spread across a social continuum, from those totally embedded in a traditional African way of life to those who were completely ‘westernized’. The question then arose how to achieve justice for people living at different points of this continuum. In seeking an answer, the Group considered how a law reform commission could assist in the political process of decision-making.

The Group believed that a set of questions had to be researched before the law reform commission could make any recommendations. A major objective, that should guide research into living law, was to discover conflict of laws rules and how and why they are applied in practice. Research hypotheses and priorities could be identified by asking: which group will
have advantages in the national legislature? which law is used in what situations? which system of law would people prefer?

In considering the last question, a researcher should begin with actual cases, for posing hypothetical questions is a less fruitful line of inquiry. On this assumption the following questions could be pursued. Which system of law was chosen and why? What did the people concerned know about the law? What system of law was actually applied? Was it a mixture of laws, as WLSA discovered in their research? How do courts justify the application of hybrid rules?

Research hypotheses should be formulated on the basis of the following variables: length of residence in urban and rural areas, education, economic status, power, status (as married, unmarried, widowed or parent), gender, ethnic affiliation, geographical area, religion, political party allegiance, ideological leanings, age and lineage association (on the assumption that the more influential the lineage, the more customary law will benefit its members).

A further set of variables concerns access to the courts and conflicts of law. Who stands to gain advantage from the system (paying special attention to single mothers and widows, youths and children and so-called illegitimate children)? What is the language of the court? Are litigants subject to one or other of two different laws or do they manipulate the systems?

Research undertaken in Botswana showed that a mixture of different laws allowed the more powerful men to manipulate the system, hence power relations become an important variable to be considered. A case was related where the 'husbands' choice of customary law left his ex-wife with virtually no property. The woman could have appealed to a state court, but, in order not to prejudice her remarriage prospects, she did not do so in case she upset the elders.

(3) GROUPS C AND D: ways of ensuring that research and legislation on customary law do not disempower marginalized groups

To meet this aim, and bearing in mind the problem of objectivity, researchers must identify relevant groups, be aware of possible methods and terminology, and they must be prepared to educate informants on legal rights in exchange for the information they are given.

The Groups recommended use of research methods that would have the effect of empowering the marginalized. This proposal has the following implications.

- When deciding the research aim, a target group of beneficiaries must be identified. Marginalized groups were deemed to be women (whether unmarried or married), disabled women, ethnic minorities (such as the San), the poor and illiterate, rural youth and gais. Deciding who are marginalized, however, depends on the issue selected for research. (Some members of the Groups felt that target people should be involved in research, since they have a direct interest and can reveal the law in action.)

- The identified target group(s) must be consulted.

- A problem-oriented, participatory methodology must be developed.

- Careful choices must be made about language and terminology.

- In-depth research methods, such as case studies, group discussions and individual interviews, should be preferred.

- Legal education should be built into the research method.
- When households are interviewed, the researcher should talk to as many people within the household as possible.

In the case of inheritance, for example, surviving spouses and orphaned children can be identified as vulnerable groups. The entire project should not focus on these groups to the exclusion of all others, however, for the representativeness of a sample can lead to problems when justifying recommendations for reform. (A sample could still be representative without involving a large number of informants - a topic that needed further discussion.)

To decide what information about customary law should be assessed in a field study, the first task should be to define the sources of law, bearing in mind that norms set by state legislation are not necessarily applied in practice. The Constitution, pre- and post-Independence legislation are primary sources of law, but in addition people’s perceptions of these laws should be taken into account.

When considering customary law as a source, attention should be paid not only to versions given by traditional leaders but also to those of other strata of society, such women, the young, urban dwellers, traditional and community leaders. The self-stated or written laws compiled by certain communities in Namibia are another source of law, together with court decisions and anthropological studies.

When scrutinizing such materials, researchers should concentrate on how norms change, people’s perceptions of change and how they manage it. Are only certain rules changing or are the underlying principles changing too? Inquiring into the living reality of law - determining how people cope in specific social fields - is a complex task, especially when deciding what information should be gathered during a field study.

Interviews should be issue-centred rather than abstract. To pose inheritance or maintenance as issues, however, was thought to narrow the field of inquiry unduly. The focus should rather be broadened to include property, the concept of property, property relations and access to resources.

(4) GROUP E: which questions should guide field research into customary law in Namibia?

What sources of customary law are authoritative and whose account of it should be considered? How are conflicts of customary law resolved? How is customary law to be defined? Who is (or should be) governed by customary law? Should all the courts be competent to apply all the systems of law in the country? What language and terms should be used when describing customary law? How are conflicting sources to be cross-checked?

On the question of the sources of customary law, it was felt that additional sources should be considered, such as the opinions of judges who were not involved with customary-law cases, government reports and the decisions of High Courts. These materials should be disclosed to interviewees in order to discover what they think about them. Trouble cases should not be an exclusive concern, for ordinary or standard cases are also relevant. Ideally, everyone’s account of customary law should be taken into consideration, not only the version given by traditional leaders or assessors.

Great care should be taken to cross-check sources. No one statement should be accepted as correct, definitive or complete, because it could be the result of a particular interest or it might have been influenced by pending or recently decided cases. All such biases must be detected.
The definition of customary law was considered especially complex. Even when employing a problem-centred approach, a working definition would be necessary, because customary law carries a sanction, which implies that it can be distinguished from social practice. Although the definition of customary law in the Namibian Traditional Authorities Bill was considered circular, no other legislation seems to have provided a more satisfactory definitions. The most practical way of defining customary law may be through authoritative sources and cases.

While all customary is based on usage, practice in itself is not sufficient to define law, since law must be generally accepted as binding by the people in question. Nevertheless, the opinion of the community subject to a particular system of customary law should determine what is considered law. A restatement could stipulate its own definition, by simply declaring that whatever is contained in the restatement is customary law. In conclusion, it was felt that all definitions are functional and therefore partial.

When discussing who is, or should be governed by customary law, the Group concentrated on the latter part of the question. It thought that general choice of laws were necessary in, for example, cases of contract and personal status. Certain connecting factors would indicate the applicable law, such as nationality at a national level or ethnic allegiance to a specific system of customary law. At the inception of colonial rule, definite geographic boundaries marked the ethnic character of customary law and determined its application, but today the situation is much more confused, because most people are to a lesser or greater degree exposed to all kinds of law, depending on the case and the circumstances. Deciding which law to apply (bearing mind the difficulty of defining customary law) presents another insoluble problem.

The Group agreed that at present there is a transition between two kinds of legal system. Botswana’s Common Law and Customary Law Act attempts to define the applicable law by providing strict legal guidelines, rules that may well not be followed by the customary courts. These choice of law rules, as well as those in Zimbabwe, may none the less provide insights and grounds for reflecting on how to counteract manipulation of applicable laws and fora.

Two situations should be sharply distinguished: who in general is subject to customary law, and, if a person is subject to customary law, then to which system?

The Group recommended that all courts should have jurisdiction to apply all the laws of the land. (Even in Britain the government is under pressure to recognize a plural legal system, one that would take account of rights generated by cultural and religious systems of law.) It would follow that the status of customary law would have to be upgraded to become a substantive law applicable in all courts. Integration or unification of the national legal system would be facilitated as a result.
PART TWO: THE ORIGINAL WORKSHOP PAPERS

DAY ONE: COMING TO GRIPS WITH CUSTOMARY LAW

A CUSTOMARY LAW IN NAMIBIA

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I INTRODUCTION

Namibia, like many other African countries, has a huge rural population. Due to certain historical developments many of these people are subsistence farmers living in areas set aside by the former colonial regime specifically for particular ethnic groups.

These specifically designated areas, now commonly referred to as ‘communal areas’, are scattered all over the country from South to North and East to West. The resolution of disputes and dispensation of justice in these areas is usually the prerogative of traditional leaders. They apply their own customs and traditions to solve disputes brought before them.

Due to lack of resources and manpower, few civil courts have been established in these areas. For those who live in the communal areas access to justice is thus inhibited not only by a paucity of courts but also by a lack of financial resources. For a major part of the population in Namibia their only recourse to justice today is still the ‘courts’ of chiefs and headman. It is therefore clear that customary law plays a very important part in the daily lives of many Namibians.

Customary law also finds wide acceptance amongst many Namibians:

‘Any legal system which seeks the firm basis of popular support cannot afford to ignore the law which the people use to regulate their domestic affairs.’¹

These facts were apparently recognized by the founding fathers and mothers of the Constitution. Article 66 of the Constitution of the Republic of Namibia provides that:

‘Both the customary law and the common law of Namibia in force on the dates of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.

Subject to the terms of this Constitution, any part of such common law of customary law may be repealed or modified by Act of Parliament and the application thereof may be confined to particular parts of Namibia or to particular periods.’²

By virtue of these provisions, the status of customary law has been elevated and entrenched. This position is strengthened if we take into account the approach to interpreting the Constitution suggested by Mohammed J, as he then was, in S v Acheson.  

‘The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.’

II RECOGNITION AND THE APPROACH OF THE COURTS

The treaty of Peace and South West African Mandate Act 1919 gave effect to the Mandate for South West Africa, established pursuant to the Peace Treaty of Versailles. In general this Act delegated administration of the territory of South West Africa (as Namibia was then known) to the South African Government.

In 1919, the South Africa Government introduced Roman-Dutch law as the common law of Namibia by way of Proc 21 of 1919. Section 1(1) thereof provided that:

‘The Roman Dutch law as existing and applied in the Province of the Cape of Good Hope at the date of coming into effect of this Proclamation shall be the common law of the Protectorate and all laws within the Protectorate in conflict therewith shall to the extent of such conflict and subject to the provisions of this section be repealed’.  

Although Roman-Dutch Law was introduced to the territory as its general law, customary laws were retained in so far as they were not in conflict with Roman-Dutch law or statutory enactments.

In Uazengisa and others v Executive Committee of the Administration for Hereros and others, Levy J restates this principle as follows:

‘... whatever customary law of the Hereros or any other people living in South West Africa is still applicable, such customary law is only applicable subject to legislative enactments of this country and ... only such customary law that has not been repealed or modified by common law or by legislation still remains.’

The application of this principle was qualified, however, by the full bench of the Supreme Court of South West Africa in its decision in Kakuja v Tribal Court of Okahitua

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3 1991 (2) SA 805 at (Nm) at 813A-B.
5 Supreme Court of South West Africa, unreported, October 1983 at 9.
and others, when Strydom J (as he then was) introduced the following qualification to the Ndisiro decision.  

'The Ndisiro case went in my opinion too far .... As far as Hereroland is concerned, the common law and statutory law, in my opinion exist side by side with black law and custom and the latter was not replaced or amended by the former except for those instances where legislation specifically so provides ....'

Prior to Independence and the adoption of the Constitution, our courts thus accepted and applied indigenous customary law subject to certain qualifications. This principle is clear from the judgments quoted above and was concretised by Bethum J, in the Kaputuaza decision, where he stated:

'It seems to me, however, that in so far as Herero customary law might be applicable, such law is part of the law of South West Africa of which the Court can take judicial notice. Consequently it need not be proved in the same manner as Foreign Law. In the process of taking such judicial cognisance this court may inform itself from history books.'

The South African locus classicus on how customs are to be proved is the judgment in Van Breda and others v Jacobs and others. Whoever relies on the existence of a custom must prove that it has long been established; it is uniformly observed, and that it is reasonable and certain. Bethum J, in his landmark judgment in the often-quoted case of Kaputuaza v Executive Committee of the Administration for the Hereros and others, restated these requirements for the acceptance of custom under the indigenous law of Namibia.

'The custom observed in the reserve (as opposed to customary law) can be proved in the same manner as any other custom, i.e. by ordinary persons who have knowledge of the nature of the customs and the period over which they have been observed. It has authoritatively been held that the party relying on such a custom must prove it beyond reasonable doubt (Van Breda and others v Jacobs and others 1921 AD 330 at 333).'

It must at all times be borne in mind, however, that the courts' acceptance and application of customary law were not unqualified. According to Ndisiro v Mbanderu Community Authority,

'This section indeed does give a headman criminal jurisdiction but only in respect of crimes arising out of native law and custom, not common law of statute, and native law and custom means only so much of the native law and custom which still survives at the present time.'

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7 Ndisiro v Mbanderu Community Authority 1986 (2) SA 532 (SWA).

8 At 301F-G.

9 1921 AD 330.

10 1984 (4) SA 295 (SWA).

11 At 301H-I.

12 1986 (2) SA 532 (SWA) at 536F-G. Also quoted with approval in the same judgment at 536H-I is R v Detody 1926 AD 198 at 202. Customs, of course, cannot prevail over the plain and unambiguous meaning of a statute.

13 See also the judgment in Kakujaha quoted earlier.
III THE LAW OF INTESTATE SUCCESSION AS APPLICABLE TO NATIVE NAMIBIANS

Succession in Namibia is governed by the common law and the Succession Act. Very briefly stated, the position is that the wife or husband, as the case may be, of a deceased and his or her children born in wedlock will be the heirs of the estate, and, failing them, other blood relatives.

As far as native Namibians are concerned, however, a totally different approach has been adopted. It was intended that, in the first instance, their estates would devolve according to native law and custom. Section 18 of Proc 15 of 1928 thus provides as follows:

'(1) All movable property belonging to a native and allotted by him or accruing under native law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under native law and custom.

(2) All other property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom.'

Subsection 9 of the same section states, inter alia, the following:

'The administrator may make regulations not in consistent with this Proclamation -
(a) prescribing the manner in which the estate of deceased native shall be administered and distributed;
(b) dealing with the disinherit of natives;
[(c) Deleted by National Assembly Act 27/34/7(b)];
(d) prescribing tables of succession in regard to Natives; and
(e) generally for the better carrying out of the provisions of this section.'

In terms of GN 70 of 1954, a regulation under the provisions of s 18(9) to the following effect was issued:

'If a Native dies leaving no valid will his property shall be distributed in the manner following:

(a) If the deceased at the time of his death was -
(i) a partner in a marriage in community of property or under antenuptial contract; or
(ii) a widow/divorced, as the case may be, of a marriage in community of property or under antenuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, the property shall devolve as if he had been a European.

(b) If the deceased does not fall in a class described in paragraph (a) hereof the property shall be distributed according to native law and custom.'

1413 of 1934, as amended.
15Native Administration Proc 15 of 1928.
The provisions of s 18 of the Proclamation as well as the regulations issued in terms thereof were not made applicable and were not brought into force until 1974, when Proc R192 of 1974 was issued. The result of the enactment of GN 70 of 1954 (and its subsequent enforcement under Proc R192 of 1974) was to apply, with a few exceptions, the common-law rules of inheritance to the estates of native Namibians.

Certain areas were again excluded. These were defined in the Government Notice referred to above as areas north of the ‘police zone’ and the ‘police zone’ is defined and has been amended by amongst others by GN 14 of 1956, GN 21 of 1957 and GN 110 of 1960. The police zone thus appears to be the areas previously known as Kavango, the Eastern Caprivi Zipfel, Ovamboland and Kaokoland.

To determine the law of intestate succession applicable to a native Namibian the following categories of people should be distinguished.

(i) Those who have not entered into a civil marriage, ie those who married only in terms of their own particular customary rites and usages.

(ii) Those who married in terms of the civil rites, which means a marriage solemnized by a person who is legally recognized or appointed as a marriage officer. This group should again be divided into those whose marriages were contracted north of the police zone and south of the police zone.

(iii) Spinsteres and bachelors: those who have never been married and thus died single.

The legal position would therefore seem to be the following. Customary law applies to all the estates of those who were never married at all, those who married according to customary rites and usages and finally to those married under civil rites but north of the police zone. The common-law rule of intestate succession applies to the estates of all those who were married, whether they were subsequently divorced or widowed, in terms of civil rites but south of the police zone.

The complexity of customary law was emphasized by Lewin, who states that:

"The place that Native law occupies in the legal system of South Africa is so uncertain that its problems are more complex than those which lawyers normally face. Moreover, these problems arise in every branch of Native Law: not only in the law of persons with its question of marriage, guardianship of children and inheritance, but also in contract, in delict, and in the innumerable questions of court practice and procedure ...."  

The complexity and difficulty referred to by Lewin presents itself, in my submission, quite clearly in cases involving the administration of estates under native customary law.

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16 Application of the Provisions of Section 18 of the Native Administration Proc, 1928 (Proc 15 of 1928) (South West Africa), and of the Regulations Published under GN 70 of 1954 (South West Africa), in the Territory of South West Africa: ‘By virtue of the powers vested in me by section 27 and 18(9) the Native Administration Proc 1928 (Proc 15 of 1928) (South West Africa), read with section 2 of the South West Africa Native Affairs Administration Proc 1958 (Union Proc 119 of 1958), I Megiel Conrad Botha, Minister of Bantu Administration and Development, hereby declare that the provisions of section 18 of the said Native Administration Proc, 1928, and the regulations published under GN 70 of 1954 (South West Africa) shall apply in the whole of the territory of South West Africa, excluding the areas referred to in paragraphs (d), (c) and (f) of section 2(1) of the Development of Self-Government for Native Nations in South West Africa Act, 1968 (Act 54 of 1968)."


18 See Report of the Technical Committee on Commercial Farmland (n1) 108.
First of all, one needs to determine the customary law applicable to a particular estate. This question can only be determined by reference to the tribe of the deceased. It is not, however, clear what the position will be where a person belongs to two different tribes (which may happen if the deceased's parents were from different tribes) having diametrically opposed systems of inheritance. Many tribes in Namibia follow a matrilineal system of inheritance, and in such a case it is suggested that the system of the mother of the deceased should take precedence.

Another important provision of GN 70 of 1954 quoted above is s 3, which reads as follows:

'All the property in any estate which falls within the purview of paragraph (a) of regulation (2) shall be administered under the supervision of the native commissioner of the district or area in which the deceased ordinarily resided and such native commissioner shall give such directions in regard to the distribution thereof as shall seem to be fit and shall take all steps necessary to insure that the provisions of the proclamation and of these regulations are complied with.'

The effect of this provision is that estates of native Namibians devolving in terms of customary law are to be administered in the manner prescribed by s 3. Since the office of native commissioner was abolished, their functions have been taken over by district magistrates.

It is questionable whether such an arrangement meets the exigencies of modern times, especially regarding the protection of the interests of minors and creditors, as envisaged by the Administration of Estates Act. As far as estates devolving in terms of customary law and traditions are concerned, no regulation exists at all, except a requirement that such estates must be dealt with according to the customs and tradition of the particular deceased.

IV THE MARITAL REGIME APPLICABLE TO NATIVE NAMIBIANS

'Community of property, community of profit and loss, and the marital power apply in all marriages unless expressly excluded by an antenuptial contract entered into by the spouses before their marriage, notarially executed, and registered in the deeds of registry.'

What is stated above is the general legal position in Namibia at the present moment.

The position with regard to marriages contracted between native Namibians according to civil rites was supposed to differ radically from the above. Such marriages were intended to be out of community of property, unless the parties had made a declaration in the presence of a magistrate in which they expressly stated that their union should have the consequences of a marriage in community of property.

 Provision was made for this eventuality by s 17 of the Native Affairs Administration Proc 15 of 1928. Subsections (6) and (7) of this section read as follows:

'(6) A marriage between Natives contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses; provided that in the case of a marriage contracted otherwise than during the

\[19\] 66 of 1965.

subsistence of a customary union between a husband and any woman other than his wife it
shall be competent for the intending spouses at any time within one month previous to the ce-
lebration of such marriage to declare generally before any magistrate, native commissioner or
marriage officer (who is hereby authorized to attest such declaration) that it is their intention
and desire that community of property and of profit and loss shall result from their marriage,
and thereupon such community shall resolve from their marriage.'

In terms of GN 67 of 1954, the provisions of subsection 6 were brought into force on
1 April 1954. The relevant paragraphs read as follows:

'Now therefore it is hereby notified that the administrator has been pleased, under the
powers conferred upon him by the said section 27, to declare and make known that the provi-
sions of subsection 6 of section 17 and of subsection 3 and 9 of section 18 contained in chap-
ter 4 of the said Proclamation shall apply in that portion of the territory north of the police zo-
ne as defined in the first schedule to the Prohibited Areas Proc, 1928 (Proc 26 of 1928) 3/4
and shall be deemed to have come into operation in that area with effect from the 1st day of
August 1950.'

The legal position therefore seems now to be as follows. All civil marriages contracted
between native Namibians in Namibia have the legal consequences of a marriage in community
of property (provided, of course, the parties did not enter into an antenuptial contract prior to
the marriage ceremony), except for marriages contracted in certain specifically excluded areas.
These areas are the same as those that were excluded for purposes of the law of interstate suc-
cession.

An interesting situation presented itself in Namibia when a Namibian who had married
a fellow Namibian while in exile abroad returned home. Under the well-known rule of private
international law, because they retained their domicile in Namibia, the law governing the mar-
tial property regime was determined by reference to their country of domicile, in other words,
Namibian law. If a particular Namibian’s domicile happened to be north of the police zone, his
marriage would be out of community of property, while the opposite would be true of Nami-
bians domiciled south of that zone.
B INTERNATIONAL DEVELOPMENT IN CUSTOMARY LAW: THE
RESTATEMENT OF AFRICAN LAW PROJECT AND THEREAFTER

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I THE JURIDICAL BACKGROUND TO THE RESTATEMENT: THE
PLURAL LEGAL SYSTEMS OF AFRICAN COUNTRIES

To understand the legal problems posed now, it is necessary to recapitulate the shape of Brit-

ish colonial and ex-colonial legal systems in African territories formerly controlled by Britain

Whatever policy other colonizing countries may have followed, Britain’s general
strategy in its newly acquired territories was, first, to introduce a general legal system as the
territorial law, and thereafter to give recognition, limited or unlimited, to the indigenous
customary and religious laws it found there. The general law was usually based, in East, West
and Central Africa, on the enacted and common law in force in England at the date of the
acquisition (or at some later date). In the southern African territories, this general law was
based on the Roman-Dutch, rather than the English, common law. This policy was later
sanctified under the title of ‘indirect rule’.

The local customary laws were usually recognized under certain restrictions, the most
important of which were that their rules should not be in conflict with the general law, and that
they should not be repugnant to justice or morality. The customary laws for a time continued
to be applied by ‘native courts’, which were tribunals constituted more or less in accordance
with customary law, although as time went on non-customary elements, especially of staff,
procedure and jurisdiction, were introduced.

Depending on the territory, jurisdiction over customary law and the native courts or
tribunals applying it, was either segregated from the ordinary courts that applied the general
law (with appeals never reaching the non-customary inferior or superior courts) or was
integrated with the ordinary courts in their appellate jurisdiction. The former was a parallel
system of courts, the latter an integrated or partially integrated one.

The dualism thus introduced into African legal systems extended to the subjection to
the laws, as much as to the competence of the courts. Broadly speaking (but varying with the
territory), African customary laws applied solely or mainly to ‘Africans’, while the general law
applied - in some respects - to the non-African section of the population, and in other respects
(for example, criminal law) to all. Which laws would apply to which persons and in which
categories of case was regulated by the rules of ‘internal conflict of laws’.

When independence was achieved, this dualism was still generally in place.

II THE PROBLEMS IN APPLICATION OF CUSTOMARY LAWS

These problems were the following.

-Which courts could apply customary law? Should all types of law in principle be
applicable by all types of courts?
-To which classes of person, and in what kinds of case, should customary law be applied? As society evolved, and ‘Africans’ chose to adopt more of the important legal institutions of the general law (for instance, marriage and wills), should the ambit of all laws be made uniform, with customary laws applying where appropriate to ‘non-Africans’?

-What was the definition of ‘customary law’? If based on the practices of the people, which of these practices should be given the force of law? What about changes in and the evolution of customary laws (the time factor)? Was customary law unchanging and timeless, or should the fact that it was altering be recognized?

-What about conflicts between customary laws, for example, in towns?

-How were courts to ascertain the content of the customary laws they were called on to apply - the problem of authoritative sources (especially a problem with non-customary courts hearing cases governed by customary law)?

-From the strategic point of view, what was the eventual goal to which the legal system should be directed? Should it be continued parallelism, integration, supersession of customary law or unification and codification?

III THE ASCERTAINMENT OF CUSTOMARY LAW

During the colonial period, especially in the 1950s, there was much discussion of these issues. Some officials wished to develop customary law, others to suppress it. Should it be codified? The greatest difficulty lay with the ascertainment of customary law. Authoritative texts were largely absent (with some striking exceptions, such as works by Schapera, Rattray and Sarbah) or they were written by anthropologists and administrators. There was a general will to do something - but what?

One line of attack was to obtain declarations of customary law from native authorities, which could then be given legal force as subordinate legislation. Another was to rely on judicial decisions of superior courts. Specific enquiries by trained people were also instituted, such as those by Cory, Pogucki, Allott and Gulliver. But these were sporadic, both in extent and style, and they were not immediately usable as legal texts by trained lawyers. There was no general, comprehensive survey of customary laws. The French had instituted such enquiries in some of their West African possessions, as had the Germans before them in East Africa.

In many territories, in the non-customary courts called on to apply customary law, the court would require proof of its rules by persons expert in them, thus treating customary law as a matter of evidence.

If customary laws were to remain important sources of legal rules and institutions, it was vital that courts called on to apply them should be able to ascertain what they were.

IV HOW TO DO THE JOB: PROBLEMS AND ANSWERS

To leave things as they were was not an adequate response. And yet some experts and judges felt that as soon as one commenced the investigation and reduction to writing of a customary law, one had radically changed its character, even if the recording had not been put into statutory form. Customary law became non-customary, it was said, thus losing its main advantage: that it represented what the people, through their constant practices - which could vary from
time to time - had adopted as having that obligatoriness, which gave its rules a legal character. This was a contradiction or incompatibility which had to be overcome.

Next, whatever the sources drawn on for discovering the current and applicable rules of customary law, its presentation in writing must be in a form which the ordinary judge or magistrate could use; so the form must be analogous to that of other legal texts. Philosophical and sociological disquisitions would not meet this need.

Lawyers must therefore be in intimate control of the process of investigating, recording and statement. But, it was argued, lawyers, even legal academics, were not trained to do such a job. Their approach would necessarily be too legalistic. So a special kind of lawyer was needed.

Contemplating all these points, and bearing in mind British experience in India in investigating and recording customary laws of the Punjab, I decided that some form of 'restatement' was the answer. I borrowed the idea from the American Restatements of the common law. These were authoritative, comprehensive, careful and systematic statements of common-law rules in such fields as torts, contracts and property. Necessarily cast in semicodified form, they were still not codes, as they lacked the force of legislated law. Instead, they were the most accurate and precise statements of what those producing them had concluded were the main principles and rules as evolved by the courts, and, as such, courts and practitioners alike could turn to them as guides.

The Restatements did not supersede the decisions of the courts, nor did they bind the hands of the courts in deciding future cases. So the law could grow and develop as seemed best to the courts from case to case.

V THE RESTATEMENT OF AFRICAN LAW PROJECT

This project was set up in 1959, with generous aid from the Nuffield Foundation, as a major endeavour of the Department of Law at the School of Oriental and African Studies in London. I was its first Director. We recruited a team of research officers to carry out the work under central direction and on a collaborative basis.

Central to the restatement idea was the fact that the law of a country is a possession of that country. As such, we, the researchers, had to respect the public role of the law. Our research therefore differed from the private initiatives of anthropologists and other interested parties. Since we expected that the Restatements would acquire semi-official status, we would only conduct research in an African country with the active support of the government of that country.

Among the countries which most actively accepted and collaborated with the project’s investigations were Kenya, Malawi and Botswana. Many other countries - Sierra Leone, Ghana, Nigeria, Lesotho, Swaziland - welcomed its investigations, however, and gave assistance and facilities.

1 Bibliography and scrutiny of written sources

Although we were careful to emphasize that it was the current customary law, and not that of some earlier period, that should be recorded, it was nevertheless valuable to the understanding of the present law to survey what had already been discovered and written about each customary law, as a base for future research. To this end, our officers were instructed to prepare a
comprehensive bibliography of all that had been written, in whatever form, about the customary laws they were investigating.

These sources included: published and unpublished monographs, reports, etc (whether government or private), prepared by anthropologists, sociologists, administrative officers, judges, commissions of enquiry; declarations, by-laws, or statements of customary law by indigenous customary and local authorities; and the judicial decisions, if any, of higher and inferior courts.

(2) Law panels

By arrangement with government, we constituted law panels for each locality or law-area. Special efforts were made to ensure that the membership of such panels, while being expert in the customary law, also was representative of the various interest-groups (for instance, women) who might have something to say, both about the existing law and its reform.

(3) Field research

Research officers then conducted extensive field enquiries, making use of the law panels, but not confining their attention to them, consulting whoever appeared to be specially qualified.

(4) Provisional statements and scrutiny

The research officer then prepared provisional statements of the law in systematic form. These were not only criticized locally, but were also sent to the Restatement office in London. Here they were subjected to critical comment by joint meetings of all the Restatement personnel in London at that time. Clarifications and modifications were called for where necessary. Special attention was paid to questions of terminology.

(5) Final Restatements

In modified form, if necessary, the drafts were then finalized.

(6) Publication

By arrangement with the law publishers, Sweet and Maxwell, in London, the Restatements were then published in book form, as well as being made available without charge to the local government for use by it and its organs. It was for the local government, whether through legislative means or otherwise, to determine exactly what status such Restatements should be given, and how they might be employed by the courts.

(7) Choice of topics for restatement

We decided to concentrate on those areas of the customary law that were most likely to survive in the near future, in other words, family law (including both marriage and divorce), succession and property. In some countries, however, other areas of customary law were investigated.
(8) Use of the Restatements

The Restatements were never envisaged to function as codes, but rather as strong prima facie evidence of the customary law on a given topic. As such, they could either be accepted and relied on by a court or overridden by the court if other evidence or subsequent developments had demonstrated that some modification was necessary. It was also envisaged that, after the lapse of a certain time, a similar process should be set in train for review and revision of the Restatements.

VI CRITICISMS OF THE RESTATEMENT IDEA

There have been several critical comments on the restatement notion. In the first place, it was said that the Restatements would freeze customary laws at a certain stage of their development. Such freezing was already occurring through judicial decisions, statutory declarations, etc in some countries. There were two answers to this criticism.

First, not to investigate the customary laws doomed them to distortion through ignorance, or even their disappearance, as well as running the risk of injustice through incorrect decisions. Secondly, we had in any event specifically provided that there should be scope for departure from them, and for the development of the customary laws.

In the second place, it was said that the whole exercise was fallacious, because the Restatements purported to state rules of customary law, and it was argued that this would distort the character of customary laws, which lacked fixed rules. This assertion is highly contestable - most customary laws, even those which allow a large scope to discretion in the settling of cases - have rules of greater or less rigidity. It is the researcher's job faithfully to record the discretion ary element - if there is one - in the customary law.

It was said that the exercise was misguided, in that the rules (conceded to exist) and institutions of the customary law had little or no meaning without the sociological background which explained and qualified them. One of course concedes that a better understanding and more just application of any legal system - of western type or not - will follow if courts understand the background to it. But there is a limit to the amount of non-legal content that one can put into a legal text. There is nothing to prevent such content being inserted in a restatement wherever it may be necessary to explain a rule or institution.

VII OPPORTUNITIES FOR REFORMING THE LAW

One should not lose sight of the fact that restatement is also a useful, if not essential, preliminary to reform of the law.
C SELECTED PROJECTS OF THE CODIFICATION AND
RESTATEMENT OF CUSTOMARY LAW IN SOUTHERN AFRICA

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I TERMINOLOGY: RESTATEMENT AND CODIFICATION

Restatement entails an authoritative and systematic recording of customary law or a branch thereof for juridical purposes. The main aim is to provide handbooks on the subject for those who teach and apply customary law, in particular courts and legal practitioners. A restatement does not result in a legislated code.

Allott explains the purpose of restating customary law in Africa in the following terms: ‘These restatements were intended only to be guides, prima facie evidence of the customary law, and not codes.’ This definition eliminates much of the criticism levelled against the restatement of customary law, for example, that restatement would freeze the law at a given stage in its development or that it would exclude all other evidence pertaining to this law at any particular time.

The principal aim of restating unwritten customary law is to attain certainty regarding its content and to make available suitable written sources. Realistically viewed, the first product of a restatement project cannot in all respects be said to be a correct exposition of customary law. Nevertheless, researchers should not be discouraged from embarking on such a project, as any legal textbook is subject to correction. Furthermore, customary law is continually subject to change by the people, and completed restatements of customary law should therefore be periodically revised and updated.

Restatement is also a useful method for the unification of customary legal systems. Even if no direct effort at unification is made, restatement of the customary law of a number of tribes in a particular ethnic group contributes considerably to unification, for example, by restating congruent rules as general rules. This objective guided a number of projects, and astonishing similarities were revealed between important elements in the legal systems of the tribes concerned.

Cotran, for instance, adopted this approach when restating the family and succession laws of tribes in Kenya. He said that local variations were recorded, but where a variation was a matter of detail rather than principle (for example, in the amount of compensation required),

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2 For a reply to some of the criticisms see Allott op cit 68.
unification was effected by agreement. Although this type of restatement is not a direct method of unifying laws, it serves to indicate the corresponding rules and is an important step preceding unification by means of legislation.

Substantial differences in tribal legal systems within the same ethnic group, however, can be eliminated only by a direct method of unification in the restatement. Cory adopted this method when restating laws of the ethnic groups in the western part of Tanzania.

He followed four steps in the process of unifying Sukuma law. First, he gathered the unwritten law by questioning a representative panel of informants. In the initial draft report, the corresponding rules were recorded and variations were clearly indicated. Secondly, this draft report was submitted to a council of chiefs and their councillors (nominated by the Sukuma Federal Council) for discussion and possible unification. After due discussion, agreement on unification was achieved by selecting the best rule, not simply the rule observed by the majority of tribes. Proposals for unification were then laid before a full council of chiefs for final approval. Lastly, a Swahili text of the unified Sukuma law was submitted to the tribes for their comments, and, on receipt of these, the final texts on Sukuma law in Swahili and English were completed and published for use in the courts.

An indirect method of unifying customary legal systems by way of restatement was adopted by Cotran in his book *Casebook on Kenya Customary Law* (1987). In this work Cotran arranged the material according to subject matter rather than by presenting the material of each ethnic group in a separate chapter, as had been done in previous restatements.

Codification means the preparation and enactment of a major piece of legislation designed to be a comprehensive and exhaustive statement of the applicable customary law on a given area or topic. A code can only be amended by the enacting legislator. The disadvantages of codifying customary law out-weigh the advantages. A code serves as a certain and convenient source of reference for the courts, but it runs the risk of becoming law that is neither known nor generally accepted. In the case of customary law, the most serious problems with a code are: it represents a fundamental change in the way in which law is authorized as law (the people are the law-makers of customary law, a code is enacted by parliament) and it makes customary law rigid and difficult to amend.

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6See H Cory *Sukuma Law and Custom* (1953) xii-xvi.


8See also J C Bekker & P Maithufi 'The dichotomy between "official customary law" and "non-official customary law"' 1992 *Journal for Juridical Science* 55-7.

9Allott (n7) 22-3.

II CODIFICATION PROJECTS IN SOUTH AFRICA

It is not deemed necessary to deal here with the Transkei Penal Code of 1886 and Maclean’s *Compendium* of 1856. The former was a codification of colonial law, based on English and Roman-Dutch criminal law, and it contained only two minor references to customary law: confirming that practice of witchcraft was a crime and recognizing communal responsibility for stock-theft. Maclean’s *Compendium* was not a code but a handbook for the guidance of magistrates. Without being too critical of a work written more than a century ago, mention should be made of its main deficiency: that it was compiled by a number of officials and missionaries who had not made a proper study of the relevant customary law.

The Code of Zulu Law, is the original and only codification of customary law in South Africa. The original Natal Code of Zulu Law, promulgated in 1878, was drawn up over a period of two years by a specially constituted board. It served as a guiding document for magistrates. The Code of 1891, drawn up by Mr W Y Campbell, formed a basis for the present Codes. It consisted mainly of private law, covering such topics as marriage, lobolo and inheritance, but it also contained a few elements of public law, including provisions on the Governor’s status as Supreme Chief and the position of chiefs and familyheads. The 1878 Code remained in force in KwaZulu and the 1891 Code in Natal until 1932, when both were replaced by a revised version, which was in turn replaced by the code of 1967.

When commenting on the function of the Code in 1924, Dr Brookes said that: ‘Quite certainly, the Natal Code has not been a complete success: equally certainly, it has not been an utter failure.’ He noted that magistrates had welcomed a written source of law, because they were relieved of the difficulties and uncertainties of discovering customary law, but the result was that the Code could only be amended by the legislator, which knew very little about it. Finally, he noted that a code should reproduce the actual structure of the society for which it was enacted, not a structure which the codifier thought ought to exist.

Notwithstanding the Code’s distortion of Zulu law and the discrepancy between its provisions and African practice and opinion, the courts were bound by it. While noting that district and higher courts in Natal and KwaZulu applied and interpreted the Code clearly, Professors Bekker and Maituhi said (and this was at a time before the distinction between official and unofficial customary law was popularly accepted) that:

‘For many years the Code ... served as a customary law ready reckoner in Natal and as a point of departure and for comparative purposes in other provinces as well’.

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12See E H Brookes *The History of Native Policy in South Africa from 1830 to the Present Day* (1924) 219-22.


15Brookes (n12) 222.

16Brookes (n12) 221.

17T W Bennett *Application of Customary Law in Southern Africa* (1985) 44.

18Bekker & Maituhi (n8) 56.
The inadequacies of the Code may be summarized as follows. It was compiled without a deep study of Zulu law, and materials were obtained from magistrates by way of questionnaires. In many respects it does not truly reflect Zulu law, some provisions differ materially from Zulu law and attitudes. It is often neither observed by the people nor applied by traditional courts. The Code of Zulu Law is regarded 'as a model of how not to do it'. On the other hand, it is reported that the people have made at least some of the provisions of the Code their own, for example, the presence of an official witness at a wedding ceremony and the registration of customary marriages.

In 1981 the Code of Zulu Law underwent a drastic transformation. The KwaZulu Government enacted a new code with a view to enhancing the legal status of women and to affording customary marriage better recognition. In Natal a similar code was enacted in 1987, in part with the object of reforming the law pertaining to women and customary marriages and in part with the aim of bringing the law in Natal into line with the law in KwaZulu. Despite the government's praiseworthy intention to elevate the status of women and customary marriages, the present Codes are to some extent tainted by the inadequacies of earlier versions: the use of unscientific methods of compilation and non-observance of some provisions.

III RESTATEMENT PROJECTS

(1) Schapera's Handbook of Tswana Law and Custom

Schapera, a professor of social anthropology, published his *Handbook of Tswana Law and Custom* in 1938. This work is regarded as a model restatement of customary law. The material was gathered from discussions with Tswana informants, observation of everyday behaviour, attendance of cases in the traditional courts and from perusing official records of the Administration and the unpublished notes of academics. When the first edition of the book was prepared, no published works on the subject were available.

Because officials of the former BechuanaLand Administration and tribal authorities at the various centres rendered 'willing co-operation' (and the author drew on fieldwork notes made during several visits to the Bakgatla from 1929 onwards), it was possible to complete

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19See, inter alios, Bennett (n17) 44; De Clerq, Sibiya and Sibhoseana Report on the Indigenous Law of the Mathenywa Tribe of the Ingwavuma District in KwaZulu (1985) 78 and 86; Allott (n7) 16-18.

20Allott (n7) 18.

21Bekker & Maithufi (n8) 56.


24Field research was done for substantial periods with the Bakgatla and Bangwato and for short periods with the Bakwena, Bamalete and Batlokoa.

25For a brief explanation of the research methods see I Schapera *A Handbook of Tswana Law and Custom* (1938) xi-xiv.
the research in a reasonably short period. Four years after the invitation to undertake the research was received in 1934, the handbook was published.

The primary object of the project was to record ‘for the information and guidance of Government officials and of the Tswana themselves, the traditional and modern laws and related customs of Tswana tribes of the Bechuana Land Protectorate’.

In other words, Schapera was asked to provide a source of customary law for practical use by the administration, the courts and the people of the country.

The material in the book is arranged in terms and categories familiar to western legal science, but it also includes classifications and concepts well-suited to Tswana law (and thus foreign to western law). Related cultural practices were aptly used to explain some laws. The topics of the sixteen chapters are: the social structure of the tribes, the nature and sources of Tswana law, tribal constitutions, family law, property, contract, wrongs (in private and criminal law) and procedure.

Roberts regards the Handbook as deservedly popular: ‘it has gone through many editions and there are well used copies all over Botswana today in administrative centres and court rooms’. (He adds that the Handbook is used by tribal courts and offices.) I agree fully with the preceding remarks and can testify that this book is also used by the Basotho of the Republic of South Africa. In addition, it is widely used for teaching and research purposes in southern Africa.

Considering the research methods, the positive approach and co-operation of government and tribal authorities, the duration of the project, the exposition and explanation of the material for juridical purposes, the publication and availability of the book and its wide use by the courts and people, we can conclude that this project achieved its aim, and should indeed be regarded as a model for a restatement project.

The Handbook did not escape criticism, however. Roberts refers to the ‘normative repertoire’ of the explanation, presentation and categories of the book and maintains in his ‘friendly argument’ that Tswana law and customs ‘do not have and never have operated like legal rules, and that Schapera’s presentation of them in that way in the Handbook conceals an important part of their character’. Yet, as Schapera explained in the preface to his book, the aim was not to include a discussion of theories about customary law, but to describe general Tswana principles.

(2) Restatement projects of the Centre for Indigenous Law

The Centre for Indigenous Law is a research centre in the Faculty of Law at the University of South Africa. Its members include researchers attached to the Rand Afrikaans University and the University of Stellenbosch. Since the inception of the Centre, five major restatement pro-

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26 Schapera op cit xi.
28 Roberts op cit 85.
29 Schapera (n25) xi and xiii.
jects have been undertaken, four of which have been completed, while the fifth is still in progress. This discussion will be confined to the main features of the research methods used in the Centre's restatement projects.

(a) Memorandum for field research

The Centre considers it essential to compile a memorandum or guide for interviews in the field. The purpose of such a memorandum is to cover the research topic fully, to deal with various themes systematically (yet without inhibiting informants from giving information voluntarily), to have sufficient examples available while interviewing and to facilitate the verification of existing literature against the field data. A memorandum is not a questionnaire, but a memory aid and a checklist of topics and items to be covered. It is a scientific instrument, which forms the basis for interviews, aimed at obtaining information about unwritten customary law.

The memorandum contains all the themes on which information must be obtained. It also contains summaries of the literature for comment by informants and examples of cases for discussion in the field. To test the reliability of the field data the memorandum should include items entailing various control techniques. A systematic exposition of the material in the memorandum is also useful for recording and using field data and for cross-referencing. This applies in particular to a project designed to study the law of several groups. Informants' discussions and responses often give rise to new questions that were not included in the original memorandum. In the case of a study of more than one group, the memorandum can therefore be amended to include whatever new questions arise. These questions can in turn be put to informants in other groups.

The memorandum may be amended from insights gained in the field, and it does not bind a researcher to an inappropriate classification of phenomena or to an incorrect presentation of a group's law. Inappropriate material (such as the definitions, classifications and examples) from western legal systems, notably legal expressions in Latin, should not be used.

In compiling the memorandum, an author should bear in mind that informants who are unused to conceptualizing law in abstract terms may find it difficult to supply information not related to specific disputes, events or other facts. Abstract ideas, definitions and legal notions should be avoided in the memorandum. Provision should be made for informants to illustrate their answers with examples from actual cases, disputes or events.

Proper attention should be given to the completeness of the memorandum. It is not important that the items be described in detail. What matters is that, for the sake of completeness, each item to be studied should be included in the memorandum.

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31 A Restatement of the Customary law of the AmaSwazi of the Eastern Transvaal by L P Vorster & F C de Beer.


33 See also Botha 'Memorandum' in Van Niekerk & Vorster op cit 53.
To compile a memorandum a sound general knowledge of customary law is required. Moreover, before compiling the memorandum, researchers should familiarize themselves with the legal principles, judicial processes and customs of a people by studying the literature and other available sources. Other memoranda could also be consulted, but with care, because each study is unique and each memorandum must be compiled to fit the individual circumstances of the study. Thus, when items are derived from other memoranda, they must be suitable and valid for the proposed group.

(b) Field research methods

There are three general methods of field research in customary law: interviewing expert informants, observing trials and other juridical events and collecting data from the written reports of traditional courts and magistrates’ courts. Researchers should design their primary method of field research with due consideration to the research topic, available sources and other relevant circumstances.

Generally speaking, interviewing a panel of informants is suggested as the primary method of field research in customary law. Within a reasonable time, ample material can be collected on a particular topic, and, by applying control techniques, a researcher can ensure the reliability of the data. The interview method involves risks, however, which a researcher must guard against. Informants may cite ideal rules, instead of the actual rules; they may speak in favour of or against traditional practices or they may find it difficult to conceptualize law in the abstract, unrelated to particular cases.

The Centre is aware that all methods employed have shortcomings and that the best results in field research are obtained through a combination of all available methods. Interviewing informants, observance of trials and other juridical events and a study of recorded cases must be used as complementary methods rather than mutually exclusive alternatives. Information obtained by one method should be supplemented by and checked against information obtained from the other methods.

(c) Interviewing panels of informants

The best results achieved by the Centre were by means of interviewing panels of informants. These panels consisted of local people who had a sound knowledge of the topic to be researched. In this way, after the informants had checked and supplemented one another’s knowledge, their collective understanding of a topic could be recorded. Ideally a panel should not be too large. Its size should foster a rapport between the researcher/s and the informants and should facilitate the formation of a working group, in which contributions to the discussion may be elicited from all informants.

In the project currently being conducted by Vorster and De Beer, however, a large panel of 36 informants is being interviewed. The size is attributable to the extent of the research project: all branches of customary law amongst twelve Swazi tribes is being

34 See also Cotran (n 4) The Law of Marriage and Divorce xi; Vorster ‘Interviews’ in Van Niekerk & Vorster (n32) 42-50.
36 See also Allott and Cotran (n1) viii; A J G M Sanders ‘Comparative law, law reform and the recording of African customary law’ 1983 De Jure 329; Roberts (n27) 83.
Field data has been gathered by means of interviewing and the application of several control techniques, inter alia, the use of cases, the principle of falsification and the application of legal maxims. Interviewing such a large panel is evidently going well, with a dynamic interaction between researchers and panel members. This relationship is ascribed to the fact that both the government and members of the panel regard the project as essential for recording their legal values, and in general for maintaining an orderly life-pattern and Swazi values.

The principle technique used when interviewing is to raise a specific point for discussion and then to ask further questions based on the original response of the informants. In this way, uncertainty, incompleteness or other deficiencies in the responses can be rectified. This technique aids impartial interviewing and encourages informants to share their first-hand experience with the researcher.

In order to avoid misunderstandings and to preclude theorizing, researchers should put specific questions related to actual events, rather than abstract questions. It is senseless, for example, to ask whether prescription of a debt is known. It is better to ask whether a debt for outstanding marriage goods can be cancelled through the lapse of time. Similarly, a general and abstract question concerning a chief’s administrative powers should be avoided, because it covers too comprehensive an area and because the topic lies outside most informants’ area of expertise. Reference should rather be made to a chief’s specific powers.

Some researchers warn against the use of leading questions. Questions suggesting specific answers may be put, provided they are sufficiently qualified and the answers are controlled. Leading questions containing false statements are frequently used to test informants. Questions that can be answered simply in the affirmative or negative should not be put frequently, as they discourage informants from thinking the problem through and from formulating answers on their own.

The researcher must exercise patience and should not interrupt informants when they wander from the point. Invaluable information regarding other issues has often been obtained in this way. Questions about sensitive matters should be put only after a relationship of trust between the researcher and informants has been established. The researcher must appreciate that differences in sex or age between himself and the informants might hinder the giving of information on sensitive and confidential matters. Female informants will usually not give male researchers the same information they give female researchers. In interviews on confidential matters the interpreter, and, if possible, the researcher, should be of the same sex as an informant.

Field data may be controlled by: comparing the information furnished by the same informant or panel of informants on various occasions (ie cross-questioning on the same point

38 See Vorster & De Beer op cit 43.
39 See Royal Anthropological Institute Notes and Queries on Anthropology (1951) 46.
41 Compare also Royal Anthropological Institute (n39) 44, Coertze op cit 19 and J Mouton & Marais Metodologie van die Geesteswetenskappe: Bosiese Begrippe (1985) 92.
and checking whether the information on a specific point fits with that of preceding points); testing information against cases, preferably actual cases and, in default of court decisions, against the informants’ answers to hypothetical cases; checking data obtained by interviews against data from observations; comparing data obtained from different tribes; comparing field data with data obtained from the literature. A useful technique for checking the accuracy of information and the reliability of informants is by means of falsification, that is, posing the opposite of what informants have previously said as a correct statement.

The Centre’s restatements, as published in handbooks, have been criticized for using interviews of panels as the main research method and for presenting materials in a normative repertoire. The Centre’s method of research and its presentation of material have also been criticized for being rule-centred, i.e. for using the language, structure and divisions of the South African common law, a western legal system.42

It must be acknowledged that the Centre’s restatements are open to correction. Perhaps the terminology and explanation of the first restatement could have been simplified with a view to giving the book greater practical relevance. Other improvements could also be suggested, such as the use of more case material. We maintain, however, that the Centre’s research methods were the most efficient in the circumstances. The Centre was also aware of the shortcomings of its methods and it used the necessary control techniques to ensure the reliability of the field data.

We also uphold the juridical approach of our presentation, for the main aim of the restatements is use by lawyers. Furthermore, western legal terms, categories and divisions were used only in so far as they were suitable for explaining customary law for juridical purposes. Terms and concepts foreign to western legal science were also used, and the Centre is fully aware of the importance of restating law within its cultural context. The Centre’s researchers included persons experienced in field research and qualified in law and anthropology.

D CUSTOMARY LAW IN CONSTITUTIONAL AND INTERNATIONAL PERSPECTIVE

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In southern Africa the recognition and enforcement of customary law has always been classified as a division of private law, and, because the topic has been conceived in this way, it has been taken for granted that the state has an absolute discretion whether to recognize customary law and associated institutions, such as traditional courts. In accordance with this thinking, only social and political factors were to be taken into account when the state exercised its discretion.¹

The promulgation of a constitution with a justiciable bill of rights is occasion to reconsider attitudes that are perhaps more characteristic of colonialism than a democratic state. Article 19 of the Namibian Constitution has the effect of shifting recognition of customary law into the domain of public law. It guarantees every person’s right to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.²

In what follows, the extent and the implications of the right to culture will be examined in light of comparative jurisprudence and international law.

I ‘TO ENJOY, PRACTISE ... ANY CULTURE, TRADITION’

The central condition for applying customary law is a guarantee of the right to pursue a culture of choice. Although this right derives, in the first instance, from art 19, it also carries the authority of international law.³ Self-determination, for example, a rule of customary international law, has always included a people’s right to pursue their culture.⁴ And art 27 of the

¹Hence recognition of customary law has by and large been governed by a realistic appreciation that the state was in no position to impose an alien system of justice on the entire population.

²According to L Berat & R J Gordon ‘Customary law in Namibia: what should be done?’ (1991) 24 Vanderbult J of Transnational Law 644 this article applies to customary law and not only to the social aspects of culture.

³And it is argued that a cultural group has more secure rights if their rights are endorsed by public and/or international law. See, in the context of aboriginal land rights, J Crawford ‘The aboriginal legal heritage: Aboriginal public law and the treaty proposal’ (1989) 63 Australian LJ 398-9 and R L Barsh ‘Behind land claims: rationalizing dispossession in Anglo-American law’ (1986) 1 Law & Anthropology 43-4.

ternational Covenant on Civil and Political Rights, the most widely recognized conventional right to culture, provides that:

'persons belonging to ... minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

More recently, the right to culture has found expression in the body of rules that is being developed to protect minorities and indigenous peoples.\(^5\)

A critical issue - but one that has not been satisfactorily answered in these international instruments - is identifying the right and the corresponding duty-bearer. In most cases, the beneficiary of the right is assumed to be an individual human being. A right to culture would then imply that individuals have a right to participate in a culture, and the obvious duty-bearer would be the social group concerned. Alternatively, the right-bearer could be a group,\(^6\) in which event the right would be to maintain a culture, and the most logical duty-bearer would be the state; but it could also be the individuals who constitute the group.\(^7\)

Theorizing about the juridical structure of the right has important consequences for individuals. Can the group (or at least a member of the group) insist that all members be bound by customary law? Until now the general understanding has been that customary law is applicable to those persons who adhere to an African culture.\(^8\) And an individual's affiliation follows from an objective consideration of whether he or she has been integrated into that culture by participating in its activities and adopting its values and norms.\(^9\)

There has been a marked tendency, however, to make allowances for personal inclinations. Hence, courts throughout Africa start with an assumption that in domestic matters African are bound by customary law;\(^10\) but, if it appears that both parties to a dispute reasonably expected common law to apply, then common law will be applied.\(^11\)

By using fulfilment of reasonable expectations as an unspoken guiding principle, the courts have elaborated a series of more specific choice of law rules. If the parties agreed that


\(^6\)This is implicit in the individual right to culture. It is a common phenomenon of individual rights that they indirectly benefit the group.

\(^7\)A question explored further below.

\(^8\)It is a 'personal' legal system in the sense that it is attributed to persons rather than places.

\(^9\)In other words, it is unlikely whether a purely subjective notion of belonging would be trusted. See T W Bennett The Application of Customary Law in Southern Africa (1985) 7.

\(^10\)In this regard, Proc 15 of 1928 introduced to the South West Africa s 11(1) of the Black Administration Act 38 of 1927, the enactment controlling application of customary law in South Africa. This provision gave certain courts a discretion to apply customary law 'in all suits or proceedings between Blacks involving questions of customs followed by Blacks'.

\(^11\)See, for example, s 3(1) of the former Zimbabwe Customary Law and Primary Courts Act 6 of 1981 and s 5 of the Botswana Customary Law (Application and Ascertaintment) Act 51 of 1969.
a certain law should apply, effect is simply given to their agreement.\textsuperscript{12} Such an understanding might be express, but more often it is inferred from conduct, most commonly from the pleadings that initiate an action. The plaintiff’s summons will give the first clue as to which legal system had been selected as the basis of the claim.\textsuperscript{13} If the defendant does nothing to contest this choice of law, acquiescence can be inferred.\textsuperscript{14}

Where the defendant disputes the plaintiff’s choice of law as it appears ex facie the summons, a court must decide whether the parties had contemplated a particular legal system at an earlier stage of their dealings. This inquiry entails a close examination of the words and deeds out of which a claim arose, an investigation that often leads to a prior transaction on which the suit is based.\textsuperscript{15} The parties’ use of culturally inscribed transactions is usually decisive in evincing an intention to abide by the law indicated.\textsuperscript{16} Where a juristic act lacked any cultural markers, however, courts have delved deeper into the circumstances in which it occurred in order to discover a particular cultural alignment.\textsuperscript{17} Thus, in suits that do not involve prior transactions, such as those arising out of delicts or family relationships, the parties’ lifestyles have been used as indicia of an overall orientation and hence choice of law.\textsuperscript{18}

II THE RIGHT TO PARTICIPATE IN, OR OPT OUT OF CUSTOMARY LAW

The way in which the right to culture is framed in art 19 of the Constitution (and art 27 of the International Covenant) suggests that each individual is free to participate in whatever culture

\textsuperscript{12}It is only where there happens to be a mandatory choice of law rule, such as the rules contained in ss 22 and 23 of the Black Administration Act 38 of 1927, that the parties are not free to choose a law. Nonetheless, the decision whether to apply customary law ultimately lies within the discretion of the court: Lebena v Ramokone NAC (C&O) 14 at 16.

\textsuperscript{13}For the nature of the remedy, or the type or quantum of damages sought: Mbaza v Tshehula NO 1947 NAC (C&O) 72.

\textsuperscript{14}Hence, if the plaintiff had relied a particular system of law to bring a claim, he or she would be precluded from objecting to the defendant’s use of defences under the same system: Warosi v Zotimba 1942 NAC (C&O) 55 at 57. And, conversely, if the defendant had raised a defence known to only one system of law, he or she was stopped from objecting to the plaintiff’s reliance on the same system: Goba v Mthulo 1932 NAC (N&T) 58.

\textsuperscript{15}Undertakings, like bridewealth and loans of cattle, usually point to customary law: Nkumalo v Ngubane 1932 NAC (N&T) 34; Peme v Gwelo 1941 NAC (C&O) 3; Fuzile v Ntoko 1944 NAC (C&O) 2. Conversely, commercial contracts, which are typical of the common law, suggest that the parties contemplated application of common-law rules: Dhlamini v Nhlapo 1942 NAC (N&T) 62; Michelo v Male 1945 NAC (C&O) 63.

\textsuperscript{16}For instance, should the parties have married in church or in a registry office, the form of the ceremony would imply the applicability of common law to issues associated with the marriage.

\textsuperscript{17}Thus, the purpose of a transaction, the place where it was entered into, and its subject matter have all been used as indications of a tacit choice of law. Mhlongo 1937 NAC (N&T) 125; Sawintshi v Magidela 1944 NAC (C&O) 47. And see Mpikakane v Kunene 1940 NAC (N&T) 10 and Warosi v Zotimba 1942 NAC (C&O) 55.

\textsuperscript{18}People who adhered to a nationally traditional, African way of life were deemed to be subject to customary law, while those who had become acculturated to a ‘western’ lifestyle were considered subject to the common law. See the cases from Lesotho, Mokorosi v Mokorosi & others 1967-70 LLR 1 and Hoohlo 1967-70 LLR 318 (S M Pouller Legal Dualism in Lesotho (1979) 24-8) and Ranothata v Makhothe 1934 NAC (N&T) 74 at 76-7. See, too, the Zambian case Munalo v Vengesa 1974 ZLR 91 (and casenote in (1981) 13 Zambia LJ 62).
he or she chooses. Broadly speaking, this has been the approach in most parts of Africa. Persons subject to customary law have been free to use common-law institutions, in particular, wills, contracts and civil or Christian marriages.

The individual’s right is not, however, absolute. Cases elsewhere show that a group may lay down criteria for membership to ensure that its identity will not be destroyed or its resources wasted by an influx of strangers. For example, Lovelace, who was originally a registered Maliseet Indian, lost her status as an ‘Indian’ (and thereby her right to live on a reserve and to benefit from government social welfare programmes) under the Canadian Indian Act of 1951 because she had married a non-Indian.

Lovelace claimed violation on her rights under art 27 of the International Covenant on Civil and Political Rights, on the ground that the Indian Act prevented her from enjoying her culture rights in common with her cultural group. The Human Rights Committee conceded Lovelace’s argument. Nevertheless, the Committee held that laws could legitimately be passed to define a right of residence, if they were reasonably and necessary to protect a minority’s resources and to preserve its identity. A balance had to be struck between the group and the individual right.

A problem that the courts do not seem to have solved is whether one party to a suit may insist that the other party be bound by customary law because he or she is normally subject to that legal system. Can the plaintiff, for example, argue that the defendant may not change legal status, for to do so would result in prejudice to the plaintiff’s rights?

Under colonial rule, the state permitted Africans who wanted to change their personal law from a customary to a common-law regime, to do so through a formal act of ‘exemption’. Although évolués became generally subject to common law in matters of personal status, they could not in this manner escape obligations they had incurred under customary law before the change of status.

Where neither party had been exempted, two approaches are discernible in judgments given by the South African courts. On the one hand, where a plaintiff attempted to claim

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20In certain African states, notably Zambia and Malawi and Nigeria, testamentary succession was not permitted on the ground that the expectations of intestate heirs would be upset. See Bennett (n9) 218 fn8. But in southern Africa, this issue was never seriously considered. Cf *Fraenkel NO & another v Sechele* 1964 HCLTR 70 at 78-9 and 82.

21An issue (as yet untested in southern Africa) is whether an individual may demand to join a chieftaincy in so as to benefit from a right of avail to land.


23Paragraph 16. Lovelace’s case should be compared with the Australian decision, *Gerhardt v Brown* (1985) 159 CLR 70, and the *Belgian Linguistics Case* 1968 European Court Series A vol 6.

24Which is still provided for in s 31 of the South African Black Administration Act 38 of 1927.

25*Kaula v Mtikulu & another* 1938 NAC (N&T) 68, *Ngebo v Dhlamini* 1943 NAC (N&T) 13. Cf *Miya v Nene* 1947 NAC (N&T) 3. Very few people made use of this procedure in view of the paternalistic way in which it was conceived. The question is now whether exemption is a constitutional right; in other words, can a person - particularly a woman who wished to escape the constraints of customary law - avail herself of the right to participate in a western culture and thereby apply for a declaration that her status had changed?

26The only courts to have considered the problem in southern Africa.
damages based on a common-law scale (ie more than would be permitted in customary law), the courts were understandably reluctant to force the defendant into a disadvantageous position. In Yako v Beyi, the court held that:

'To do justice with equity in these circumstances the Court must apply the system of law equally to all individuals of the community subject thereto without favouring one or other party by allowing him or her to have recourse to another system of law, to avoid restrictions of Native Law in so far as that party is concerned, or to enable that party to obtain a greater benefit than the native system provides.'

On the other hand, in another series of cases the courts felt that the plaintiff should not be denied a claim merely because none was available in customary law. Plaintiffs, as subjects of the state, were fully entitled to make use of the law of the land. Today, this argument is strengthened by the Constitution. A party who wishes to opt out of customary law can claim that the fundamental rights under the Constitution provide a national value system which the courts may not deny individual petitioners.

III ‘SUBJECT TO THE TERMS OF THIS CONSTITUTION’

Whether a litigant may abandon customary law in favour of rights guaranteed by the Constitution depends, at least in part, upon whether fundamental rights are applicable in the private sphere. The usual understanding of justiciable bills of rights is that they are applicable only to relationships between citizen and state, not to individuals in their private relationships.

It would appear from the terms of the Namibian Constitution, however, that constitutional norms are always to prevail. Article 19 itself states that the right to culture is ‘subject to the terms of this Constitution’ and art 66(1) provides that the customary law in force on the date of independence shall remain valid to the extent that it does not conflict with the Constitution.

Article 5 could also be read to support this proposition, but its wording is somewhat ambiguous. It provides that:

'The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies [including courts of traditional leaders?] and, where applicable to them, by all natural and legal persons in Namibia ...'

27 The typical cases were women claiming damages for seduction (Yako v Beyi 1944 NAC (C&O) 72) and men claiming increased damages for their wives' adultery (Ndodoza v Tshaniwa 1939 NAC (N&T) 64 and Nazo v Lubisi 1946 NAC (C&O) 18).

28 1944 NAC (C&O) 72 at 76.

29 Mangwane v Nontana & another 3 NAC 98 (1914); Mlondleni v Magcaca 1929 NAC (C&O) 10. Hence, as the court in Maguboya v Mutato 1929 NAC (N&T) 73 at 78 held: it would be a 'travesty of natural justice and a violation of the fundamental right to inviolability of person to which everybody is entitled' to prohibit the common-law claim.

By saying that the fundamental rights ‘shall be respected and upheld ... and, where applicable to them, by all natural and legal persons in Namibia’, suggests that direct application of all constitutional norms in the private sphere is not contemplated.

The limitation clause in art 22 is of little help in determining whether customary law is to be shielded from the fundamental rights. It speaks of ‘any law providing for such limitation shall ... specify the ascertainable extent of such limitation and identify the Article or Articles hereof ’. The reference to an explicit limitation indicates that legislation was the target of this article, not common or customary law.

If fundamental rights are applicable in private relationships, and if no statutory limit is placed on their scope of application, most customary law could be eliminated immediately. Article 10(2) provides that no person may be discriminated against on the grounds of sex, and, because customary law is pervaded by the principle of patriarchy, most of its rules could be deemed discriminatory. The consequences would be catastrophic.

Because the marital relationship is not an equal one, nearly all spousal rights and duties would be deemed abrogated in favour of a highly generalized norm of equality. The result would be legal chaos. How would a prohibition on gender discrimination affect rights to marital property on divorce, or the wife’s right to custody and guardianship of minor children? Would a widow/daughter automatically be entitled to succeed to a deceased familyhead, instead of the oldest son? Would the giving of bridewealth become illegal? And what of polygamy? If customary law were swept away, any right to culture would become an empty gesture.

Presumably, the drafters of the Constitution had no intention of abolishing the personal law of the majority of the population. The following arguments could be made in support of customary law. In the first place, it is a general presumption of constitutional law that all laws are valid until they are expressly held not to be. Thus the burden of arguing unconstitutionality rests on the party making such an assertion.

Secondly, in spite of the narrow wording of art 22 (the limitation clause), experience elsewhere has shown that constitutional rights have a ‘natural’ scope of operation. Application is limited by balancing social, economic and political considerations against human rights. The Constitution of the United States is a good example: although it contains no express limitation on the application of its bill of rights, these rights are far from being absolute. They may be validly infringed, provided that an potentially offending law complies with certain standards laid down by the Supreme Court.

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31Bridewealth could not be tolerated because, according to Meesadoosa v Links 1915 TPD 357 at 159, ‘a woman is in every respect the legal equal of a man according to our civilised customs’.

32Although art 66(1) might suggest an automatic abrogation, this is not supported by art 25(1)(b) of the Constitution. Indeed, the chaos that would ensue if customary law were deemed invalid from the date of promulgation of the Constitution does not allow any reading other than common-law rule.

33Zimbabwe Township Developers (Pvt) Ltd v Lou’s Shoes (Pvt) Ltd 1984 (2) SA 778 (ZS) at 783. This is a general presumption in the common law: J E Nowak & R D Rotunda Constitutional Law 4ed (1991) 579 and S Woolman ‘Riding the push-me pull-you: constructing a test that reconciles the conflicting interests which animate the limitation clause’ (1994) 10 SA Journal on Human Rights 83-4.

34An excellent summary of which can be found in Nowak & Rotunda op cit 568-76, and the seminal article on the topic is by J Tussman & J tenBrock ‘The equal protection of the laws’ (1949) 37 California LR 341. Cana-da sought to avoid the uncertainty of having no statutorily fixed limitations in its bill of rights. Accordingly, the Canadian Charter of Rights opens with a provision that the rights within it are ‘subject only to such
Thirdly, the German doctrine of *mittelbare Drittwirkung* offers a sensible accommodation of both private and constitutional norms. This doctrine does not discount the relevance of human rights in private law altogether (since the Constitution created an objective value system against which the application and interpretation of all law must in the final analysis be measured), but it does not permit unqualified application of these rights. Accordingly, fundamental rights may be applied only where private-law rules are abstract and general. By extension, if private law has no directly applicable rule, or if its rules are vague and contradictory, reference may be made to constitutional norms.

IV ‘DO NOT IMPINGE UPON THE RIGHTS OF OTHERS’

There are many occasions when we may legitimately impinge on the rights and freedoms of others. On the basis of a prior agreement, for instance, the law of contract allows us to do so. The law of delict and crime, however, creates certain absolute limits on this generalized freedom.

It has always been assumed in southern Africa, although not much serious thought has been given to the matter, that wrongs should be classified according to the common law as delict or crime, and, if deemed delictual, customary law may be applied. To take a typical example, if a suit is categorized as rape, the common law applies and the offender will be prosecuted. If, on the other hand, the suit is deemed seduction, customary law may be applied, in which case the victim has no cause of action, for the right to claim damages vests in her guardian. A bill of rights should have the effect of constitutionalizing this decision: if a woman’s right to equal treatment has been denied by customary law, then customary law must give way.

A Canadian case, *Thomas v Norris*, reached a similar conclusion on different grounds: the relationship between individual rights and a group’s right to pursue its culture.

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35 As exemplified in the *Lath* decision BVVerfGE 7 198 at 204ff. This and other decisions are cited in K M Le- wan, ‘The significance of constitutional rights for private law: theory and practice in West Germany’ (1968) 17 International & Comparative Law Quarterly 571ff esp 587-8. It was felt that if no limitations were imposed, private law would be seriously destabilized, and that the state would have licence for unwarranted interference in private lives.

36 In such Generalklauseln the absence of any specific rule was taken in an invitation to the courts to employ the Grundgesetz as the basis for their decisions. Typical general clauses are those that would declare a legal transaction void if contra bonas mores or would require performance nach Treu und Glauben. The interpretation of such clauses entails reference to higher or more general norms, and the Constitution is the obvious source of these norms: B Pieroth & B Schlink, *Grundrechte Staatsrecht* II 3ed (1987) 51.

37 Much the same approach was advocated in the Bangalore Principles 1988: see (1992) 2 Victoria Unlv of Wellington LR 5. This approach has also taken root in Austria and Switzerland (Drzemczewski (n30) 200 fn4) and a similar doctrine has evolved in Japan (Horan (n30) 864ff).

38 This, in substance, is what happened in the celebrated Zimbabwean decision, *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (S) at 127-8. When the Legal Age of Majority Act 15 of 1982 was extended to Africans, a woman was held not to require a guardian to assist her in pursuing legal rights or incurring obligations. In consequence, a father lost his right to sue for damages for the seduction of his major daughter, since the right had passed to the woman.

The plaintiff had been ‘grabbed’ by the defendants, detained in a long house for four days and forced to undergo an initiation ceremony of spirit dancing. In common-law terms, his experience was tantamount to assault, battery and unlawful imprisonment. On the basis that his fundamental rights had been contravened, the plaintiff sued for damages arising out of tort.

The defendants contended that, because spirit dancing was an ‘existing Aboriginal right’, it fell under s 35(1) of the Charter of Rights, and for that reason was exempted from application of the fundamental rights contained in the Charter. The court’s reply to this argument was to hold — unfortunately not on very convincing grounds — that the aboriginal right had been extinguished because it involved conduct incompatible with the introduction of English criminal law.

Hood J then went on to advance other reasons for preferring the plaintiff’s individual rights. He felt that the use of force, assault, battery and wrongful imprisonment entailed in spirit dancing was opposed to a peaceful society committed to protecting the rights and freedoms of all. He also noted that aboriginal (cultural) rights were not absolute: like other rights and freedoms they were limited by both the civil and the criminal law in order to protect others who might be injured by their exercise. Perhaps the most telling part of the judgment was the finding that the plaintiff was ‘free to believe in, and to practise, any religion or tradition, if he chooses to do so. He cannot be coerced or forced to participate in one by any group purporting to exercise their collective rights in doing so.’

V ‘OR THE NATIONAL INTEREST’

The precedence given to the common law of crime becomes even clearer when the further qualification — ‘national interest’ — is added. Practices considered socially injurious have never been tolerated, even though they were culturally sanctioned. Hence South Africa has always

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40The Court held that the defendants could not have relied on s 25 of the Charter of Rights (which would have guaranteed them the right to spirit dance as a freedom or religion), because the Charter does not apply to actions between private parties unless the government is involved. See RWDSU v Dolphin Delivery (1987) 33 DLR (4th) 174.

41At 156. According to established precedent, notably R v Sparrow [1990] 70 DLR (4th) 385 at 401, extinguishment of aboriginal rights is possible only where the Crown had shown a ‘clear and plain intention’ to override them. In Norris’s case extinguishment was possible only when general reference or mere inference. In consequence, the decision is arguably wrong on this issue.

42Interestingly enough, Hood J had no difficulty (at 156) in finding that civil wrongs could also override aboriginal rights, for they had the same purpose as the criminal law, ie to protect citizens from wrongful conduct. See Isaac (n39) 634-5.

43At 160-1.

44At 162. Isaac (n39) 627 says that this does not deny the aboriginal right to practise spirit dancing. It merely sets a limit on the extent to which it may inflict harm on others within a community; in other words, reasonableness is involved.

45See R v Njikelana 1925 EDL 204 and cf S v Sikonyana 1961 (3) SA 549 (E) at 551: ‘Any intentional act which involves the likelihood of bodily harm to another and which is not recognised by modern usage as a normal and acceptable practice of society is forbidden by law and is in no way dependent upon the absence of consent on the part of the victim.’
had a rule that, whenever serious harm is involved, criminal liability will follow, notwithstanding the victim’s consent to injury and notwithstanding the sanction of customary law.\textsuperscript{46}

This approach is understandable. What we must guard against is using ‘the national interest’ qualification in the same way that colonial courts used the repugnancy proviso.\textsuperscript{47} Instead of engaging in the troubled debate whether and to what extent constitutional rights should apply in private relationships, the courts could apply fundamental rights via the beguilingly simple method of construing ‘national interest’\textsuperscript{48} as an expression of constitutional norms. All customary law would then be read subject to the Constitution.\textsuperscript{49}

This approach is misconceived. In the first place, it is misleading to assume that the phrase ‘national interest’ is synonymous with the catalogue of rights contained in ch 3 of the Constitution. ‘National interest’ is a norm of high abstraction, equivalent to public policy, and, although it might be informed by human rights, it transcends constitutional provisions. In the second place, it is facile to assume that ‘national interest’ trumps the right to culture in art 19 of the Constitution. To the contrary, ‘national interest’ might well be read to imply tolerance of legal pluralism. If a working relationship between customary law and the Constitution is to be found, then it must be sought in terms of a more rigorous set of criteria.\textsuperscript{50}

\textsuperscript{46}R v Matomana 1938 EDL 128 at 131 said that it could be contrary to public interests to hold that a death resulting from stick fighting should be excused on the ground of consent. See, too, Phiri v R 1963 R&N 395 (SR), and the cases concerning pre-marriage abductions and rape: R v Swartbooi 1916 EDL 170 and R v Maina 1948 (1) SA 196 (E). S v Sita 1954 (4) SA 20 (E) at 22 held that custom cannot override the common law, no matter whether the custom is legal or illegal.

\textsuperscript{47}Which was repealed in Namibia by Act 27 of 1985.

\textsuperscript{48}Together with the proviso that cultural rights should not ‘impinge upon the rights of others’.

\textsuperscript{49}S M Poulter ‘Ethnic minority customs, English law and human rights’ (1987) 36 International & Comparative Law Quarterly 595, for instance, points to the interpretation of public policy in terms of the European Human Rights Convention, when English courts were called upon to recognize foreign custom.

\textsuperscript{50}Via such issues as limitation and horizontal application of fundamental rights.
VI ‘MAINTAIN AND PROMOTE ANY CULTURE’

It is implicit in both the individual and the group right to pursue a culture of choice, that the institutions necessary to maintain that culture must also be recognized. If this were not done, the right to culture would have little substance. It can therefore be argued that maintenance of customary law involves continuing support for traditional courts, on the ground that an authentic application of customary law requires tribunals familiar with African procedures and processes. ⁵¹

⁵¹See, for example, *Minority Schools in Albania* 1935 AB/64 17, where the Permanent Court of International Justice held that minorities must be permitted certain institutions, in casu schools, if they were to preserve their special character. Cf *The Belgian Linguistics Case* (Merits) 1968 European Court Series A vol 6.
E LEGISLATING IN MATTERS OF CUSTOMARY LAW: ISSUES OF THEORY AND METHOD

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I INTRODUCTION

The purpose of this paper is to share some thoughts on the nature of customary law and the use of legislation as a tool for dealing with it. The theme of the paper is that, in order for research into customary law to be meaningful, a suitable theoretical framework should be adopted as a starting point to guide the inquiry. It is submitted that the term ‘customary law’ is a somewhat simplistic label to describe a very complex phenomena. The term is usually employed in a manner that is not sufficiently sensitive to history and social change, with the result that any state intervention in this area rarely succeeds.

Thus the first section of this paper takes a closer look at the term in historical perspective and identifies the various types of customary law, as well as the different senses in which the term can be understood. Section two proposes a suitable theoretical framework for use as a starting point for research into customary law. By organizing this methodology seminar, the Law Reform and Development Commission is obviously aware of the importance of clarifying issues of methodology for the success of any research endeavour.

This awareness has not characterized approaches to law reform in other countries of the southern African region, where innovatory statutes have often failed to influence the daily lives of the majority of people.¹ The problem will be illustrated in section three, where a case study of legislative intervention in the area of child maintenance from Botswana is presented. Applying the framework suggested in section two to research done in Botswana, this section will explain why state intervention in customary-law matters through legislation sometimes fails.

The final section identifies some of the policy and methodological lessons that can be drawn from the Botswana case study and how a proposed research project into Namibian customary law might avoid some of the pitfalls experienced in Botswana.

II SECTION ONE: THE VARIOUS MEANINGS OF CUSTOMARY LAW

The term ‘customary law’ can be understood in at least three senses, which, although they sometimes overlap, should be conceptually distinguished. These senses are briefly summarized below.

¹Other well-known examples in the region include the Law of Marriage Act in Tanzania and The Legal Age of Majority Act in Zimbabwe. These two statutes sought to introduce major changes in the area of family law, where customary laws are very strong, and have not succeeded in changing the situation on the ground.
(1) Traditionalists’ customary law

First, we begin with the sense in which customary law is most popularly used and understood: the traditional norms, values, habits and other principles that have been associated with the various ethnic groups who now make up a modern nation state. Used in this sense, customary law is equated with traditional and cultural values that imbue it with a certain propriety and legitimacy. Customary law in this sense is often used by traditionalists to resist the introduction of new laws and policies.

When we look closely at this meaning of customary law, we find that, in its ‘pure’ form, we know very little about its content, mainly because it was practised nearly two centuries ago and was not written. What remains is what has been passed by oral tradition from generation to generation, some of which has been lost or transformed by the social, economic, and political changes that have taken place over the years.

It is simplistic, therefore, to talk about customary law in this sense as if it were a single, immutable, generally known and easily ascertainable body of law, firmly rooted in tradition. In the next section, where we look at what happened to customary law during the colonial period, it becomes clear that the matter is much more complicated.

(2) Lawyers’ customary law

The second sense in which the term ‘customary law’ is used is more technical or legal, as it is linked to the settlement of disputes in courts. Woodman has labelled this category ‘lawyers’ customary law’ because it is derived from three sources with which the western-trained lawyer is familiar. The first of these sources are rules decreed by chiefs and other traditional authorities. The second is the rules developed from the colonial courts’ practice of requiring that customary law be proved like any other fact. And the third source of lawyers’ customary law derives from decisions of the courts based on these rules.

It is plain to see that the second category of customary law, especially that derived from the colonial courts, is rather different from the first. Research on customary law in other parts of Africa has revealed that versions of customary law quoted by elders in colonial courts had certain weaknesses. First of all, their versions were influenced by events, such as their anger at the loss of political power to the colonial administration. Thus, instead of presenting the law as it was in practice, some elders gave idealized versions of what they believed customary law should be.

In the second place, once these versions had been processed in the colonial courts, the ultimate product to emerge was ‘in the form of decision and remedy [and] was completely different from anything that the traditional system would have produced’.

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4B Rwezaura From Native Law and Custom to Customary Law: the changing political uses of customary law in Modern Africa (1992) 5-6
notions of procedure, justice and fairness, which were brought to bear upon the interpretation of customary law.

An important point to note is that this is the version of customary law that was inherited by the post-independent states of Africa, and it now passes as the ‘official customary law’ that is regularly applied by state courts.

(3) The living customary law

The third sense in which ‘customary law’ may be understood is as a description of a way of life, one that is based upon certain norms of behaviour which, to varying degrees, reflect a tradition. This ‘living’ or ‘contemporary’ customary law is manifested in the way many people live in both rural and urban areas. It is fluid, flexible, negotiable and dynamic, and it represents people’s adaptations to socio-economic change. To the traditionalist, this is a debased or corrupted form of customary law, one that has been ‘contaminated by ‘modernization’ and other western influences.

None the less, this type of customary law is often closer to the actual lives of ordinary people than the first two versions. Paradoxically, it is the first two meanings that are commonly invoked in discussions about customary law. An example in point would be the procedures observed for the conclusion of a marriage in southern African countries. A wide range of procedures, or combination of them, can be found in the marriage arrangements within and between ethnic groups. They are to some extent based upon ‘traditional’ notions of marriage, but they have been adapted to accommodate socio-economic change. Some, for example, have embraced Christian notions of marriage, as well as the formalities of state law, and people treat them as part of customary law.

Before proceeding, an important warning must be sounded to conclude this section. The different meanings of customary law identified above are not exhaustive nor do they exist in water-tight compartments. To the contrary, they often overlap. Both lawyers’ and the living customary law, for example, contain some aspects of traditionalists’ customary law. Similarly, the living law may be influenced by the lawyers’ law.

Thus it is evident that customary law is a complex issue and that it should be approached with caution by those wishing to study it seriously, to understand and to make interventions in it. The next section suggests a theoretical framework that has been found to be useful in locating the various types and meanings of customary law.

III SECTION TWO: THE FRAMEWORK OF LEGAL PLURALISM

(1) Traditional approaches to the nature of law

The traditional approach to the nature and study of law in western legal systems is one that associates law with formal rules and institutions, such as the state and its agencies. This approach continues universally to dominate legal thinking and action. It has been labelled ‘legal centralism’, which means that:

‘Law is and should be the law of the state, uniform for all persons, exclusive of all
other law, and administered by a single set of state institutions.’

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Legal centralism, which has origins in western legal theory, has several weaknesses, especially when applied to the study of non-western legal systems. The first, and the main, one is that it looks at non-western law through western eyes, although in some cases analogies do not exist (or they may exist but in a different context). Thus scholars working within this paradigm often make false comparisons, sometimes based upon an imperfect understanding of their own legal systems.

Secondly, the legal centralist approach has been criticized for regarding rules of law as a discrete, homogeneous unit, unconnected to other social norms. (On this understanding dispute settlement would be (wrongly) treated as the exclusive preserve of such judicial institutions as courts.) Thirdly, because this approach focuses on formal rules and state institutions, it overlooks many other norms influencing the actual conduct of peoples’ lives.

Researchers who work within a legal centralist paradigm will employ certain methods for finding law, such as reading statute books, court records and law reports, and they may perhaps interview some key informants associated with the making and enforcement of law. These methods will certainly miss the more common forms of regulation and modes of dispute settlement, which, although they are conducted in less formal social settings, are none the less regarded as binding by the people concerned. In view of these and other weaknesses, a broader, more comprehensive framework of legal pluralism is recommended below.

(2) The paradigm of legal pluralism

The starting point of this approach is to recognize the plural nature of law and legal systems, a position that is the antithesis of legal centralism. Although only specifically labelled as ‘legal pluralism’ in the 1970’s, this perspective had been utilized much earlier by scholars of the sociology and anthropology of law. Thus it has been expressed (explicitly or implicitly) differently by different writers.

The idea at the root of these various approaches is that the state does not have a monopoly on legal regulation: multiple sources and types of regulation, recognized by their members as binding, operate outside state structures.

Moore’s idea of the ‘semi-autonomous’ social field is perhaps the most useful way of describing a situation of legal pluralism. Moore conceives of society as being occupied by various semi-autonomous social fields (SASFs). These are indigenous social organizations that generate their own norms and possess their own structures. While each SASF has a regulatory capability, it is not entirely autonomous, because its members are also members of other SASFS.

The state, various levels of the bureaucracy, village communities, age sets or regiments, trade unions, civil and professional associations, are all examples of SASFS. They

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vary in their size and the degree to which they can regulate the behaviour of their members, and, to some extent, they compete with one another. Thus each SASF produces its own internal norms (or ‘indigenous law’),\(^{10}\) which vie with state laws for control of the members.

It is this plurality of regulation that is seen as a situation of legal pluralism. Griffiths has sought to formulate a descriptive theory of the phenomenon.\(^{11}\) He distinguishes two types of legal pluralism: one in a strong and one in a weak sense. Strong legal pluralism ‘is when in a social field more than one source of "law", more than one "legal order" is observable, that the social order of that field can be said to exhibit legal pluralism’. Thus strong legal pluralism corresponds with social pluralism by recognizing the existence of numerous SASFS. The weak sense in which the term is used is associated with scholars who espouse the ideology of legal centralism. Here, legal pluralism is used to describe a situation where the state allows different systems of law applicable to different groups to co-exist within the official legal system.

A common situation that comes to mind is the dual legal systems to be found in many African countries, where customary law is allowed to exist side by side with ‘general law’. When one examines the customary-law component, as we did in the first section, one usually finds that it is not as homogeneous a system as is often suggested. As we saw, customary law is itself plural, not only because there may be different ethnic groups with different laws, but also because these laws may be attached to different historical periods and interpreted differently by different people.

The approach of legal pluralism is therefore useful as a tool for our understanding of customary law, and, in a further elaboration of this approach, Griffiths has suggested a theory of legislation which partly explains why state intervention sometimes fails. He begins by criticizing what he calls the instrumentalist perspective to legislation, which implies that a government may attempt to use law as an instrument for social change. This approach presupposes that legal rules are capable of influencing people’s behaviour towards desired social objectives.\(^{12}\) It is associated with policy-makers who are interested in whether the objectives of the legislation have been fulfilled and the reasons for their success or failure.

Griffiths dismisses this perspective as theoretically sterile, and as one that has hindered the development of a sociological theory of legislation. Instrumentalism makes untenable assumptions about social life and the place of legal rules within it; it is based upon a false legal centralist notion that the state has a monopoly on legal regulation.

In place of the instrumentalist perspective, Griffiths proposes an approach posing the following questions:\(^{13}\)

‘What difference does the law in question make in a concrete situation of (inter)action, of behavioural choice? Not: did individuals obey? but: what did people do? Not: did this law steer social development in the desired direction? but: what exactly happened in the society in question when the new legal factor was added? Attention is directed, in other words, not (exclusively) to the instrumental effectiveness but to the social working of law.’

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\(^{10}\)Gallanter op cit 1.

\(^{11}\)Griffiths (n5) 1.


\(^{13}\)Griffiths (n8) 8.
Griffiths uses Moore's concept of the SASFs to elaborate his theory of legislation. He defines the SASF to include ‘every collection of persons which exercises control over its members ... a SASF is a group, the fundamental unit of social control’. External law such as legislation is released not into a normative vacuum, but into a complex network of these SASFS. It will be remembered that not only do Moore’s SASFs generate their own norms, but they also resist the penetration of external norms. They do so because, although they are only partly autonomous, SASFs strive for maximum autonomy. According to Griffiths, the extent to which such autonomy can be achieved depends on two important factors.

The first factor is the internal organization of the SASF, especially the degree to which its members are dependent on the relationships it regulates for access to resources for which they have no alternative source. Secondly, the SASF depends upon the investment which the external competitor (or SASF), such as the state in the case of legislation, is prepared to make in the ‘penetration’ of its own rules.

As far as the investment factor is concerned, the external SASF can do this either by providing the energy itself (proactive mobilization) or it can rely on the cooperation of the members of the local SASF (reactive mobilization). Griffiths observes that the former type of mobilization is rare, while reactive mobilization is more common. In the latter case, the external SASF, such as the state, does not invest in understanding local structures or relationships. Rather, it relies upon members of the local SASF to invoke its rules in both trouble and troubleless cases. In addition, it often depends upon local SASFs to implement and apply its rules in trouble cases.

Yet these external rules must compete with those of the local SASF, as members have a choice between the two. Thus the mobilization of external law occurs within the context of, and subject to the regulatory supervision of the local SASFs directly concerned with the interaction in question. Griffiths concludes therefore that reactively mobilized external law respects the internal order of SASFs, and has a limited capacity to effect change there. In certain cases, SASFs may adopt external law or become agents for its implementation. In other words, especially where they are well organized, local SASFs are ‘in charge’, because they control local relationships. Because legislation does not alter these relationships, it can have only a limited effect on the conduct of its members.

Griffiths demonstrates the dependence of external SASFs on local ones by discussing two important prerequisites for reactive mobilization of external law. First of all, the new law must be communicated to the members of the SASF. The external SASF does not usually do this itself, however; it depends upon various intermediaries (such as its local branches) to communicate and apply the law, which in turn depends upon their internal order. In the process, the external law is invariably transformed by the time it reaches the people. Thus most people either do not know the law or they receive transformed versions of it.

The second prerequisite to reactive mobilization of external law is to activate the relevant actors, who must decide what to do with the information in their possession. Numerous studies have shown that responses are varied: some actors may do nothing, while others may use the law to achieve certain goals. Their responses are determined not only by

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14 Moore (n9).
individual personal characteristics, but mainly by the social context in which they operate, that of SASFs. This fact leads him to conclude:

‘Thus the social working of law, even in the case of some degree of penetration, is more dependent upon the circumstances and motives of the actors than the intentions of the legislator. And their circumstances and motives are to a large extent determined by the SASFs in which they find themselves.’

This framework was applied to the study of a statute in Botswana and was found useful for understanding why legislation sometimes fails to achieve the desired impact. The study is summarized in the next section.

V  SECTION THREE: A BOTSWANA CASE STUDY IN LEGISLATIVE INTERVENTION

In the early 1970s, the Botswana government passed a number of statutes in the area of family law which were generally aimed at addressing gaps brought about by socio-economic change. These enactments included the Affiliation Proceedings Act of 1970, which was meant to enforce support obligations owed by men to their extra-marital children; the Married Persons Property Act of 1971, which created new options for property arrangements during marriage; and the Matrimonial Causes Act of 1973, which sought to bring divorce law into line with the universal move away from fault-based divorce.

All three statutes were transplanted from Britain, and, apart from superficial parliamentary debates, little inquiry seems to have been made about how suitable they might have been to conditions in Botswana. Despite recognition of customary law as the law according to which most Batswana families regulated their lives, no research was carried out on the implications of these statutes for customary law. As a result, implementation, especially implementation of the Affiliation Proceedings Act, which is the focus of this section, has been plagued by numerous problems.

This legislation was introduced because remedies of Roman-Dutch law were unknown and inaccessible to the majority of the population. Furthermore, Parliament considered that traditional remedies for extra-marital pregnancy had been undermined by socio-economic change. Most traditional customary laws in Botswana ideally gave the father of the woman, not the woman herself, a right to sue the man who impregnated her for seduction. He would receive a certain number of cattle as compensation and he was under an obligation to support the child.

These rules had become difficult to enforce, partly because young people in search of jobs were more mobile and partly because elders were not always available or prepared to assist the young. The Affiliation Act therefore gave unmarried women the right independently to sue the fathers of their children for maintenance in magistrates’ courts. In order to make the Act accessible to its intended beneficiaries, an apparently simple and inexpensive procedure for claiming maintenance was laid down.


17See volume III, Laws of Botswana.
The writer conducted research in a large Botswana village into the traditional way of dealing with extra-marital pregnancy and the working of the Act. A combination of traditional legal methods (such as the reading of statute books, law reports, court judgements, textbooks and restatements) and social science methods (such as a sample survey, extended case analysis and group interviews) were used.

The findings of the research revealed that, although informants in the village were quick to state ideal rules of traditional customary law, these were not the only norms used in the management of pregnancy cases. Moreover, these ideal traditional rules had over the years been adapted to socio-economic change without people identifying them as part of their customary law. In some cases informants gave versions of their customary law which were different from what was applied in the customary courts. In others the customary courts were borrowing common-law concepts, such as periodic maintenance in the form of cash, which were previously unknown or unrecognized in traditional customary law.

These findings showed that customary law is a complex phenomenon and confirmed the advantage of considering its plural meanings (as suggested in the first section). Thus, instead of being puzzled by the apparently conflicting versions of customary law presented by villagers, we understood that some people (especially elders and chiefs) were citing a traditional version, some people (especially the state courts and officials) lawyers’ customary law and others the living customary law. This plurality of meanings makes research into customary law a risky endeavour, and underlines the importance of selecting appropriate methodologies to capture the mosaic.

Now briefly to the findings on the working of the Affiliation Act in the village: a major discovery was that the statute had fallen far short of its objectives, for reasons which can be partly explained by the theoretical perspective discussed in section two.

First, far from being simple and inexpensive, the procedure for claiming maintenance under the Act is rigid, time-consuming and costly. In practice, women had to go through various stages before they could obtain maintenance orders, and numerous administrative bottlenecks were identified. Some of these had to do with a legalistic interpretation of the Act’s provisions, such as the requirement that evidence had to be led irrespective of a man’s admission of paternity. Others had to do with the fact that court proceedings were generally conducted in English (in spite of the fact that at the time of the research court members and litigants usually spoke and understood Setswana), which had to be translated, because it was not understood by most litigants. As a result inordinate delays ensued, which meant that many cases were pending, withdrawn or simply abandoned.

Secondly, many women were found to be unaware of the existence of the legislation, and those who were often had insufficient or inaccurate information of its provisions. Furthermore, although the enforcement provisions in the legislation were good on paper, enforcing court orders in practice was very difficult. Only a quarter of the men complied. No attempt had been made by state agencies to disseminate the provisions of the legislation to women or to improve methods of enforcement.

To use Griffiths’ analysis, the state had not invested any effort (by seeking an understanding of local structures and relationships) to ensure the penetration of its norms. Mobilization had been reactive, as opposed to proactive. In consequence, the men who control local SASFs, such as wards, customary courts, the police and other local groups, were
able to resist the penetration of the Act’s provisions. They did so by insisting upon the use of customary law (which is cheaper for men), by labelling women who resorted to the Act as ‘making money out of children’, by distorting its provisions and by avoiding compliance with orders made under it.

A major finding of the research was that Parliament had failed to take account of the social context in which the Affiliation Proceedings Act would operate. Especially in rural areas, such as Kanye, we found that the most common method for dealing with extra-marital pregnancy was for the families first to negotiate, which is what had happened in the case of 43 per cent of the women in our research. The cases studied demonstrated that these negotiations could take long periods of time, from a few weeks to several years.

Many women who ended up at the magistrate’s court had first attempted to negotiate with the fathers of their children for compensation or maintenance. The main reason why these women eventually registered complaints with the magistrate’s court was that negotiations had failed or promises to pay compensation had not been fulfilled. Against this background, the requirement in the Act that complaints at the magistrate’s court be registered within one year of the birth of the child is clearly unrealistic and insensitive. It was also found that the court clerk regularly turned back women who had not exhausted the avenue of negotiations, although no provision had been made for this eventuality in the Act.

These findings demonstrate once again the strength of the indigenous norms of local SASFs, which continue to influence the behaviour of their members irrespective of the introduction of external norms through legislation. The state’s failure to invest in the success of the statute by disseminating its provisions, by making resources available (in the form of sufficient courts and personnel to implement the Act), etc contributed substantially to the limited success of the legislation.

VI SECTION FOUR: METHODOLOGICAL AND POLICY IMPLICATIONS

Based upon the foregoing discussion of theoretical perspectives and their application to the case study of the Botswana Affiliation Act, certain methodological and policy lessons may be identified.

As far as methodology is concerned, a major lesson learned was that traditional legal methods should be combined with other social science methods in order to find the different types of customary law existing in local communities. The weaknesses of traditional legal methods and the legal centralist perspective on which they are based does not mean that they should be completely abandoned. They still provide a useful starting point for discovering ideal or traditional rules of customary law. Although many of these have undergone change over the years, the values and principles on which they are based continue to inspire contemporary or living customary law. Once ideal rules are identified, the researcher can proceed to critically investigate the actual situation, using other more qualitative and participatory methods, such as extended case analysis and focused group discussions.

It must be conceded, in the light of our findings, however, that on their own, traditional legal methods and the theory they imply are far from adequate. They are based upon certain untenable assumptions about the nature of law and society. Because these methods lead us only to the laws recognized by the state, the underlying assumption is that the state has a monopoly on legal regulation. Our findings confirm that this perspective of legal
centralism is insufficient because various additional sources of regulation operate, especially at the grassroots level.

The social reality is, therefore, variation and plurality, not uniformity of regulation, as traditional legal methods and their legal centralist perspective assume. The two need not be juxtaposed, however; legal pluralism is a much more comprehensive approach, for it encompasses elements of the narrower concept of legal centralism.

Now to the policy implications. The most important policy lesson from the Botswana case study is that, in order to make an impact on the lives of ordinary people, state intervention must take account of the reality of pluralism. This study has shown that state intervention had a limited effect on the position of unmarried women and their children, because it was ‘top down’ and did not take account of the social context (which is characterized by a variety of relationships and arrangements).

State reforms, such as the Affiliation Proceedings Act, have tended to assume uniformity. They have moreover posited themselves as alternatives to local customary arrangements. In our research, we found that, in practice, people used a combination of customary and state laws and procedures. By implication, villagers regarded neither of the two systems by itself as sufficient for dealing with their problems. The proper policy approach should therefore be one which is flexible enough to be incorporated by the consumers of the law into their own realities, not the other way around. This point is especially important, if the state wishes to legislate in areas of customary law, as the government of Namibia intends doing.

It follows that law reform should not be regarded as a simple process of transplanting statutes from other jurisdictions, as happened in Botswana. If any borrowing of solutions should take place, it must be preceded by research into their compatibility with existing laws and realities. In this respect, by planning research into customary law, the government of Namibia is taking a welcome step in the right direction. Proposed new legislation should nevertheless be scrutinized for its applicability to the social context of contemporary Namibia, bearing in mind that most of the population live in rural areas, and also taking account of socio-economic changes.

Consultations with the public on law reform should involve both men and women and should go beyond the superficial arrangements of the parliamentary law reform committees, as in Botswana. The popular use of community meetings as a ‘participatory’ method of research should not be abused by government officials or others wishing to influence reforms in a particular direction. Current remedies should be properly explained to the public, so that it can make informed choices and contributions to law reform.

The law reform process should not end with the simple enactment of legislation and its publication in a government gazette. Once enacted, basic provisions of the legislation should be disseminated to the people, so that they can exercise informed choices when wanting to use the legal system. This principle is particularly important for women in maintenance cases, who, as we saw in our research, often had their complaints dismissed because of inadequate or inaccurate information on statutory procedures.

More importantly, the state must be willing to invest sufficient resources in ensuring the effectiveness of its legal reforms. Sufficient courts, personnel, legal aid and other schemes should be made available to the people, if such laws are to be meaningful to them. Clearly, this involves a long process of planning, which begins with a comprehensive theoretical framework, the selection of appropriate research techniques, the enactment of socially
sensitive legislation and the devotion of sufficient resources to carry the programme through. This is a challenge that faces the Namibian law reform commission, and by convening this Workshop, the Commission is taking the challenge seriously.
RESEARCHING THE LIVING LAW IN URBAN SOUTH AFRICA

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I INTRODUCTION

South Africa has the longest history of modern urbanization and industrialization in Africa south of the Sahara, and its experience of developments in customary law in urban areas may well indicate probable trends in the customary law of other African countries. This paper outlines a few of the changes revealed by the research of the Centre for Socio-Legal Research at the University of Cape Town over the past eleven years and indicates some of the problems presented for customary-law research.

The Centre for Socio-Legal Research, an interdisciplinary research centre at the University of Cape Town, was set up in 1983 to do socio-legal research on how the current law affecting women, children and the family operates in practice, with a view to pin-pointing urgently needed reforms in South Africa’s legal and social welfare systems. Projects have usually lasted for two to four years. Sampling was concentrated on the Cape Town metropolitan area, although comparative work was conducted in the Eastern Cape and other Xhosa-speaking areas in projects where customary law and migration were relevant. In addition, because each of South Africa’s three largest cities due to historical and demographic factors is unique in certain relevant aspects, some comparative research has also been undertaken in the other two: Johannesburg and Durban. An outreach programme to the community makes the results of the research more widely available and also, incidentally, feeds additional relevant information back into the research.

Research methods vary, depending on the project, but they include such sources as the sampling of court records, court observation (including, where relevant, informal township courts) and in-depth interviews with judges, magistrates, lawyers, paralegal workers, court officials, other civil service and municipal bureaucrats, social workers, religious leaders and, of course, litigants. In addition, many projects include taking individuals’ life histories in samples located outside these categories, a source which has proved most valuable for discovering facets of life not otherwise evident in the academic literature or official records. While such methodologies are usually more costly than quick surveys, they have been found to produce more reliable and textured data.

Projects have focused on issues rather than areas of law, covering such topics as problems arising out of the divorce process, how the remnant family survives after divorce, difficulties resulting from illegitimacy and problems arising out of the changing shape of the family under the circumstances of urbanization, migration and apartheid. As can be seen, these topics have inevitably embraced studies of the role of the legal profession and the courts in the divorce process, of custody and property settlements in practice, of the role of both spousal and state maintenance arrangements (as well as the alternatives to which families may resort for survival), of the nature and use of informal courts, of the actual implementation of religious and customary law in divorce, illegitimacy and adoption - and of much more besides.
Customary law is relevant to almost every study, but it is often a customary law unrecognizable in any textbook setting out the courts' version of the law.

Cape Town is the oldest city in South Africa, and thus perhaps best reveals the changes that tend to take place in customary law under the pressures of urbanization. Three examples are discussed below to illustrate various types of change: first, changes in the meanings, purposes and forms of various customary-law practices; secondly, changes in the legal consequences of customary-law institutions; and, thirdly, the variations evident in purportedly the same customary law, as urbanization and a growing ignorance of earlier customary practice impact upon it.

II THE AMBIGUITIES OF MODERN MARRIAGE PAYMENTS

Research undertaken in Cape Town in the early 1980s showed that customary-law marriages were still taking place, particularly in what were then squatter areas of newly arrived migrants, but that it was not uncommon to find a couple marrying by customary law and some years later marrying by civil law, often after they had come from the country to settle in town. This arrangement was partly a result of a requirement imposed by housing authorities, that a marriage certificate be produced before an applicant could be admitted to the housing waiting list, and partly because of a growing awareness among women of the added protection they gained from a civil-law marriage.

Lobola (bridewealth) was (and is) usually given, even for civil marriages. The property transaction is still widely regarded as essential to mark the legitimation of a sexual union, and the amount is rising steadily. For a well-educated girl it is often considerable. When payment is made nowadays, however, it may be unclear for one of several different reasons why it is given, although this disagreement may surface only on divorce.

First, it is no longer necessarily obvious to the community in which the couple live what consequences are expected to result from the payment. As the formalities surrounding a customary marriage have become attenuated, it is not always clear (even to some of the parties concerned) whether a customary union has taken place followed by a civil marriage, or whether lobola payments were made in anticipation of a civil marriage, before which the couple merely lived together.

Secondly, it may be unclear to outside observers (and even sometimes to the parties themselves) whether a payment constitutes lobola at all. Sometimes, prior to the marriage, the prospective bridegroom may make a substantial gift of cash or goods to the wife's parents which may not be intended (by at least some of the parties) to form part of the lobola payments. It may become a source of subsequent bitter disagreements, as was evident in interviews with divorcees.

It may also be unclear, even in the case of a long-term relationship, whether a customary union accompanied by lobola payments has taken place, or, as frequently happens in the urban areas, whether a couple are simply living together with the man paying seduction damages to the woman's family on the birth of each child. Indeed, seduction damages are often converted into the first lobola instalment, if the parties agree to marry by either customary law or civil rites. Such lack of clarity is compounded by Xhosa custom, whereby lobola is frequently paid throughout the marriage. As it is uncommon for anything to be in writing and as witnesses may be scattered, should the relationship between the couple end, much depends on what each party thinks has been agreed and on subsequent interpretations. Xhosa women, who are not present at negotiations over seduction damages or bridewealth,
perforce rely upon what is reported to them and they may claim to be married by customary law when a court would not find this to be the case.

A third type of ambiguity to have developed is the lack of clarity in practice about the purpose lobola is meant to serve. Not only has its ritual purpose to mark a change in relationships become less clear, as indicated above, but actual payment would also no longer appear to be essential for securing the children to the man’s family.

A number of the women divorcees interviewed admitted that their men had made only token payments towards lobola at any time, and in one case it appeared that promises to pay the lobola had not been fulfilled at all. None the less, most of these informants were adamant that, when the divorce occurred, both they and their families regarded the children as children of a legitimate customary union and therefore as belonging to the man’s family. Disagreements on this point had sometimes surfaced, however, on the breakdown of the marriage or where the husband’s family subsequently tried to claim the lobola of daughters after the wife had brought them up.

Part of the ambiguity results from the fact that, in practice, unlike a civil law marriage, a customary union does not necessarily take place at a given moment; it is concluded over a period of months or even years. Conflict between township practice and South African court rulings on the consequences of lobola payments before and after civil law marriages further complicates the situation.

Further, although lobola has continued to be paid, it has lost most of its uses for insurance and social cohesion, both inter- and intra-familial. This development is due largely to the changed means of payment. Money has generally replaced cattle, and, instead of producing calves, money tends to be spent, leaving nothing on the dissolution of the marriage either to be returned to the man’s family or to support the ex-wife.

For this reason, the number of claims in urban areas for refund of lobola when marriages break up has declined steeply, even when there are no children and the marriage has been of fairly short duration. The substitution of money for cattle is not a new development - missionary records mention it as beginning to occur in the nineteenth century - but the process has been accelerating throughout this century. Lobola in Cape Town is currently still expressed in terms of cattle (in contrast to Johannesburg, where there appears to be a growing tendency to refer to it in monetary amounts), but it is rarely fully paid in animals (which are usually kept in the country).

The value of lobola beasts is unrelated to the market value of real cattle. Rather, lobola is determined in every case, within conventional margins, by a bargaining process between families, and ‘calves’ are sometimes said to ‘grow’, as money is given in instalments. Thus, virtually all women informants claimed, at least initially, that between eight and ten head of cattle had been paid on their marriages, but the monetary amounts these represented varied by hundreds - and, latterly, thousands - of rands. The rapid spending of the money tended, however, to be a very widespread feature.

Spending the lobola has resulted in a further transformation of its traditional depiction, in that, increasingly, the flow of money to the bride’s family has actually been reversed. In customary law, the bride took to her new family her own cooking utensils and sleeping mat, which originally were home-baked pots and a woven mat, of little material value compared with her lobola cattle. With the changes entailed by urban life, however, a trousseau will now ideally include full bedroom and kitchen suites, or at least a bed, chest of drawers and modern cooking utensils.
The wedding, if a church ceremony, will be open to all, and it may cost the bride’s family a considerable amount in food and drink for the guests. It is quite common now for the bride’s family to find itself in debt (its obligations including hire-purchase payments for the furniture) for more than the amount of the lobola paid and promised, while the young couple receive a considerable amount in goods from the bride’s family - in effect, a dowry.

It is tempting to suggest that this type of dowry arrangement was a logical consequence of the change-over from the practice of the couple living with the husband’s family in an extended household (as was the custom and still is to a large extent in rural areas) to that of setting up their own home in the city. The old arrangement generated a concomitant attitude of disapproval of any interference in the arrangements of the new couple, including major gift-giving by the bride’s family after the marriage (which was taken as a slur on the husband’s family). This attitude has proved to be persistent. None the less, the young couple now needs more financial assistance and the bride’s ‘dowry’ today (though it is not referred to as such) frequently helps the young couple to establish their home.

The practice is also being more often observed in rural areas, where conditions are different, and informants stressed that it was a development of the bride’s family wishing to help their daughter and to demonstrate their status, rather than a response to demands from the groom’s family. Furthermore, in the grossly overcrowded accommodation that is common in Cape Town’s townships, suites of furniture are often an embarrassment, not an assistance. While they wait for a house, the young couple frequently has to live with the groom’s family or they have to lodge with someone else, quite possibly without even a room to themselves, and their furniture has to be left with the store or temporarily distributed to friends and family.

It seems that, with the ever-increasing instability of marriage, the ‘dowry’ may be an attempt by the girl’s family to replace the ongoing insurance of assistance provided originally by lobola cattle should the marriage be dissolved through the husband’s fault.

Given the legal situation, such insurance is now to some extent provided by the furniture, even in the case of marriages in community of property, since, according to a frequently invoked provision in the law, a party guilty of gross misconduct may have to forfeit benefits he or she would have derived from the marriage. Quite possibly, too, ideas of a trousseau given by the girl’s family in ‘western’ style are becoming more widespread from the growing number of magazine and other sources, and these ideas are playing a role in the growth of ‘dowry’.

III THE CHANGING CONSEQUENCES OF BIRTH OUTSIDE CUSTOMARY UNION

Once rules defining the existence of a union begin to blur, it is unnecessary to spell out the legal ramifications to specialists in customary law. Even where it is clear that a union is recognized legally and socially according to the rules and agreed facts, practice is in various ways blurring some of the legal consequences that follow.

One increasingly common example is where a son is born to a couple who have no acknowledged customary or civil marriage (and currently some 70 per cent of African births in Cape Town occur in such circumstances). According to the legal textbooks, the son would belong to his mother’s family. A basic corollary of this rule is that his senior male agnate in that family should perform the ancestor rites necessary to sponsor the child through his life, until he reaches an age in adulthood to undertake them himself.
Fieldwork has shown, however, that many boys, when they reach the age at which they should be initiated, prefer to seek out their fathers and that the fathers then frequently arrange for them to be initiated by their (the father’s) own families. So fundamental an inversion of customary rules indicates a considerable blurring of the distinction between legitimate and illegitimate children. Nor is this a unique instance. The Unit’s research has revealed other fundamental changes in practice in the consequences of various types of status.

IV VARIATIONS IN PRACTICES RELATING TO SEDUCTION DAMAGES IN AN URBAN AREA

The first township (location) for Africans already living in Cape Town was established in 1901, and many families have now lived in the city for several generations. For these, experience of customary-law practice has frequently become attenuated, with the result that cases observed in the commissioner’s courts indicated a considerable discrepancy between the parties’ knowledge of customary law and consequent intentions.

The type of problems resulting are perhaps best indicated by notes taken during courtroom observation of such a case (Cape Town Maintenance Court, 26 March 1981). While evidence was being given, it rapidly became clear that, although both families (one of which had been in Cape Town for 32 years) had viewed themselves as operating in terms of customary law, their versions of that law were rather different.

At issue was whether a payment was for customary seduction damages and isondlo (a maintenance repayment to the child’s guardian or any other person who provides for the child). Under the officially recognized version of Xhosa customary law, the customary amount for seduction damages is five head of cattle and the isondlo payment is one head of cattle, irrespective of the sex or age of the child when the payment is made, unless it is not yet weaned, in which case no payment can be claimed. Actual expenditure incurred in keeping the child until it is claimed by its guardian is irrelevant. Nowadays, money usually substitutes for cows, but the sum agreed by the families may bear no relation to the market value of cows. Once the amount of seduction damages and isondlo has been agreed and paid, however, a father cannot be held liable to pay past maintenance under Roman-Dutch law.

According to the evidence, the girl’s family, on learning who the father of her child was, had gone to the man’s family to report the pregnancy in accordance with customary law. An increasingly heated discussion had ensued. Eventually the man’s family paid the girl’s family a sum of R50 ‘to make them go away’, according to the girl’s father. The girl’s family had apparently operated on the assumption that, as this was the ‘reporting of the pregnancy’ and not a customary formal meeting to decide the amount of the payment, any payment could not be one towards compensation or isondlo. The man’s family appeared rather vague as to how many beasts the money had represented, but they were quite sure that it had been accepted on the basis that, with an additional amount to be decided at a further meeting, the money was being paid in settlement of damages and isondlo.

The commissioner was left with the task of deciding whether it had been a payment towards six beasts under customary law, agreed payment towards compensation for seduction only or some other form of payment. If it had been a payment towards six beasts, the girl’s family, having accepted the arrangement, had no right to sue for maintenance under Roman-Dutch law. From the way in which the witnesses reported the matter, however, it was far from clear that they had considered the payment in terms of cattle at all, until they were forced to do so by the way in which the law was framed and presented to them in court.
Indeed, observation in such cases indicates that families long urbanized are not necessarily well informed on what official customary-law requirements are in such cases, nor what current customary practices pertain in either rural areas or among recently-arrived urban dwellers. Defining what constitutes urban customary-law practice thus becomes a major problem.

V CONCLUSION

The standard customary-law text books in South Africa have for a long time recognized that conflict of laws rules are necessary to resolve clashes between the customary laws of different ethnic groups and sub-groups - clashes that are particularly likely to occur in cities. There has been considerably less discussion, however, of the variations in the living customary law in urban areas produced by such factors as differing degrees of regular rural contact, length of residence in the city, socio-religious life style, education and age. Nor has the effect of the ever-accelerating speed of change in the cities been discussed. The above examples illustrate how actual, current customary-law practices do not necessarily accord with the law manuals and on occasion how customary law appears to have changed so greatly as to have become almost unrecognizable.

To tease out all the influences leading to this result is beyond the scope of this paper, but the effect of citizens incorporating some civil-law ideas into township practice should not be underestimated. Indeed, as can be seen above, it may be far from clear which system the parties involved believed they were following: they may not have considered the question and, in some matters, they may not in fact operate according to customary law at all.

Furthermore, given the widely differing lengths of time people have been urbanized, and given their different degrees of contact with the rural areas since coming to town, any two opposing parties in a case are not necessarily both operating on the same version of customary law (even if they both come from the same rural area). The problem is which law to apply when the version of the textbooks is patently no longer applicable to the lifestyle of either party, even though they both think they are operating according to custom. A restatement of customary law seems an obvious answer, but custom is changing so rapidly that restatements are likely to be overtaken almost as soon as they appear. People nevertheless require at least some degree of certainty as to what law will be applied to their problems.

One possible answer is to require evidence on new practices to be led, but this tends to be an expensive, time-consuming procedure and it is often productive of much conflicting evidence. Even in the early days of colonialism, when rural magistrates resorted to taking evidence to discover what custom was, it was found a most unsatisfactory method; and with the diversity and pressures of urban living these problems have multiplied. Moreover, Chanock has since shown the difficulties of obtaining unbiased evidence, given the underlying pressures to which customary law was subject, as women and youth perforce gained new powers in changing circumstances and elders sought to protect their own powers under the customary law. In a modern urban setting, such problems are likely to be magnified, even if evidence is taken from women and youth themselves.

An alternative suggested is the establishment of local neighbourhood courts to which customary law cases could be referred. The argument is that such courts would, like the traditional rural courts, know what existing customs were and therefore would not require such proof. This may be over-optimistic, however, in view of the mixture of ethnic groups in the townships where people from a specific rural area do not necessarily live together. Nor, in
many cases, do the recently urbanized live separately from those who came to town many years before.

Further, given the nature of customary law, it may not adequately provide for the realities of the changing role of women and the youth in urban areas, unless such people are appointed to the court in the first place. And, even more basically, there is an inherent contradiction in expecting the procedure of local neighbourhood courts to lead to the application of law that accords with community norms: to ensure that judicial officers are cognizant with community thinking they must be selected from the community, but in a modern state they must then be trained to apply concepts that are not necessarily part of the community’s thinking. Moreover, appeals will inevitably go to judges who are not of the community.

A third alternative is for the legislature to decide to apply a national system of laws which does not pretend to match practice. The risk, as in all cases of social engineering, is that the populace may simply ignore the law, in so far as it is able to do so, and continue with a probably unsatisfactory hotchpotch of small, informal community courts and courts operated by dictatorial individuals or gangs. For a nationally-imposed system of laws to operate effectively, initial national consent and cooperation would have to be obtained, at least at community leadership level, and an extensive, ongoing (and inevitably expensive) community legal education programme would be required.

It would seem that there is no perfect solution to the problems inherent in the degree and speed of change in urban customary law. Both these factors also need to be considered in relation to the size and stage of industrialization of a city: it may be that, at a certain point in a city’s development, the cumulative effect of change leads to a metamorphosis in the very processes taking place, necessitating completely different solutions.

Indeed, any attempt to codify, restate, or apply customary law in an urban setting needs to take into account the contradictions inherent in the operation of a law developed for one type of society when applied to a very different one. Essentially, customary law developed for small, homogeneous (if hierarchical) groups, in which the interests of the individual were secondary to the good of the greater whole. When such law is applied in a fast-expanding and increasingly diverse society, where individualism is rapidly becoming the key value, the mismatch results in an ever-growing number of anomalies and injustices. It seems inevitable that, at some stage in African urbanization, radical intervention in reshaping the legal system will become necessary.
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SECOND DAY: FIELD RESEARCH INTO CUSTOMARY LAW

G DECISIONS OF TRADITIONAL AUTHORITIES TAKEN TO THE HIGH COURT

ADV G SUPER
LEGAL ASSISTANCE CENTRE

The Legal Assistance Centre (LAC) was founded in 1988. The impetus for its establishment came from various churches in Namibia, the National Union of Namibian Workers, the Namibian National Students Organization and various other community organizations and individuals.

Since the Constitution of Namibia protects fundamental rights, the LAC has resolved not only to continue with the work of assisting victims of human rights abuses, but also to attempt to foster a belief in law as an instrument of justice. To further these aims, the LAC has resolved to concentrate on three broad areas. In the first instance, this involves continuation of legal advice and the conducting of impact litigation, with particular focus upon the Constitution and abuse of power. Secondly, the Centre has become more actively involved in education and training. Thirdly, the Centre continues to be engaged in advocacy and policy work, based upon extensive research.

I have been asked to discuss cases involving decisions by traditional authorities which the Legal Assistance Centre has taken to the High Court. I am going to refer to two articles in the Constitution, arts 12(1)(a) and 18. The first provides that:

‘In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court or tribunal established by law: provided that such court or tribunal may exclude the press and/or public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.’

Article 18 states that:

‘Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent court or tribunal.’

In terms of our overall case load, the LAC does not receive a large proportion of customary-law cases. In fact, we spend far more time in the labour courts battling with errant employers, on behalf of employees who have been treated unfairly, than we do with traditional leaders.
I have chosen one particular case to discuss, because I feel that it raises important issues relating to the interface between customary law, traditional authorities, the Namibian Constitution and natural justice. The case involved an application in terms of Rule 53 of the High Court Rules, which relates directly to art 18 of our Constitution. Rule 53 governs proceedings to bring under review a decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions.

The case at hand involved the Oukwanyama Tribal Council of Headmen. The applicant was an unmarried woman who derived her income from a cucashop in likango village, where she resided. She approached the Human Rights Centre in Ongwediva for advice, after she had been ordered to pay 12 head of cattle and N$200,00 by the Tribal Council. The sentence was imposed after the applicant was found ‘guilty’ of causing somebody’s death by selling him poisonous tombo. The relatives of the deceased complained to the headman in likango village and the sentence was the result of the complaint.

The applicant disputed poisoning the deceased: according to her she was not even at her cucashop on the night that the deceased was alleged to have drunk the ‘poisonous’ beverage. In addition, the post-mortem report stated that the deceased died of hepatitis induced by carcinoma of the liver (liver cancer).

The LAC is a non-profit, public-interest law centre based in Windhoek, and it is the only centre of its kind in Namibia. It provides legal and educational services in the public interest to people who would not otherwise have access to the legal system. In addition to the Windhoek office, there are four other affiliated advice offices in Namibia. These are the Human Rights Centre in Ongwediva, the Rundu Advice Office, the Walvis Bay Advice Office and the Keetmanshoop Advice Office.

The first hearing was adjourned for the senior headman’s attention; and this hearing was also adjourned, apparently due to a lack of evidence. The next hearing was reconvened at the offices of the Oukwanyama Tribal Authority in Ohangwena. The relatives of the deceased were requested to take the post-mortem report to the hearing. According to the applicant the headman presiding over the hearing did not understand the contents of the post-mortem report and the report was taken to a sister at the Ohangwena Clinic for interpretation. The post-mortem report was explained to the effect that the deceased had died of liver cancer. This explanation was given in the presence of the applicant, two members of the Tribal Council and two representatives of the deceased’s family.

No further witnesses were called. The applicant was not given an opportunity to call her own witnesses, nor was she allowed to cross-examine witnesses or give her version of events. She was also not afforded the opportunity of representation at the hearing. Her rights in relation to the charge were not explained to her and she was unclear as to whether she was standing trial for the criminal offence of murder or for a claim of damages for compensation.

We cited the Oukwanyama Tribal Council of Headmen as the first respondent, the Chairperson of the Council as the second respondent and the two complainants as the third and fourth respondents, respectively. We asked for the following:

(i) that the proceedings and ruling be reviewed and set aside, or alternatively corrected and, in the further alternative, declared in contravention of the Namibian Constitution.

(ii) That the respondents return the money that the applicant had already paid.

(iii) That the respondents pay for the costs of the application.

(iv) We also asked for a record of the proceedings in terms of Rule 53(1)(b).
Our application was based on the following:

(i) If the hearing was a criminal trial, then in terms of s 4(1)(b) of Proc R348 of 1967 the respondent had no jurisdiction to hear the matter, for the Schedule to the Proclamation excludes the crime of murder from the jurisdiction of traditional authorities.

(ii) If it was a civil case in which the complaints wished to claim damages from the applicant, no evidence in respect of loss of support or material had been led.

(iii) The proceedings were irregular because:
(a) the applicant was not given an opportunity to present her case;
(b) she was not allowed to be represented;
(c) she was unaware of her rights in their proceedings and they were not explained to her;
(d) the evidence was not adduced under oath and she was not afforded the opportunity of cross-examining witnesses;
(e) the Tribal Council was biased and had not properly applied its mind to the matter before it;
(f) the result reached was manifestly unfair; alternatively, the Tribal Council being an administrative body had acted unfairly and unreasonably in contravention of art 18 of the Constitution;
(g) the proceedings were in contravention of art 12(1)(a) of the Constitution, in that the applicant’s right to a fair trial was denied.

None of the respondents opposed the application and we accordingly set the matter down on an unopposed basis. The Judge ordered that the decision be set aside, that the respondents return the money paid by the applicant and that they pay the costs of the application.

On the one hand, we achieved that we had set out to do, which was to have the decision set aside. On the other hand, we succeeded in alienating the Tribal Council and the family of the deceased. Ironically, representatives of the Council visited the Human Rights Centre and complained about the fact that the High Court had not listened to their version of events! The money has still not been returned to the applicant, but she is under no further obligation to pay any outstanding amount.

It must also be pointed out that, since the matter was unopposed, the applicant’s version of events went undisputed and our points of law were also not contested.

In conclusion, I would like to leave you with the following thoughts. The concept of ‘western’ law is inaccessible to the vast majority of Namibians; not only is it costly to seek legal advice but in many instances legal terminology itself is also totally incomprehensible, which alienates large sectors of the society. Perhaps this is why the customary-law cases which are referred to the Legal Assistance Centre are only referred once the ‘traditional court’ route has been taken and one party feels aggrieved by the decision.
CUSTOMARY LAW RESEARCH IN NAMIBIA: METHODOLOGICAL REMARKS

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CUSTOMARY LAW RESEARCH: THEORETICAL ASSUMPTIONS

"Law" is a rich and ambiguous word with wide ramifications in ordinary speech. It has been adopted and given even more widely ramifying technical meanings by two separate disciplines. The first is the discipline of lawyers. To lawyers the law is the core of that highly refined system of ideas and practices of which the legal institutions of our society consist. To ethno-

gical or comparative jurists, on the other hand, "law" is any system of jural institutions which controls, wholly or in part, the "force" inherent in any politically organized society.1

To talk about customary-law research in Namibia means to talk primarily about empirical research. Customary-law research is a neglected area in Namibia, despite the undeniable importance of customary law for the great majority of the Namibian people.2

What is customary law research about? The answer could be that it investigates legally relevant facts, but what are legally relevant facts? What facts are of relevance and what is legally relevant? What is relevant for whom?

HOW TO DETERMINE THE SUBJECT OF CUSTOMARY-LAW RESEARCH

(1) Introductory remarks: folk systems and analytical systems

There are basically two ways of looking at customary law. The one is to select from the inex-
hautable aggregate of social facts existing in a given society, those which the researcher con-
siders appropriate in view of his/her pre-defined research criteria. Legally relevant facts for this approach are those that can be subsumed under what the researcher expects law to be.

The other way of approaching customary law is to look for all sorts of societal mechanisms which the society cultivates to resolve conflict resolutions at a low price, and, thus, ensure the survival of the society. Which of the mechanisms will be recorded as legally relevant is not predictable and may vary from society to society.

1P Bohannan Justice and Judgment among the Tiv (1968) 4.

2M O Hinz Customary law in Namibia: development and perspective (1995) CASS 101ff gives an overview. Since the German questionnaire project (which was conducted after the German/Herero war of 1904-5), research on the customary law of Namibian communities did not, until recently, become a separate issue: research on the administration of justice by traditional authorities is documented in Hinz op cit.
The first approach, the lawyer's approach in Bohannan's sense, may ignore social facts that the second approach, the approach of the 'ethnological or comparative jurist', may consider as crucial to the proper execution of the duties of the 'jural institutions' of a society. The conceptual difference between the two approaches is neither new or special to legal research. Its appearance in legal studies is very much linked to the controversy between Bohannan and Gluckman over customary-law research, but it goes back to the general theoretical debate in anthropology between evolutionism and functionalism or cultural-relativism. The classic evolutionist, who sees societies as less or more developed, but always aiming at more development, needs only one universal language which can be applied to all societies. The classic functionalist or relativist denies the applicability of such a universal language, as each society has its own pattern, which cannot be directly translated into the language of another society.

The practical way out of this dilemma is to adopt a meta-language which allows the researcher to translate from, what Bohannan calls, the folk system into an analytical system. To exemplify this, the researcher, researching how justice is administered in traditional communities of Namibia, will fail his/her task when structuring his/her research in terms of the general-law definition (ie, folk system definition) of courts. Using the term 'courts' would necessarily imply the concept of courts developed in and by the general law of this country. By using the term 'dispute settlement bodies', one will gain access as to how Bushman communities, for example, but others too, such as Nama communities and communities in urban areas (townships), secure the settlement of conflicts.

(a) 'Native law and custom' in southern Africa

Botswana, Zimbabwe, South Africa, Namibia and other countries in southern Africa, all had Native Administration Acts by which special courts for blacks were established. 'Native law' could be applied in those courts 'in all suits or proceedings between natives involving questions of customs followed by natives'. The application, however, was at the discretion of the presiding officer.

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4M Harris The Rise of Anthropological Theory (1968) 142ff, 514ff and 568ff.

5It was R Benedict Patterns of Culture (1934) who introduced the pattern to describe the different ways societies developed to deal with their complexity.


7Much has been said about the different approaches to customary law by South African scholars: the jural school proper, the anthropological/jural school and the anthropological school. It is beyond the scope of this paper to go into this matter. See J G Hund 'Legal and sociological approaches to indigenous law in southern Africa' 1982 Social Dynamics 29ff; cf L P Voster & F C de Beer 'Regeoptekening in KaNgwane: metodologiese aspekte' 1993 Suid-Afrikaanse Tydskrif vir Etnologie 39ff.

8Section 9(1) of the Native Administration Proc 15 of 1928. Section 9 was repealed by the Native Administration Amendment Act 21 of 1985. Other parts of the Proclamation are still in force.
The establishment of native courts led to two somehow contradictory results. It marginalized (African) customary law, and, at the same time, it opened reserves in which customary law was developed into a "paralegal legal system". The marginalization of customary law is best expressed by Hosten et al in their leading textbook 'Introduction to Law' who say:

"... there is only one legal system operative in South African law which, in turn is a hybrid system of law composed of Roman-Dutch law and English law elements. Despite this it is a fact that a large proportion of the South African population, namely the Blacks, have lived for centuries according to their tribal or customary laws."

The legalization of the paralegal, ie marginalized systems of law, can be studied by examining how the courts of the Native Administration Acts applied customary law. The following refers to the example of South Africa, as native appeal courts were never introduced to Namibia. The decisions of the Native Appeal Courts became a source of law for all involved in the application of customary law by commissioners and the Appeal Courts themselves. Warner, author of a digest of 'native civil case law', wrote in the foreword to his compilation of 4704 cases (which covers the period from 1894 to 1957) that he saw the objective of his work to contribute to the 'smooth and expeditious handling of ... cases', a process that was 'hampered by the lack of a ready means of referring to reported authorities concerning the points involved'.

Together with textbooks, such as Seymour's customary law by Bekker and the Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes by the three Oliviers, African customary law was transformed from a legal system of its own into a source of law. This made it easy to apply rules and principles of general law. One example is the application of general-law criteria for ascertaining customary law. What Van Breeda v Jacobs spelled out in order to determine when custom becomes law, appears in similar words in the definition of (African) customary law. That this customary law (which some authors term 'indigenous law') also has other sources seems to be widely ignored.

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141921 AD 330. The requirements are that the custom must be reasonable, long established, uniformly applied and certain.
15See M W Prinsloo (assisted by A C Myburgh) Inheemse Publiekreg in Lebowa (1983) 16 and Bekker (n12) 11. With reference to relevant decisions, Bekker says: the custom must be reasonable, conclusive and in accordance with natural justice and public policy. Prinsloo says that the definition for general-law custom and customary law are the same. The criteria are "'n vaste gedraegslyn oor 'n lang tydperk, algemene bekendheid en redelikheid". In Ngobo v Ngobo 1929 AD 233 at 236, the Supreme Court of South Africa held that African customary law 'must be proved in the same manner as any other custom'.
16Namely, legislation by traditional authorities and court decisions. See Prinsloo op cit 17ff. Hinz (n2) 91ff discusses the self-stated laws of Namibian communities, enacted by traditional authorities.
It is not the purpose here to discuss the advantages or disadvantages of this type of consolidation and standardization of customary law. To do so would require going into other methods of consolidating customary law, be it by way of codification or restatement. The point is that these consolidations produce not only what has been called official customary law but also, on the other side of the coin, a special space for the development of law: the so-called unofficial customary law.

(b) Legal pluralism: a framework for legal anthropological research

The dichotomy between official and unofficial law per se is not unique. It is a societal fact that occurs everywhere. Legal researchers (lawyers, sociologists and anthropologists) have for many years taken note of it. Many studies have been published on unofficial law, its mechanisms, its relationship to the official law, its role in the administration of justice and so forth.

The dichotomy is highlighted here, because of its methodological value for legal anthropological research. Both types of law are part of the legal reality in Namibia, South Africa, Botswana etc. There is official customary law and there is unofficial customary law. It might even be that different levels (or perceptions) of both exist side by side. The researcher, whose task it is to establish knowledge about customary law, cannot deny the reality of legal pluralism.

This proposition is even more valid for customary law research, which is to serve the process of law reform. The law reformer may, at the end of the day, eliminate parts of the unofficial or official customary law, but, can he/she do so without knowing what the situation is?

(2) Towards a gender perspective in customary-law research

In a recently published article, two Tanzanian researchers called their country’s customary laws on inheritance ‘a case of cultural violence against women’. The view, implicit in this quotation, that ‘customary law subjects women to injustice and discrimination’ has largely informed the recent debate in South Africa on whether or not customary laws should be beyond...

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17See, however, Hinz (n2) 9ff and 46ff.
18There is even a Journal of Legal Pluralism & Unofficial Law, which was first published some thirty years ago. The Bellagio Papers also deserve a special mention, as they represent an informed collection of thoughts on unofficial law and legal pluralism: A N Allott & G R Woodman (eds) People’s Law and State Law. The Bellagio Papers (1985).
19That some scholars talk about the ‘invented’ tradition (see here T W Bennett A Sourcebook of African Customary Law for Southern Africa (1991) 46 and R J Gordon ‘Vernacular law and the future of human rights in Namibia’ 1991 Acta Juridica 86ff) certainly reflects the number of interventions and inroads into what tradition used to be. However, the inventions have been lived by the people (at least to some extent) and are therefore part of society.
the reach of the bill of rights. A similar view has been expressed by a number of activists in the Namibian women’s movement.

The idea that customary laws inevitably oppress women is rooted in the perception that they have existed unchanged ‘from time immemorial’. This conception is also shared by certain apologists of African customary laws, who presume, for example, that African customary marriages are necessarily, and will always remain, polygynous. According to this conception, African customary laws are rooted in a pre-colonial past, in which a woman

... generally lacked all formal legal capacities; she was not allowed to sue for the divorce or for the guardianship of her children; she would not be entitled to hold or dispose of property; she could not approach a court unassisted; and she might not have a say in the government of her community.

It is difficult to decide whether or not this picture held true in pre-colonial southern Africa. It is beyond any doubt, however, that African societies, like any others, are inherently dynamic. Christianity, labour migration and colonial administration have challenged the social organization of traditional communities. Although these changes were largely initiated by outside forces, communities have reacted by undergoing substantial transformation.

The notion that customary laws are static has to be dismissed. Instead, customary laws must be analyzed within the framework of social change. Gender research will seek ways of ‘deconstructing’ customary laws in the light of contemporary conditions. It will identify those customary values supporting the dignity and rights of women and others constraining women, so that law reform efforts can build upon the former and reject the latter. A primary school teacher in northern Namibia has put the task of customary-law research and reform in unequivocal terms:

‘We should look at the things that happened in the past and then decide what we should keep and what should be done away with.’

Whether we do or do not agree with the judgment quoted above, namely, that certain customary laws actually present violence against women, it none the less touches upon three

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23This view was expressed repeatedly in interviews conducted by Becker in 1990-91.
24See, for example, C R M Dlamini ‘It’s a women’s right to be one of many wives’ Weekly Mail & Guardian, October 21-27 1994, who claims that ‘customary marriages in South Africa are polygamous ... (and) As customary marriage is part of the culture of black people, black women who marry by customary law do not regard this as a derogation of their dignity.’
26Bennett op cit 274.
27The impact these factors have had on Namibia has been depicted in H Becker ‘From Anticolonial Resistance to Reconstruction: Namibian Women’s Movement 1980 to 1992’ (1993) University of Bremen, PhD thesis, 61ff.
29During an interview conducted by Becker in Ongwediva in May 1991.
central categories, that an approach aimed at deconstructing customary law on gender lines would need to investigate: first, culture; secondly, gender and gender relations; and, thirdly, power.

(a) Culture

Based on its colloquial meaning, ‘culture’ implies all issues of human thinking, feeling and behaviour in one or more than one social or national group, that is, religion, philosophy and attitudes, the social, administrative and legal institutions, clothes, nutrition, architecture, demographic behaviour, arts, etc.\(^{30}\)

While the understanding of ‘culture’ may often be imprecise and confusing, there is arguably a consensus that culture is composed of patterned and interrelated traditions which are transmitted over time by mechanisms based on human beings’ linguistic and non-linguistic symbolizing capabilities.\(^{31}\)

Defining culture is an on-going process, in which all human beings belonging or adhering to a certain culture are involved. Thus, while culture transmits traditions, it is also ever-changing, according to the changing socio-economic and political conditions under which people live.

People define culture in accordance with their specific socio-economic and political situations. Different social locations on grounds of gender, socio-economic position (‘class’), age, etc will invariably lead to an individual’s different perceptions about culture. Which definition of culture becomes ‘officially’ recognized, however, and which might be enforceable by law, depends largely on power relations within a specific community or society and beyond.

An approach to a gender perspective on customary law must first, therefore, look at how culture, including its customs, norms, traditions and law, is defined and by whom. It should also be asked who stands to gain from preserving a cultural tradition. In short, ‘the politics of culture’\(^{32}\) should be investigated in a gender perspective on customary law research, i.e. concepts of (African) culture and the political context in which its significance is debated.\(^{33}\)

An historian working on changes in Ovamboland society,\(^{34}\) for instance, revealed in an exemplary fashion the impact of internal power relations on the definition of ‘official’ culture and how that culture was enhanced and cemented in interactions with the colonial administration.

According to the ‘women-do-not-own-cattle’ myth, women in Ovamboland are presumably excluded from cattle ownership. The opposite is true, however: women owned cattle in the past and they still do. Kreike has ascribed the persistence of this myth to a ‘male discourse’, to which the long-serving Ovambo native commissioner Hahn made a large contribution. The gender bias of the ‘bantu cattle complex’ is still pervasive in Ovamboland discourse. According to the prevailing discourse, the man is regarded as the owner of the

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\(^{32}\) Bennett (n25) 276.

\(^{33}\) Bennett (n25) 269.

house, fields and cattle and, nowadays, also of motor vehicles, notwithstanding the fact that some of these assets might in reality belong to the wife. Today women perceive this discourse as unfair and discriminatory, and it is felt that change is needed.  

(b) Gender

The foregoing section has shown that research into gender and customary law must indeed consider the power relations in the community or society under study, and gender power relations in particular. The two concepts - gender and power - will therefore be analyzed in this and the following section.

Gender refers to the social relations between women and men. It is a set of socially constructed relations, i.e. gender is 'made' by human beings, men and women, who define it and live it. As has been indicated above, language and discourse play a major role in the definition of culture, and consequently gender too:

'Our conceptualisation of "women" and "men" is produced by language and discourse. Our concepts of "women" and "men" are part of the ruling relations, to be deconstructed and transformed.'

The gender concept thus acknowledges that gender relations vary, i.e. that they have changed over time and space, and are characterized by (as well as defined through) conflicts, inconsistencies, ambivalence and contradictions. In short, they do not fit into simple unilinear or dichotomous models that would state, for instance, that in all circumstances all men would yield power, while all women would be absolutely powerless victims of male dominance.

(c) Power

While the construction of gender is indeed part of ruling relations in any one society, the absolutist notion of male power and female powerlessness has to be dismissed. It is not only men that 'make' gender relations by imposing them on women; women also play an active part in the process. As the German sociologist Max Weber has suggested, even the act of submission implies a (residual) action, i.e. those who obey do so to a certain, albeit often minimal, extent, because of own interests. Women's power strategies, especially indirect ones, are inherent in gender relations. They contribute to the legitimacy of male dominance while counteracting male authority.

Contemporary feminist social scientists, who have done comparative study on societies and communities showing relatively little gender inequality, have therefore rejected the

35 See Becker & Hinz (n9) 65 and 70ff.
37 Mbilinyi op cit 34.
38 Mbilinyi op cit 36.
39 As the above-mentioned example of the 'women-do-not-own-cattle' discourse has shown.
41 I Lenz & U Luig (eds) Frauenmacht ohne Herrschaft. Geschlechterverhältnisse in nichtpatriarchalischen Gesellschaften (1990). One example examined by the authors is the traditional Bushman society.
perspective of power relations as a one-way street: one party enforcing his or her will on the other. Lenz has instead suggested understanding power relations as a process of negotiation:

'My suggestion is that power should be understood as mutual influence that is exerted within social relations by those involved, namely women and men in our context. Power strategies are those actions that aim at reaffirmation or extension of influence. Thus the significance of power will shift from a unidimensional incident of enforcement to processes of "negotiation" between the parties." 42

This understanding of power relations, and gender power relations in particular, allows for a perspective on gender relations that will move away from the 'victim image', which is ultimately disempowering for women (and any other disadvantaged group in society). Instead, it acknowledges that 'human beings are active agents in history and not just passive, hapless victims of circumstances'. 43

(d) Culture, gender and power in customary law research

Attempts to deconstruct customary law will greatly benefit from use of the concepts outlined above. First, the concept of culture, and thus traditions and customary laws, as an ever-changing social construction, leads to an historical view of customary law. Socially constructed customary laws are open to processes of deconstruction and eventually reconstruction, ie progressive change, which will bring them into line with the actual lives of women and men.

Secondly, this perspective suggests that gender customary law research should focus on 'living law', ie what people and communities actually practice, since the living law is the sphere where women (and men) can directly exert influence on the definition of the customary laws governing their lives. Obviously, other legal systems, ie official customary law, common and statutory law, must also be considered in comparison in order to identify contradictions and possible conflicts.

Thirdly, there should be a focus on power relations and inequalities, both within the community under study and between it and 'the outside world'. This analysis should be done in order to determine the framework within which customary laws are defined and practised. The interests of the different actors within, and those interacting with, the community must be considered.

Fourthly, while starting from an assumption that there are indeed, traditionally as well as currently, gross gender inequalities in most communities (and definitely in those so far studied in Namibia), researchers must identify women's strategies to define or resist aspects of customary law. It is true that female definitions and practices are often hidden beneath dominant (mostly male) interpretations. Because women are social actors and not simply

42I Lenz 'Geschlechtssymmetrische Gesellschaften' in I Lenz & Luig Neue Ansätze nach der Matriarchatsdebatte (1990) 17ff.


44This definition has been developed by E Ehrlich. See also M Mamashela 'Women's Property Rights in Lesotho. A Basic Human Right or a Privilege?' (1992) paper presented at the SAUSSC Conference on Women and Development, 14-16 December.

45See Becker & Hinz (n9), but also Becker (n27) 41ff.
victims, however, their concepts and strategies must be revealed, for they will probably provide useful information for a reform-oriented approach.

III RESEARCH METHODOLOGY

This section will discuss methodologies and methods for research into customary law. The following is concluded from the theoretical remarks in the foregoing sections as well as from experience with empirical research into customary law in Namibia (which has resulted in two recent publications on the development of and perspectives on customary law and customary marriage in particular).46

(1) Methodology

Methodology concerns the theory and analysis of the methods and approaches most appropriate for a given theory or research problem.47 A methodology must therefore take into account: first, the state of knowledge available on the research problem in question; secondly, theoretical assumptions; thirdly, feasible and appropriate research methods, i.e. techniques for data collection, including the funds and human resources available.

First, research on customary law in Namibia has so far been a neglected area. Thus, research in the field has very little experience to build upon.48 It follows that the empirical research on customary law presently to be started will have to be exploratory and will involve researchers in a learning process.

Secondly, and following from the theoretical assumptions outlined above, customary-law research will follow a legal/anthropological or legal/sociological approach rather than a strictly legal approach. Thus, investigation of customary law will include the wider cultural and societal context of the legal systems under study. While the following list is by no means inclusive, issues in need of immediate research are:

- mechanisms of customary conflict resolution, no matter how ‘unofficial’ they may be;
- the ways in which customary laws are ‘made’;
- the socio-economic and political conditions of a changing Namibian society and their impact on customary legal systems;
- social structures, formal as well as informal;
- power relations and authority structures within the communities to be studied; and
- gender relations, both factual and ideological (discursive).

The nature of customary law, as the legal framework governing most people’s day-to-day lives, calls for an approach that goes beyond a legalistic perspective by integrating legal and empirical social research. Research should therefore start from people’s whole experience, which assumes that laws are inextricably intertwined with other aspects of social

46 Hinz (n2) and Becker & Hinz (n9).
47 Mbilinyi (n36) 32.
48 See above.
organization. Customary-law research should, in other words, be multi-disciplinary, involving both lawyers and social scientists.

Research into customary law in a changing society, or, as it has been referred to with regard to gender research, the ‘deconstruction’ of customary law, also requires an action-oriented and participatory approach. In short, this refers what we have elsewhere called an ‘empowerment approach’.

This approach attempts to integrate elements of the re-construction of customary laws into the research aimed at their deconstruction. The approach supports the on-going process of redefining culture and customary laws within a community. It further, and in particular, means that traditionally less powerful sectors of the community, women and youth, for example, should be encouraged to raise their voices. An empowerment approach can go even further to provide assistance for these groups to organize for change.

In practice, an empowerment approach will involve making extensive use of legal education as a research method. In the course of the research, the communities under study will be provided with legal advice and education about their rights in order to shift the research process away from a one-way flow of information towards a two-way exchange of knowledge. Legal education as a research method necessarily takes up the concerns of the communities under study and possibly supports changes initiated by communities or certain sections within communities, such as women or traditional leaders.

The research methodology must also take into consideration the fact that critical epistemologies, such as feminist epistemologies, deny the possibility of neutral, value-free science and knowledge. Researchers are inevitably part of the world under study, because their conception of the research problem, their construction of research instruments and interpretation of data are unavoidably influenced by their own identities, social positions and beliefs.

Thus, while research into customary law will draw from and meet the standards and techniques developed in the empirical social sciences, it will consciously challenge empiricist presumptions that ‘true’ knowledge can only be produced by researchers, who remain outside of the world under study so as not to ‘bias’ the findings.

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49The precarious situation of widows, for instance, is not only determined by customary inheritance laws but also by, inter alia, the widow’s social status, her opportunities and freedom to remarry, obligations of relatives and mourning rituals. H Becker Towards an Empowerment Approach: Gender Research and Legal Education in Customary Law in Namibia (1994) CASS (Working paper) 2f.

50Becker op cit 2.

51Becker op cit, focusing on gender research into customary law in Namibia.

52An example of encouraging changes has been provided by the the Women and Law Committee (WLC) of the Law Reform and Development Commission. During 1992-3, WLC strongly supported efforts by the Ndonga traditional leadership to improve the situation of widows with regard to land rights. See Hinz (n2) 91ff and M O Hinz Customary Law in Namibia: Development and Perspectives. Documentation (1995) CASS.

53Mbiliyi (n36) 52f.

54With regard to reliability and validity of research instruments.
(2) **Research methods**

Studying customary law in social context requires a multifocal approach to meet the multiple aspects and nuances of the research problem. Research techniques will include quantitative, qualitative and participatory methods, from which researchers working on a specific problem will have to choose the appropriate set of techniques. The following remarks are therefore somewhat cursory.

Quantitative survey methods have the obvious advantage of gathering a large amount of data. They will normally be based on representative samples from which the participants are randomly selected. Usually, as in the case of the NDT/CASS/SIAPAC/FES study on the legal and socio-economic situation of women in Kwayama, Kwambi and Mbalantu, a standardized questionnaire is designed, and interviewing is conducted by enumerators, who were selected and trained for the empirical research process.

While it is an obvious advantage to research a large number of people, possibly representative of the respective community or social group, a standardized questionnaire poses definite disadvantages, since it precludes findings that might not have been anticipated. It is also very important that the questionnaire is carefully designed, in particular with regard to concepts which might be alien to the respondents.

In short, quantitative survey methods can only provide information about the numerical extent of a problem, that could with less accuracy be obtained by qualitative methods. A quantitative method should rather be employed as an additional tool, once the nature of a problem has already been explored by qualitative methods.

Qualitative methods are definitely to be preferred in the initial stages of a research project in order to explore the problem. They are usually based on smaller ‘purposive’ or ‘target’ samples. Purposive sampling deliberately seeks to identify participants who have the attributes under study, for example, widows in an inheritance study. The samples can also include persons who represent extremes in terms of attributes and/or attitudes. Also included will be ‘knowledgeable’ persons within the community, ie those who are selected on grounds of their position (such as traditional leaders) and/or how articulate they happen to be.

While qualitative methods are especially valuable in the initial stages of a research project, these methods, both conventional and action-oriented participatory ones, should also be employed at later stages of a project, since they allow people to tell their own stories and to express their own opinions in their own words. They also fulfil the goal of integrating research and ‘action’, ie educating people about their rights and encouraging them to change laws which do not meet their needs.

Qualitative methods include, inter alia, case studies, group discussions, in-depth interviews with individual informants, participant observation and popular theatre. Because these methods need careful preparation and training of fieldworkers, they are time-consuming.

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56In the case of the survey mentioned above, women in the three Owambo areas.

57See Mbilinyi (n36) 60.

58Becker (n49) 3.
and thus involve considerable expense. They are worth the trouble, however, for they allow more in-depth information to be gathered and the research process to be more empowering. Thus, whenever the plan of a research project allows, there should be a focus on qualitative methods.

(3) **Researching legal pluralism**

An example from fieldwork in Namibia\(^6^0\) will be quoted here to illustrate elements to be observed in researching legal pluralism.\(^6^1\)

Empirical research conducted recently in three Ovambo communities (Kwambli, Mbalantu, Kwanyama)\(^6^2\) on the legal and socio-economic situation of women, has shown that the choice of a matrimonial property regime, and in particular the community of property regime most commonly chosen, was not governed by consideration of what the most appropriate property regime would be. People opt for marriage in community of property because it is the usual thing to do and because the church, ie the Lutheran church, advises them to do so. The fact that a high percentage of people obviously did not know what in or out of community of property meant or were unaware which regime governed their marriages confirms the above interpretation.

The seemingly simple wording of s 17(6) of the Native Administration Proc 15 of 1927, which speaks of not producing the ‘legal consequences of marriage in community of property’ has little to do with what people want or intend. Individuals obviously want to marry under general law (with the blessing of the church), but they would prefer customary law to regulate the consequences of their marriage instead of the consequences prescribed by s 17(6) of the Native Administration Proclamation. Although this is not a classic case of marriage dualism,\(^6^3\) the dualism of laws, or general law and customary law (as unofficial as the customary law may be) in the conflict situation resembles a classic case.

The legislators of the Black Administration Act 38 of 1927 and the Native Administration Proc 15 of 1928 accepted the dualism of marriage at least in so far as they accepted the customary marriage consideration (lobola, bogadi, otwinya or okuonda).\(^6^4\) The courts even enforced the lobola agreements that went hand in hand with civil marriages.\(^6^5\) Otherwise, the general understanding seems to be that the ‘assumption theory’ prevails: whoever enters into a civil marriage is presumed to accept the legal consequences of such a marriage.

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\(^{59}\) However, carrying out representative surveys is also a costly exercise.

\(^{60}\) Conducted in Ovambo, Kavango and Caprivi.

\(^{61}\) This follows, in essence, from Becker & Hinz (n9) ch9.


\(^{63}\) See below.

\(^{64}\) As has been pointed out by Hinz (n2) 56f.

\(^{65}\) Bekker (n12) 262f.
In his study on legal dualism in Lesotho, Poulter discusses four possible ways of approaching dual marriages. The first is the South African/Namibian one, in terms of which the civil marriage always prevails over a customary marriage. The second could be to give preference to the marriage concluded first. The third would entail the opposite, namely, giving the second marriage preference. The fourth approach, one supported by Poulter, would be to regard both marriages as subsisting side by side:

‘The parties have clearly manifested an intention to marry under both systems and therefore both marriages must be regarded as subsisting side by side. Instead of adopting a negative attitude in terms of which one of the marriages is treated as overridden, subsumed or of no significance, a positive approach is needed which will give life and meaning to the fruitful merging of two cultures.’

The couple’s right to organize their life according to norms which they regard, explicitly or implicitly (i.e. according to lifestyle), as fit and proper, speaks for the quoted solution quoted above, and could thus find constitutional support.

VI CUSTOMARY LAW RESEARCH TO SERVE LAW REFORM

(1) Customary and constitutional law

It will not be possible to examine all the dimensions of the relationship between constitutional and customary law. The whole matter of how constitutional requirements will affect customary law and what will eventually be the constitutional criteria for testing customary law is an area where research has just begun.

Four constitutional arguments will be briefly outlined.

First, under art 66(1) of the Constitution, customary law has been recognized on the same basis as any other law of the country. But what does it mean when the Constitution speaks of ‘customary law in force on the date of Independence’? Is customary law in terms of art 66(1) the only official customary law? Is the law of so-called customary unions now the recognized customary law of customary marriages? In art 4(3)(b), the Constitution mentions ‘a marriage by customary law’ which ‘for the purpose of this Sub-Article (and without derogating from any effect that it may have for any other purposes) shall be deemed to be a marriage’. There are good reasons to be cautious when using this provision as evidence of a

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The UNAM Faculty of Law/CASS project ‘Conflict management in the interface between customary law and the constitutional state’ (M O Hinz Conflict Management in the Interface between Customary Law and the Constitution State. Development and Perspectives of Customary Law. The example of Namibia Project outline (1992)) has to be mentioned here. Preparation began in 1993, and the project is now being implemented.

68In essence this follows from what has been said in Hinz (n2) 95ff and Becker & Hinz (n9) ch 9.
change in attitude to the recognition of customary-law marriages. The Constitution refrains from using the term ‘customary union’ and instead links ‘marriage’ and ‘customary law’. This, indeed supports the view that, together with art 66(1), customary marriages are now to be regarded as marriages (although the legal consequences of their implied protection needs further investigation).

Secondly, from the way in which art 66(1) is worded, the Constitution obviously entrenched the restricted inroad approach developed in the Kakujaha case.⁶⁹ This means that customary law can in effect deviate from common law.

Thirdly, whether or not customary law will be sustained is principally a matter of its constitutionality. Even if Parliament decides to make an inroad into customary law by way of a statutory enactment, the enactment may be constitutionally challenged, as Parliament is bound to the Constitution. In particular, Parliament has to respect the right to culture, which will include the right to one’s own law, for the entitlement is enshrined in art 19 of the Constitution.⁷⁰

Fourthly, the constitutionally required process of balancing inroads into customary law against the right to culture and other constitutional rights, can be extended to a further concept - weak cultural relativism - which might help to deal with conflicts emerging from traditional orders, on the one hand, and interests based on internationally developed constitutional standards on the other. It is obvious that customary laws which unquestionably violate the provision of equality in the Constitution (art 10) will have to go. It is also obvious that other aspects of customary law, which might be questionable from a universal human rights point of view, may be retained. This is what some scholars discuss as the approach of weak cultural relativism.⁷¹ In this field, however, more is open for legal discussion than is ready for application and implementation.⁷²

⁶⁹See above.

⁷⁰The meaning of art 19 will certainly become a matter for in-depth discussion. The right to culture is construed as the right of an individual and not as the right of a group. It might be difficult, however, to implement this right without reference to the group that sustains and develops the culture implied. Cf Bennett (n67) 1 for a short note on the equivalent article in the South African Constitution (art 31) and M O Hinz ‘The Right to One’s Own System of Justice. Legal Pluralism and Equality of Rights in Canada’ (1993) paper for the conference on Legal Equality and Legal Pluralism, Bielefeld 10-12 December.

⁷¹Cf Bennett (n19) 35; Murray & Kaganas (n67) 125f. What the late Berker JC had to say in Ex parte Attorney-General, Namibia: In re corporal punishment by organs of State 1991 (3) SA 76 (NmSC) at 95f may be recalled here: ‘Whilst it is extremely instructive and useful to refer to, and analyse, decisions by other Courts such as the International Court of Human Rights, or the Supreme Court of Zimbabwe or the United States of America on the question whether corporal punishment impairs the dignity of a person subjected to such punishment, or whether such punishment amounts to cruel, inhuman or degrading treatment, the one major and basic consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspiration and a host of other established beliefs of the people of Namibia.’

In other words, the decision which this court will have to make in the present case is based on a value judgment which cannot primarily be determined by legal rules and precedents, as helpful as they may be, but must take full cognisance of the social conditions, experiences and perceptions of the people of this country.’

⁷²Cf Hinz (n67). However, it must be held that what some scholars argue, namely, that certain customary-law institutions do not violate the equality provision of the Constitution, as the Constitution applies only vertically and not horizontally (see Dlamini (n24) and also art 5 of the Namibian Constitution), is in line with the so far imported German doctrine of the application of fundamental rights (Drittwirkungslehre). Cf, in this regard, D Davis, M Chaskalson & J de Waal ‘Democracy and Constitutionalism: The role of Constitutional Interpretation’ in D van Wyk, J Dugard, B de Villiers & D Davis (eds) Rights and Constitutionalism. The New South
Reforming customary law from within

Reform of customary law occurs in the context of the foregoing remarks on constitutionalism. While it will probably be impossible to pay regard to all constitutional requirements, reform of customary law must meet the basic ‘spirit’ of the Namibian Constitution with respect to equality and societal democratization.

As Armstrong has spelt out, the experience of WLSA’s research into gender and customary law in six Southern African countries uncovered customary values to preserve the family and to protect women and children.\(^{73}\) These findings contradict the generalized presumption that customary law in Southern Africa is discriminatory and oppressive.

She further suggested confronting official customary law, which in fact often serves the purposes of certain more powerful social strata in colonial and post-colonial societies,\(^{74}\) with these values. The ‘true’ customary law, which embodies these values, is more likely to be found in the ‘living law’ of the people than in official customary law.\(^{75}\)

Reform efforts focusing on the (hidden) values of customary laws and the living law imply that only limited reform can be carried out by the legislature. Legislative reform can supplement a community’s own (‘indigenous’) reforms; it cannot replace them, but it can serve to inspire and support them. It can thus contribute to the empowerment of rural communities and of traditionally disadvantaged sectors, such as women in particular.

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\(^{73}\) Armstrong (n28) 71.

\(^{74}\) This has been clearly put by M Chanock *Law, Custom and Social Order. The Colonial Experience in Malawi and Zambia* (1985) 4, who writes: ‘The law was the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion. And it also came to be a new way of conceptualising relationships and powers and a weapon within African communities which were undergoing economic changes, many of which were interpreted and fought over by those involved in moral terms. The customary law, far from being a survival, was created by these changes and conflicts.’

\(^{75}\) Armstrong (n28) 71.
More is needed than legislative reform, however, to encourage indigenous reforms. Without going into any detail, the importance of legal education for reform of customary law must be emphasized. First, legal education focusing on customary law will play a significant role in encouraging indigenous law reform through an exchange of ideas and concepts rooted in the customary and general-law systems. This we will call the ‘vertical’ approach to legal education, i.e. the igniting and supporting of reform of customary law through contact with and reflection on general law.

Secondly, it is equally important to facilitate an exchange between different communities about their legal systems. This we will call, the ‘horizontal’ approach to legal education, one that would focus on the different Namibian communities’ mutual recognition of and education about their legal systems. Both approaches to legal education need to be combined with legislative reforms in order to improve customary legal systems.
Deviating somewhat from our paper, I want to share with you our experiences with research into gender and customary law in Namibia. I am going to talk mainly about our field research in the rural areas of northern Namibia, and I will raise some methodological issues. The more theoretical aspect is presented in the paper we prepared for the Workshop.

In my presentation I will not start from a theoretical framework to arrive at practical conclusions; rather I will begin from the opposite direction, to narrate in a more or less chronological sequence how our approach has developed. I will not be silent about the mistakes we made.

In 1992, the first research efforts into gender and customary law were carried out by a collaborative project which brought together CASS, the development-oriented, non-governmental organization Namibia Development Trust (NDT) and the Social Impact Assessment and Policy Analysis Corporation (SIAPAC), a consultancy firm based in Windhoek. The project was funded by the Friedrich-Ebert-Foundation of Germany.

The project was known as ‘Improving the legal and socio-economic situation of women in Namibia’. It aimed at studying a very broad range of legal and socio-economic issues (which were assumed to be interdependent). The project was designed to integrate an investigation of legal matters related to: marriage and the family, access to and control of property, divorce, maintenance and such other issues as rural women’s access to health facilities and clean water. The idea was to identify the customary-law rules that discriminated against women and impeded their successful participation in socio-economic development.

It must be emphasized that the aim of the research entailed, from the very beginning, an interdisciplinary approach. Investigating gender and customary law within the context of a broader project to study the legal and socio-economic position of women in Namibia meant that studying customary laws would include the wider social and cultural context of the legal systems under examination. The research thus followed a legal/anthropological/sociological rather than a strictly legal approach.

This approach resulted in an immediate emphasis on field research. The team did not head for customary or state court files, or any other legal documents. It headed straight into the field to rural women.

The methodology used during the first phase of the project, which was conducted in 1992-93, built upon a quantitative survey. A standardized questionnaire was administered to a total of 1 800 women in three rural areas in northern Namibia: Uukwambi, Oukwanyama and Ombalantu. These communities are part of what was previously known as ‘Ovamboland’. The questionnaire included, amongst others, questions on the daily activities of the respondents (particularly their agricultural tasks), formal employment or informal economic
activities, their involvement in community activities and health facilities. Legal questions concerned particularly marriage, inheritance, access to and control of property.

The questionnaire was drawn up in English. It was not translated into the local language, mainly because the enumerators claimed that they felt comfortable with the English version and that they could use it to conduct interviews in the local language. Interviewing was done by female enumerators, most of whom had come home from exile in 1989. They received a short period of training for the empirical research process.

Then, in each study area, about 55 respondents were identified to take part in the second stage: semi-structured interviews aimed at gathering more detailed information on such legal aspects of women’s lives as marriage, divorce and maintenance. The interviews were conducted by some of the enumerators who had participated in the earlier survey. Guidelines for the interviews were translated into the local language.

Initial evaluations of the field data, carried out during the first half of 1993, showed that the findings provided little specific information. It was felt that additional in-depth interviews were necessary. Accordingly, a series of key-informant interviews were conducted in October 1993 in the study areas with senior members of the traditional authorities, regional government officials, court officers, clerics and representatives of women’s organizations.

In addition, in November 1993, about 30 in-depth interviews were conducted with women in the three communities. Two members of the CASS research team carried out this last leg of the project. One of them came from the study region and spoke the local language. The results of the quantitative survey and a preliminary presentation of the legal data, obtained through the case studies, were published in early 1994.

Despite efforts to obtain in-depth information during the last few months of the project time, an evaluation of this research revealed that its methodology, particularly the attempt to investigate a multitude of different legal and socio-economic issues through quantitative survey methods, entailed serious limitations. For the following reasons the findings did not provide enough insights into gender and customary law in Namibia.

First, quantitative survey methods, based on representative samples (from which respondents are randomly selected), have the advantage of gathering a large amount of data and possibly representing the community or social group studied. With regard to the gender and customary law project, however, it was found that the use of a standardized questionnaire posed a definite disadvantage, for results which had not been anticipated could not be discovered. Moreover, not translating the questionnaire into the local language proved to be a serious disadvantage, since many concepts were misunderstood, concepts that were alien to both the respondents and the enumerators.

In short, it was found that quantitative survey methods could provide information about the numerical extent of certain problems and attitudes, such as those concerning polygyny, but the results could hardly explain underlying norms and values and thereby the nature of gender relations and customary law.

Secondly, the evaluation revealed that differing concepts of general and customary law had not been considered. In consequence, researchers went into the field to gather data without sufficiently questioning the relevance of general-law notions for customary-law research. Because it was assumed, for example, that maintenance was a mutual responsibility of support owed between spouses or was the parents’ joint responsibility for rearing their children, little attention was paid to other familial support systems. In a similar vein, the
project operated on an assumption that divorce would necessitate the involvement of a third party and the absence of a third party would therefore result in a mere separation of the spouses.

We concluded that, for further research, concepts had to be carefully defined, and we accordingly considered an extensive literature review necessary. Moreover, we felt that in future preference should be given to qualitative methods, which would allow for in-depth studies of smaller groups of people.

Qualitative, empirical research methods are usually based on purposive or target sampling. Purposive sampling seeks to select participants with the attributes under study, for example, widows in an inheritance study. The samples may also include persons who represent extremes of attributes and/or attitudes. So-called ‘knowledgeable resource persons’ within the community would also be included. They are selected on the basis of their position, such as a chief or headman, or on the basis that they are especially articulate and critical.

We also felt that qualitative methods were preferable, because they allowed people to tell their own stories and to express their own opinions in their own words. Giving people the opportunity to express their own ideas, instead of imposing the researchers’ conceptions by way of a standardized questionnaire, would serve to reveal the nature of customary law and the ways in which it influenced women’s lives. Qualitative methods were regarded as more suitable for the integration of research and action, to educate people about their legal rights and to encourage them to change laws that were not meeting their needs. Qualitative techniques should include both participatory and more conventional methods, namely, a mixture of case studies, group discussions, in-depth interviews with individual informants, participant observation and popular theatre.

The research findings of the first phase indicated that in the three study areas socio-economic change in Namibian society had severely affected women. It was found, for example, that traditional familial support systems had to a large extent broken down and that they had not been substituted by new ones. What is more, we discovered that, in marriage and family-related legal matters, people in the study areas did not choose between the general and customary legal systems; they tended to mix elements of both.

While people in the peri-urban and rural communities of northern Namibia would thus discard and embrace both customary and general law at the same time, they did not base their practices on an informed choice. We also found that women in the study areas had little knowledge about or access to the general-law system. Their knowledge about and access to the customary legal system was also limited, however. The latter was widely perceived as neglecting women’s concerns, especially because women were excluded from active participation in customary courts.

We therefore followed up the research with a programme to train people from one of the communities studied, namely Uukwambi, as the legal resource persons, known as community legal activators. I will now speak about this programme, for it became quite important for our research.

Uukwambi was selected for the pilot programme because the chief of the area is quite outstanding in his attempts to improve the situation of women under customary law. He agreed to cooperate in the programme that started in July 1994.

The overall aim of the project was to improve the administration of justice in customary courts. The idea was that a process of democratizing traditional authority
structures and of empowering women within these structures could be facilitated through a training programme. The course attempted to teach some basic paralegal skills regarding marriage and family law from both the general and a customary-law perspective. It meant, for example, discussing together the customary norms on premarital pregnancy and the general law on maintenance.

Issues discussed during the programme included, for instance: the positive and negative effects of socio-economic development on Uukwambi society and culture; the relationship between law and women's poverty; women's control over property; women's rights and actual opportunities to participate in traditional authority structures; inheritance and succession; premarital pregnancy; maintenance; women's status in marriage; divorce and violence against women.

We lay heavy emphasis on participatory methods. The participants are encouraged to share their own, as well as the newly acquired knowledge of general law, and thus to look for solutions themselves. The CASS team mainly assists. Most issues are first discussed in small groups and later in a plenary group. The discussions often begin with story lines, fictitious cases similar to those the trainees will have to deal with in their communities. Sometimes, we ask the participants to discuss questions or statements related to the issue under discussion. We also make use of role play.

The programme consists of seven two-day training seminars. Four took place in 1994; the remaining three will follow in the first half of 1995. About thirty women and men from different areas of Uukwambi attend the course, half women and half men. Most participants are people in their thirties and forties, although some are older. Most of the younger people speak some English; most of the older people do not.

This project is obviously not a usual research programme, in which participants would feel reluctant to answer the questions of a group of curious people from Windhoek. It has proved to be a valuable source on information about gender and customary law in present-day Uukwambi.

When we started the programme, we had some notion of the social relations and customary law in present Uukwambi. Some information was derived from the earlier survey. In addition, by the time the programme started, I had embarked upon an extensive literature review of legal, anthropological and socio-economic aspects of social organization in Owambo. The desk research included in particular reports from German colonial times about the so-called laws of the natives in the Owambo communities. These sources, including reports and files of the colonial administration, mostly dated from the turn of the century, and, although they had a strong eurocentric and male bias, studying them provided a historical perspective on the development of Owambo customary law and culture.

The discussions held with the participants during the community legal activators’ programme helped us to understand several aspects of customary law. First, we learned that an individual’s perception of customary norms was affected by his or her gender. We could already see that the male and female participants tended to relate primarily to members of their own gender. Throughout the course, women always sat next to other women and men sat next to men. We could also see that women’s and men’s perceptions of customary norms differed.

For example, in cases of premarital pregnancy, a man has to give to the young woman or her parents two head of cattle, or N$800,00. Many men regarded this as a penalty. They said that the rule discriminated against them, because it would ‘only punish the man’ for
having had sex outside marriage, while the woman would ‘go free’, although she, too, had ‘committed a crime’. On the other hand, all women, and some men, tended to see this payment as support for the expectant mother and her future child. Certain male community legal activator trainees strongly resisted the notion of fathers providing for their children where they had not lived with the children. They also complained that the training programme provided detailed information on the general law of maintenance and the practical steps of lodging a case at the maintenance court.

Secondly, it appeared during the discussions that both male and female participants were in favour of making changes to their culture and law, and they were aware that the Namibian Constitution demanded change. They never assumed that they could live in isolation according to a real or imagined Uukwambi tradition. The Kwambi men and women thus were conscious of the fact that their existing culture and laws were not immune from challenges by other sectors of Namibian society. Most participants of both genders proved to be quite sensitive to some customary norms detrimental to women, but women (more clearly than men) wanted customary laws relating to marriage, the family and the status of women in general to be changed.

To sum up our experiences with this on-going programme, we can say that the intensive interactive process between researchers and the approximately thirty Kwambi women and men of different ages and educational backgrounds helped enormously to develop an understanding of the nature of customary law. True, the number of informants is very small, but they represent quite a broad spectrum of their community. And, because we return to the same people time and again, we have probably learned much more from them than from 2 000 standardized questionnaires. What is more, we obviously hope that participants in the programme and their communities have gained something from the exercise.
I would first like to give a brief overview of objectives and the activities of the Social Sciences Division (SSD). SSD has considerable experience in conducting fieldwork-based research in Namibia. My own work has encompassed research on topics that included gender and development, rural development policy and land and natural resource management. Secondly, I will draw from these experiences to identify the dimensions and issues of research in Namibia that could potentially affect the quality and relevance of research into customary law research. Finally, I will highlight the implications of what has been learned for research methodology.

I BACKGROUND TO THE SOCIAL SCIENCES DIVISION

The SSD is a socio-economic research institute. It is one of three proposed divisions of the University of Namibia’s Multi-Disciplinary Research Centre. The other two are Science and Technology and Life Sciences (which has yet to be established).

SSD was established in 1989 as the Namibian Institute of Social and Economic Research (NISER). Its objectives - which have remained constant - are to develop Namibian research capacity and to provide a basis for impartial analysis of policy-related social and economic issues. In that respect, the main functions of the SSD are to undertake research of use to planners, policy-makers and academics, to train young Namibian researchers and to act as a documentation centre.

Recently, SSD identified four core programme areas, in which to develop expertise and to establish a core of information. Since SSD is a non-profit making, self-funded organization, this approach ensures that research consultancies contribute to the strengthening of SSD’s capacity in the core programme areas.

SSD’s programme areas are:
- rural poverty and household economics;
- urbanization and regional development;
- gender; and
- land and community-based natural resource management.

These areas can clearly contribute to and in turn gain from research on customary law.

II DIMENSIONS AND ISSUES OF FIELDWORK-BASED RESEARCH IN NAMIBIA

Research into customary law and potential reforms will need to tackle three broad questions. Simply stated, they are:

(1) How does customary law work?
(2) How did it get that way?
(3) What does it mean to the woman or man on the ground? In other words, how do Namibians participate in customary law?

Lessons from fieldwork-based research in Namibia pose issues that need to be addressed in order to get answers to each of these questions.

(1) How customary law works

(a) What is the research unit?

All research must first establish the unit of analysis. How do we define our sample? Most typically, the first defining factor is geographical - agro-ecological zones or regions either the former homelands or the post-Independence delimitations. Once a geographical setting has been defined, the surveys and analysis usually proceed to take the household as the defining unit.

These units of analysis, however, fail to take account of the complex demographic, economic and social characteristics of Namibia. For example, population characteristics, such as settlement patterns, changes in population density and migration, show that the unit of analysis might not be so easily defined.

SSD’s recent research has revealed that urban-rural linkages are especially important. As elsewhere in southern Africa, the colonizers - in this case Germans and South Africans - created reserves from which cheap migrant labour could be extracted. Links to rural areas persisted, in part because of government regulation: families could not live at work sites and workers on short-term contracts could not establish a permanent base. Now the link between urban and rural areas is economic: neither non-farm income nor an agricultural livelihood can alone support households.

SSD’s recent work involved looking more closely at this linkage and at the mobility between urban and rural areas. Its study has raised questions about the household as a unit of analysis: are rural and urban households necessarily separate but linked, or might they be integral components of a single household unit, which is not confined to a single, geographic area?

Similarly, when establishing a unit of analysis, patterns of social organization must be considered. Ethnic groups are not necessarily confined to particular territories. Equally, geographical areas, whether rural or urban, are often home to several societies. The Kunene region, for example, is home to different language speakers with various modes of livelihood: nomadic pastoralists, settled ranchers, relocated migrant workers and international refugees. Moreover, the use of farm workers in both commercial and communal areas has encouraged ethnic diversity and social networks throughout Namibia.

What is more, the linkages and tensions between kinship-based organization (extended family, lineage, clan, village or tribe) and geographical organization are often overlooked. SSD has found, for instance, that the rural context changes through the interplay of three sets of leaders. Regional and local governments now exist in addition to traditional authorities, but, not as clearly recognized in research, are influential local leaders, such as clergy, teachers and representatives of political parties. These leaders play a critical role in interpreting and reinterpreting the ‘traditions’ related to family, marriage, land tenure, etc. Finally, as noted above, communities often contain a multi-ethnic population.
Namibian communities are increasingly stratified by wealth. SSD has found this to be a critical variable in such aspects of development as natural resource management and even access to drought relief. The role of wealth as a variable influencing acquisition of land or administration of justice under customary law has not been adequately addressed. The widely held assumption, for instance, that female-headed households are all poor, disadvantaged and discriminated against under customary law, while true to a certain extent, is tempered by the wealth and status of the household head.

While other variables, such as age or herd size, once determined status, access to wage income, property and business ownership can now be the basis of social status. These elites have two advantages: because they are more familiar with the law, they can exploit it to their advantage, and, by the nature of their status, they can gain special protection. They are able to form alliances with traditional authorities, who, in the face of post-Indenpendent changes, are trying to boost their power. The proliferation of fencing in some areas, which is in effect privatizing the communal lands, provides a powerful example of how elites can use and alter customary law and indigenous tenure to their own ends.

(b) Relevance of terms

A common problem in all research is the imposition of social-science or western legal concepts onto the research objective and design. Namibia is no exception. Particularly problematic has been the distinction and relations between household, extended family, family and even marriage. Most people are familiar with the difficulties of defining the head of household, particularly in rural Namibia where membership of the household is constantly changing and authority does not clearly vest in one person.

Another misleading, but widely used term is ‘communal’. While many interpret this word to mean a commons or open access, Namibians in fact hold land as families or individuals. Similarly, regarding land, the term ‘ownership’ has proved to be multi-faceted. Individual land holders often see themselves as owners, because, although they do not sell land, they can arrange less formal means of exchange. Chiefs, particularly in the Ovamboland regions, are also said to ‘own’ the land, a direct contrast with other areas of Africa where land is held in trust for members of a group. And, of course, in reality, it is the state that ‘owns’ the ‘communal’ lands under the Constitution.

(c) Theory vs practice

Yet another obstacle to research into how indigenous systems, such as customary law, work is the contrast between theory and practice. In theory, some land tenure and administration systems do not prevent women from acquiring land. In practice, however, as in Okavango or in the South, women are less likely to be allocated grazing land or granted it through inheritance.

And, of course, research often overlooks whether and how a law (western or customary) is enforced and regulated. The investigation of the Legal Assistance Centre into the Maintenance Act and the Labour Act are important efforts at identifying constraints on the effective use and enforcement of these legal reforms. SSD has begun to look at this issue with regard to resource management. In the Caprivi, tenurial claims over fishing spots are very clearly delineated, but the steady migration of people to the area from other parts of Namibia, as well as from across the border, has made enforcement of these claims difficult.
(2) **How did customary law get to its present state?**

This Workshop has already discussed the colonial legacy in southern Africa, which, as Dr Molokomme noted, redefined and merged the idealized and lawyer's versions of customary law. I would like to touch on the related issue of defining ethnicity.

(a) **Ethnicity**

Ethnicity is a term with emotional and political connotations. As the historian Leroy Vail notes, if one disapproves of the phenomenon, it is tribalism; if one is less judgmental, it is ethnicity.

Ethnicity in Namibia is bound up with both colonial and recent political history. Here, as elsewhere, missionaries played a role in shaping ethnic identity through developing written languages and recording ethnographic histories (thereby institutionalizing custom and tradition). In some groups, missionaries even drafted constitutions that became the basis of law and regulation. Schools were also a locus of influence, not only through the actual teaching of lessons on history and culture, but also by educating people who subsequently contributed to an ethnic consciousness in Namibia.

Another factor contributing to ethnic identity was the reserve (and later bantustan) system established by the German and South African administrations. By using ethnicity as a basis to define reserves, the colonizers gave it an even more pronounced territorial dimension. Traditional authorities, as administrators, became interpreters of culture and ethnicity, and thus of customary law. Secondly, and more subtly, the migrant labour system also shaped ethnicity, real or perceived. Employers often based their hiring policy on stereotypes. In the face of vast social changes, workers established networks amongst those with common languages or traditions.

Bound up, as it is, with a painful past, this complex history makes ethnicity a difficult variable to address in research. Namibia has adopted a policy of national reconciliation, which often underplays differences of ethnicity (as well as race). Moreover, real or perceived, an ethnic element has been attributed to political affiliations. As a result, some researchers, especially counterparts in government, but others too, are hesitant to raise issues that might be ascribed to ethnic differences or conflicts. They also anticipate that outsiders, those not familiar with their tradition, will not respect it or understand its subtleties.

Another side-effect of the problem of ethnicity is a concern that regional solutions or projects may be perceived in ethnic terms. We received this criticism when recommending distinct approaches and policies for managing freshwater fisheries in Kavango and Caprivi.

Some surveys, by SSD as well as by the census, by looking at mother tongues of respondents, included ethnicity as a variable without really addressing the concept. This approach may be more sensitive to the issue, but, if data is analyzed on the basis of language, does it not imply taking account of ethnicity?

A balance must be sought in accommodating ethnicity as a variable in fieldwork and as an aspect of people's lives, such as their economic livelihoods, which will affect their behaviour. It is also important to note, however, that just as with its correlate - customary law - ethnicity is situational and multi-dimensional, often depending on the perceived benefits.

And here I must emphasize that historical research must include recent changes, such as new settlement patterns, the commercialization of land (particularly as new markets open up), drought and concerns about water supply. These changes are all shrinking the resource
bases of traditional communities. As Professor Bennett suggested, increased competition could result in a growing number of claims, based on ethnicity, by groups and individuals alike.

(b) Role of traditional leaders in research

In Namibia, we typically get permission and approval from government ministries and regional governments to conduct research. For many communities, however, it is the permission of traditional leaders that validates a research project. This permission poses a dilemma, as traditional leaders, from chiefs to headmen, often want to control or participate in the research process.

Their presence at community meetings or focus groups obviously affects the willingness of people to respond in an open and candid manner. Many government officials, while using traditional leaders to rubber stamp decisions or to pre-empt problems, sometimes see them as obstacles to development. In my experience, this is not always the case. Traditional leaders are wise enough to know that the survival of their power rests on new strategies of being seen to facilitate development in their areas, often in compliance with government and NGOs. Researchers must therefore recognize that traditional leaders have a direct stake in the outcome and application of research. It is our challenge to make their interest work to our advantage.

(3) How do Namibians participate in customary law?

What does customary law mean to ordinary men and women at a grassroots level? As already noted in the discussion of living law, the interpretation and appropriation of law by men and women ‘on the ground’ is central to the very meaning of customary law. I think it is important to keep this in mind if we are to assess how law reform, as with other development interventions, will benefit or adversely affect specific groups of men and women. SSD accordingly joins the chorus that advocates a gender approach to research.

Because gender methodology is to be discussed later, I will not go into detail on this point, except to stress one lesson we are beginning to address at SSD. As I have mentioned, much of SSD’s research is household-based. As noted above, however, using the household as a unit of analysis can skew urban-rural links. More importantly, this focus masks differences of age, wealth and gender within the household.

Age has been an overlooked variable in much research, our own included. But, clearly, a young man with few resources and lower status will have different expectations and interpretations of customary law than his young wife or a widow or an older man who is well-established.

Regarding gender, in order to understand more fully the role and position of women, research must break down the household or the community to analyze relations within various types of household or family. This approach is particularly relevant when it comes to resource allocation. Much research in Namibia and elsewhere has equated access - the ability to use resources - with control - the ability to determine use of resources, including use of cash income or assets from inheritance, as well as natural resources such as land. Indeed, the point made earlier - that women do ‘own’ cattle, cars and other assets - does not mean that they control these resources.

Women (and men’s) ability to benefit from law reform will rest on changes at the household level. In addition, lest we undermine important livelihood strategies, we must
understand gender relations at this level if we are to understand informal coping strategies or how women might manipulate seemingly discriminatory laws for their own ends.

Lessons from other countries show that, in spite of positive intentions, law reform has often adversely affected the rights women and other marginalized groups already had under traditional law. In Kenya, for instance, women found themselves disadvantaged by the system of land registration, which resulted in land being registered under men’s names.

III IMPLICATIONS FOR METHODOLOGY

Research methodology will be discussed later, and previous speakers have already raised important issues for debate. I would like only to add the following suggestions and concerns that we are beginning to address at SSD.

First, while the living law is important, it is also essential to understand the processes contributing to change. Historical research could yield precedents for a more equitable customary law. In addition to archival work, two useful methods are family histories, as noted by Professor Burman, and case studies of land or property transactions.

Secondly, if legal and policy reform are to be equitable and efficient, then people must be involved in decision-making. I believe that, by using participatory methodologies, research can serve as one tool for facilitating participation at all levels.

These methodologies value participants’ knowledge and skills, a statement that might sound trite, but policies and programmes are actually encouraging people to undervalue their experiences and to question their knowledge. I have often heard rural people repeat and accept assumptions from above that small-holder farming is inefficient, private ownership is better than communal tenure and local language is inferior.

More practically, participatory research can anticipate the impact and problems of development interventions amongst different groups of people. Participatory techniques, such as mapping and wealth ranking, are effective ways of identifying and analyzing elements in social groups, such as age, wealth, gender and livelihood. Social diagramming can reveal the effectiveness and social importance of community institutions, thereby placing traditional authorities and other leaders in the context of a broader social organization.

Thirdly, as we can see from this meeting, research into customary law is an exciting field, and some prominent academics from within the region have emerged. Nevertheless, research designs and proposals often fail to consider capacity-building in an explicit manner. Rather, it is local researchers who have to develop through training and immersion on the job: the baptism by fire school!

In closing, therefore, I urge my colleagues to develop resources for building the capacity of Namibian researchers - particularly women - in the design and implementation of this research initiative.
FIELD RESEARCH ON CUSTOMARY LAW: METHOD, ORGANIZATION AND PROBLEMS ENCOUNTERED

M S M BUUKU CHUULU AND P CHILESHE-MUSANYA
WOMEN AND LAW IN SOUTHERN AFRICA (WLSA), ZAMBIA

I HISTORICAL PERSPECTIVE

The Women and the Law in Southern Africa (WLSA) is a research project that began in 1988 with a conference of scholars, both women and men, from throughout the region. Papers were presented and discussions took place on the legal position of women in each country, research into women’s legal rights and the methodologies involved. Gaps in research were identified, together with a list of priorities for future research. A comparative research project for the region was designed.

Fund-raising soon started in earnest. In order to justify the project the participating countries carried out pilot studies on maintenance and inheritance without funding. By January 1990 enough funds had been raised to start the project and to employ a regional coordinator and six national coordinators (one for each country participating). Each country had a multi-disciplinary research team working on (and continuing to work on) a part-time basis. Researchers are social scientists and lawyers, who bring different skills and perspectives to bear on the research process.

WLSA’s approach to research is activist. From the beginning, the intention was not to focus on the production of academic reports, but to produce work that would improve the lives of women and men in the sub-region. Activist research means research that is intended to inform and influence action; it includes educating women about their legal rights, providing legal and other advice, questioning and challenging the law and, in the course of research, instigating campaigns for legal change. Activism occurs both during the process of research and afterwards. It embraces legal and other assistance. In a Zambian case, for instance, while going through court records, we discovered a decision where the court had violated a woman’s rights. This case was taken on judicial review, which required finding the litigant, informing her of her rights and referring the matter to the appropriate authorities.

Priority areas identified for research were maintenance and inheritance. Work was organized regionally in two-year cycles. All researchers were brought together at regional meetings, which provided comprehensive planning and training forums. The research process was planned and deadlines were set to provide guidance for national teams in their work. Training involved discussion of existing theories and methods of data collection and data analysis, together with a general questioning of conventional research methods.

We have, for instance, questioned the scientific need for objectivity, which requires the researcher to be detached. We preferred to take a deliberate stand, to identify with the interviewer and to acknowledge that researchers and the researched are involved in a two-way process of educating one another other. WLSA also sought to discover who controlled sources of knowledge in the community. From literature reviews, we know that such sources are usually male elders, or chiefs, and that the researchers themselves are male. This finding suggested that we should be cautious in identifying interviewees. By being socialized in the same context within which we are researchers, for instance, it is tempting to see people like
key informants as ‘male’ - hence the need to balance our sample of interviewees by including males and females, the educated and the uneducated, the old and the young.

II OBJECTIVES

The goals of the project are:

- to improve the research skills of women’s law researchers;
- to encourage researchers by networking regionally and exchanging information;
- to explore and develop research methodologies appropriate to the southern African region and to promote activist research on women;
- to involve more people in women’s law research in each country;
- to produce data which will assist local and regional governments, NGO’s, women’s organizations, international organizations and others seeking to improve the status of women; and
- to disseminate information within each country (and regionally) about women’s legal rights.

III WLSA ZAMBIA’S EXPERIENCE ON RESEARCH ON CUSTOMARY LAW

(1) Background

The research into inheritance was to be examined from the perspective of customary law regionally. This decision was the result of a lesson learned during the study into maintenance: that people’s lives were governed more by customary law than by the general law. In the case of Zambia, however, new laws of succession had been passed in July 1989, that is approximately two and half years before the study began in 1992.

The process preceding the passing of the Acts was a long one - 13 years - that had involved consultations with various community leaders and women’s organizations. The idea had been to unify the customary laws of the 73 ethnic groups in the country and to incorporate some aspects of statutory law. Promulgation of these laws effectively abolished customary law, except where it applied to land held under customary law, chieftainship property and family property.

By the time of the study, it was evident that the new laws were being ignored. Media reports and speeches made by political leaders at funerals indicated a proliferation of ‘property grabbing’, a practice that usually left widows and their children destitute. (We researchers, who were part of the community being studied, also observed this new phenomena.) The Zambian research team was therefore interested in finding out the effects of the new law and whether customary law still guided people’s behaviour in inheritance.

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1A practice whereby relatives of the deceased grab household and other property leaving the remnant family destitute.
The research plan

The starting point of our research was an acknowledgment of the vast size of the country, the poor network of roads, the inadequacy or complete lack of transport, the sparse population (particularly in rural areas) and the fact that Zambia has 73 ethnic groups observing three different lineage systems: matrilineal, patrilineal and bilateral. Most groups in the country are matrilineal; five are patrilineal and one is bilateral. Among the matrilineal groups, some are matrilineal and virilocal (that is practising patrilocal residence), while others are matrilineal and uxorilocal (ie residence is matrilocal).

The research team wanted to cover ethnic groups from all three lineage systems and pay due regard to the rural-urban dichotomy. Researchers went to places where they could speak and understand the language. This decision took into account the sensitivity of the subject matter of the research and the WLSA requirement that data be collected only by researchers, not research assistants.

For the urban sample the sites chosen were in Lusaka. Lusaka province has three districts, and, according to the latest census of statistics, Lusaka urban consists of 830,238² people. Out of a total provincial population of 987,106, this figure indicates that 84 per cent of the people live in an urban area. Lusaka also represented a mixed sample in terms of ethnicity.

The second research site was Mongu and Senanga, chosen to represent a rural, bilateral Lozi sample. The population of Mongu is 142,795,³ of which 103,585 (72 per cent) are rural and 39,210 (28 per cent) are urban. Senanga has a total population of 137,768,⁴ of which 128,442 (93 per cent) are rural.

The third research site was Kasama, which represented a matrilineal, uxorilocal Bemba sample. Kasama has a total population of 189,360,⁵ out of which 140,946 (74 per cent) are rural. The study was concerned to establish whether there were differences between the urbanized and rural parts of these provincial areas. (As the statistics show, however, more areas were rural.)

Sampling

The research team was more interested in ensuring representation of all three lineage systems in the country than representation of ethnic groups or representation in terms of numbers. A deliberate decision was taken to undertake a detailed study of the customary law and practices of the various ethnic groups and to ascertain the interplay between customary law and the new laws of succession. The actual sample will be discussed below under the various methods.

Methods

The research team used the multi-method approach in order to obtain a more holistic picture. This approach also enabled the team to counterbalance the shortfalls of each method.

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³Ibid.
⁴Ibid.
⁵Ibid.
Both primary and secondary sources of data were utilized. Primary sources included in-depth interviews with widows and widowers\(^6\) and interviews with key informants. The latter were community leaders, who in the course of their work dealt with inheritance issues. They included chiefs, headmen/women, judges, magistrates and ward chairpersons. Court observation and participant observation were also involved.

Secondary sources included a review of literature, both sociological/anthropological and legal. We wanted to find out what had already been written about our area of study and what gaps existed. We also examined records from courts of all levels, ie from chiefs’ courts to the High Court.

A pilot study enabled us to test our research tools and plan the main study by assessing how much time was required to implement the different methods. Experiences during the pilot study indicated that the in-depth interview yielded very rich information and helped to establish a rapport with widows and widowers. The study was planned to include thirty in-depth interviews in Lusaka and twenty each in the rural areas. This method targeted both widows and widowers; one third of the sample was planned to cover widows. The average time per interview was two to three hours.

The actual sample - as listed below - came to more than the number originally planned for.

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<tr>
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<th>Widows</th>
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<tbody>
<tr>
<td>Lusaka</td>
<td>24</td>
<td>9</td>
</tr>
<tr>
<td>Mongu</td>
<td>23</td>
<td>3</td>
</tr>
<tr>
<td>Kasama</td>
<td>19</td>
<td>7</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>66</strong></td>
<td><strong>19</strong></td>
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Several methods were used to identify interviewees. Some were known to the researchers. In other cases, researchers were introduced to one or more widows/widowers, and, using the ‘snowball’ method, identified others through their initial contacts. Institutions, such as the Women’s Legal Clinic of the Law Association of Zambia, referred some widows to the researchers, and, in rural areas, the Zambia Red Cross (an NGO) introduced the researchers to one village. The Departments of Social Welfare and Legal Aid linked the researchers to widows and widowers.

In-depth interviews were time-consuming, not only because each interview took two to three hours but sometimes also because researchers had to make several visits before meeting the interviewee.

There was also the problem - particularly with widows - that interviewees broke down when narrating their experiences. Having to talk about their experiences, however, was also a process of healing for the interviewees: they felt relieved that someone was concerned about

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\(^6\)In-depth interview was the main method of data collection and it targeted widows and widowers. A checklist was developed, although the intention was to allow the interviewees tell their stories with minimum interruption.
their plight and was willing to listen to them. The Zambia team had no formal training in coping with grief, but it discussed the handling of this problem as a group.

Privacy was also a problem. An interviewer can never interview privately in an African environment, as was observed by Kayongo-Male and Onyango.7 Relatives or neighbours often refused to leave the scene of the interview, with the result that it took place under public scrutiny.

It is also worth noting that interviewing itself is often so irrelevant to a person's pressing development needs that he or she might deliberately not give complete answers. We as researchers, for instance, were faced with situations where, before proceeding with an interview, we had to buy medication and food for malaria- and hunger-stricken villagers. Researching, as we did, in a period of drought, we found it difficult to discuss inheritance with people whose basic food needs were not met.

Sometimes, researchers were mistakenly identified as representatives of the government Department of Social Welfare, which in order to distribute relief food had been carrying out a registration exercise in villages. Quite often, researchers provided bags of mealie meal to needy families and/or paid a token amount to the interviewee, frequently because of the desperate situations that we encountered. In one case we arrived in a village where, for three or four days, people had been living on wild fruit. Although relief food had been sent to the provincial headquarters, the sandy terrain of the area and the lack of adequate transport had caused delays in its delivery.

To reach one of the rural sites, researchers had to hire at great cost an appropriate vehicle from Lusaka. We found that even in the capital city finding a car-hire company with the right type of vehicle for the sandy desert was problematic. Efforts were made, without success, to hire from private organizations and individuals. Only one car-hire company had the type of vehicle required, which meant that there was not much room for negotiation, and the rental was fairly high. The alternative was to go the provincial headquarters of the area and hire a vehicle there on arrival. The problem with this option was that no vehicles were available for hire in provincial centres.

The research team that went to a rural site without a vehicle at their disposal had to walk, and sometimes a whole day would be spent unsuccessfully looking for widows and widowers. On occasion this resulted in two or three visits being made before an interview could be held.

Generally, in all the three research sites, finding widowers was a problem and sometimes we had to interview widowers who had remarried. Some who had remarried did not think of themselves as widowers, which seemed to indicate that being widowed was a more transient state for men than for women.

Interviews with widowers, in the case of our urban sample, almost always took place at places of work, because most of them worked away from home and it was difficult to meet them there. Interviews in offices were plagued by constant interruption, and widowers were not very keen to talk, because people in the office, while pretending to work, would actually be listening. As a result, interviewees tended to leave out much important information. In one such interview, when the interviewee escorted the researcher to the bus stop to board a cab, he came up with a number of important issues he had not mentioned in the office.

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In the case of widows in one of the rural sites, the older women had gone through multiple marriages and would ask the researchers which union should they talk about. These were old women, whose memories sometimes failed them, so that the reliability information they gave was a source of concern. Besides, the fact that they had gone through so many relationships could also have affected the information given.

We found that the in-depth interview was very helpful in getting information that had not been anticipated and in helping us to understand people’s priorities in inheritance.

(5) Court records

We examined records at three levels of court, i.e., local courts, subordinate courts, magistrates courts, and the High Courts, and also examined records from the Administrator-General’s Office. The period covered was from 1987 to 1992, namely, the period before and after the new laws on succession. With this method we were to find out how the law had been applied in practice, to what extent cases were brought to court, the type of cases brought, the litigants’ arguments and the resolution of such cases.

The problem with this method is that court records are not designed for research, and some basic information about the parties, such as their backgrounds and the nature of property in dispute, is omitted. In consequence, researchers had to read the whole file to understand what a case was about.

Reading court records is time-consuming, especially in the local courts where records are written in long-hand. Where interpreters had been used, the information was filtered and sometimes distorted. If a literal translation had been employed, the meaning of the whole case could be changed, a problem that is compounded by the fact that in many of our languages there are words which are difficult to translate accurately into English.

Local courts had no proper filing system and no proper storage. Most of the files were lying on the floor and were covered with dust. They were in no order, which made it difficult for us to do our work. Staff changes also affected filing systems: in some instances a new person would be put in charge of the registry each year.

The records at the subordinate and High Courts and the Administrator-General’s Office were very legible but were bulky, so that reading through all the records of the selected years was quite a task.

In the subordinate courts an idea persisted that no inheritance cases came to these courts. Researchers were informed by one registry clerk that the court did not handle inheritance cases, but when they reviewed the civil registers researchers found cases related to inheritance involving issues such as ‘restriction of cattle, property, and land’. The danger was that, if researchers had relied on the registry clerks, they would not have discovered this data.

At the time of the research, because civil servants were on strike, researchers had to make special arrangements to obtain access to the records. At one of our research sites, the High Court records were kept in another province (as the site had visiting High Court judges only), so we could not collect information for the year of 1987. (The High Court started operating here in 1988.)

In spite of the difficulties, perusing records yielded very important information on the courts’ use of customary law and the interplay between customary law and the general law.
(6) Observation

Observation was mainly of courts, since we were interested in how the court system functioned and what attitude court officials had towards litigants. In addition we observed funerals in order to learn more about the behaviour of various parties before and after burial. As researchers who were part of the community being studied, we were aware that non-relatives were not allowed to attend the post-burial ceremonies, such as cleansing and sharing out of property.

With regard to court observations, on the basis of our experiences during the maintenance and pilot studies, we decided to state how many cases were to be observed. This method is very time-consuming, especially in the lower courts, where no time is fixed for hearing cases and the courts frequently adjourn.

We also decided that we were not going to observe cases involving the appointment of administrators, partly because there were too many and partly because the courts' role was simply to ratify family decisions.

While observation of the High Court was easy, because the time for hearing cases was fixed, only a limited number of people could sit in on cases being heard by judges in chambers. In one case we observed relatives of the deceased, who had travelled long distances to be present at the hearing, sitting outside. This situation heightened the tensions and suspicion between the parties, and, when the court ruled in favour of the widow, the deceased's relatives concluded that she had bribed the Judge. This case demonstrated that, where court procedures are not clear to the people, the law is mystified and suspicions are unnecessarily raised.

Funeral observations are time-consuming - in that researchers had to be present throughout, lest the arrival of key people was missed - and emotionally draining. In one case at a rural site, where the researcher attended a burial, the service took one and half hours, the burial five hours and the post-burial meeting three hours. The researcher left the funeral home after twenty hours. Although few funerals were observed (because, as explained earlier, non-relatives are not welcome at post-burial meetings), funeral observation none the less yielded interesting data, for the interactions of various people can be observed.

(7) Group discussions

To obtain general views and attitudes on inheritance three group discussions were held in each research site, one for women only and one for men and one for both groups. This method was chosen in order to get the views of both men and women.

In the urban area, group discussions were organized through NGOs or churches or at places of work. In the rural sites, on the other hand, group discussions tended to happen spontaneously, as people gathered out of curiosity while in-depth interviews were in progress. At one rural site, we took advantage of a group that had already assembled for other purposes. However, groups would sometimes be joined by passers-by, who would stop to listen, make a comment and then proceed.

When influential and older people joined a group discussion, the rest of the group, especially younger members, tended to defer to them. When a headman, for instance, joined a discussion, other participants looked to him to take the lead and did not contradict him. When he left, everybody spoke up.
Through group discussion researchers could ascertain the views and attitudes of the people, and this forum allowed individuals who were uncomfortable with one-to-one interviews to express their views. In general, group discussions seemed to provide an occasion when women could voice their problems with men.

(8) **Key informants**

'Key informants' were people in the community who handled inheritance cases or regularly came across such cases. We wanted to learn how they dealt with and resolved these disputes. In addition, we wanted information on customary law, problems encountered by women, the practices of the courts and any other relevant data. From interviewing key informants we obtained some unexpected information.

In line with our gender perspective, we had decided to interview both male and female key informants. In spite of our attempts, however, at one rural site all the informants were male. Because of a bereavement, we could not interview the female chief we had wanted to see; hence we ended up interviewing her team of male advisers. At this particular research site there were no female headwomen. The explanation was that, although customary law provides for a female chief, who is second in command to the paramount chief, female headwomen are not allowed because of the roles headmen are expected to play.

Seven people were interviewed in Mongu: two village headmen, the provincial local courts officer, the senior resident magistrate, the township secretary (as an agent of the office of the Administrator General), the police and a group of indunas (advisers) at the Nalolo Royal Establishment (the palace of the Litunga La Mboela, the female chief who is second in hierarchy to the Litunga).

At the other rural site at Kasama, we interviewed six key informants: one headman, one headwoman, the Paramount chief, police and the provincial local court officer. In Lusaka seven key informants were interviewed. These included the Administrator General, the coordinator of the Women’s Drop-in Centre at the Young Women’s Christian Association, the provincial resident magistrate, a local court officer, the police, a priest and one Lusaka community leader. Of the seven, two were women: the provincial resident magistrate and the coordinator of the Drop-in Centre.

Much time was spent trying to meet key informants. In the urban areas, researchers had to make several appointments and endure constant interruptions. In rural areas, seeing chiefs and indunas involved lengthy protocol and researchers had to be escorted by people who were familiar with procedures and known to the Royal Establishment.

(9) **Case studies**

As a follow up to in-depth interviews, perusing court records and/or making observations, we conducted (according to our plan) three case studies per site. We were interested in obtaining different perspectives in each case. This research method was most useful in building a holistic picture of the nature of inheritance problems.

Sometimes we experienced difficulty in finding other people to interview, however, because they were dead, had changed address or lived far away. On occasion, widows and widowers did not want to talk to strangers through fear of exacerbating existing tensions. As researchers we respected their wishes.
Sometimes different people involved in the same case gave conflicting information. We nevertheless understood that our role was not to judge the information but to present it as it was given to us.

(10) Other organizations

We also interviewed organizations concerned with inheritance issues, such as insurance and social security companies. Because of the bureaucracy, however, we experienced difficulty in gaining access to information. In one case, after a week of being referred from one office to the next, we still did not have the information we sought.

(11) Data analysis

Data analysis commenced with the process of research and continued after data had been collected. It was analyzed site by site. Both qualitative and quantitative methods of analysis were used.

From our experiences data analysis is a very time-consuming task. There is always the temptation to collect more data than can be handled at the stage of analysis. It was most useful to begin analysis during the process of research, for researchers could meet each evening, while experiences were still fresh in their minds, to discuss the data they had collected during the day.

IV CONCLUSION

Detailed planning at regional and country level helped the process of research, and evaluation of the first phase was useful in planning for the second phase.

WLSA research has been an evolving and learning process. We have considered our initial theoretical frameworks and methods and have critiqued them in the light of our research experience. In the process, not only have researchers gained in experience and insight but we also feel that even the informants came to learn much.

WLSA has also discovered that law reform on its own is not sufficient to make an impact on people’s lives. To have meaning the law needs to be invoked. Customary law is conciliatory in nature. By contrast, the general law is confrontational, a characteristic that inhibits women (in particular) from resorting to the law. At one research site, we found that a belief in witchcraft deterred widows from fighting for their rights. In one case, a widow was threatened by her brother-in-law that something would happen to her if she did not give the deceased’s parents a 20 per cent share of the estate. The following day, three of her children died within a period of twenty-four hours. When interviewed, many widows and widowers referred to the above example. They told researchers that it was better to be disinherited and to keep all of one’s children.
I  INTRODUCTION

This paper seeks to explore, albeit briefly, some thoughts on the methods to be used for field research into customary law in order to ensure that the research will be gender aware and will also capture the views and values of different target groups. Within such a framework, it seems that the issues to be pursued are: to discover the nature and content of customary law (and, in doing so, to be gender aware) and to conducting research in a manner that will target and be appropriate to a wide range of social groups.

Although for purposes of discussion these issues can be separated, they are inextricably interlinked in any research into customary law. If the content of customary law is to be ascertained, research must include an analysis of the gender dimensions of the law as well as an assessment of the use and application of the law by various social groups. In other words, the customs and practices to be investigated must be holistically appraised. They need to be explored across various ethnic and social divisions, including the urban-rural dichotomy and generation profiles.

II  AN HOLISTIC APPROACH TO RESEARCH INTO CUSTOMARY LAW?

The primary task is to find a method by which these demands can be met within one research project, within a defined time limit and in such a way as to give a fair representation of the customs and practices of a diversity of peoples.

At first glance, such a task seems extremely complex, if there is a diversity of ethnic groups whose customs have to be explored, and, if those customs have over a period of time been subject to external forces and influences that have irreversibly affected their content. With the passage of time, one group’s customs become interwoven with those from other groups; within distinct streams they mutate and the sources of custom become uncertain.

(1)  Demarcating the parameters

The parameters within which the custom is to be collected and the purposes for gathering it will also affect what is collected. It is therefore necessary for the researcher constantly to question the direction, nature and form of the research process. This paper poses some of the questions that need to be asked and suggests a working framework for data collection.

At the outset of the project, certain fundamental questions need to be addressed. What is to be collected and how and where it is to be collected? Is the data to be all the so-called ‘customary law’ of a country (which would cover every conceivable subject) or is the data to be confined to specific topics and specific ethnic groups? Is it to be assumed that a
representative sample of customs and practices can be collected, from which a general or universally applicable version of ‘custom’ or ‘customs’ can be distilled? If there are specific topics to be pursued, what are they and why are they to be the focus of interest in preference to others? Who decides the priority areas and why are these decisions made?

(2) Collecting customary law

Earlier collections of customs and practices have been severely criticized on the ground that they were biased in favour of a particular political agenda, a generation and/or a gender. Any attempt to collect customs and practices in the present era needs to be designed so that these criticisms can, as far as possible, be avoided. Undoubtedly a new set of potential criticisms may be applied to the new methods, but, provided that the net and the method of collection within the net are sufficiently clear, some of the more serious criticisms may be avoided.

A legal centralist approach - one that defines the areas of custom to be investigated on the basis of categories derived from general or received law and then compares the content of custom to those laws - is inherently problematic, as it can obscure the framework of customary determinations and the local recognition and categorization of issues and solutions. If we are to investigate custom, we must do so within terms of that custom, not within externally determined categories.

(3) Which customs?

A decision has to be made as to the ‘temporality’ of the customs and practices to be collected. Will the project attempt to gather evidence of traditional practices or will it seek current practices and treat them as present manifestations of custom?

A very real problem is that any attempt to assemble traditional practices and to present them as a reflection of the past will be flawed by imperfections in the data collection process. There are undoubtedly idealized versions of custom, versions that individuals will claim were once applied, but these portrayals may well be skewed by present claims. Versions of custom that are cited by their proponents as traditional may be little better than a constructed image of what is theoretically desirable, not what would be applied in practice (because practice demands pragmatism). Besides, the theoretical ideals of the informants may be determined by their perception of reality or by efforts to bolster their present claims.

In other words, researchers have to make a fundamental decision about the nature and form of custom. Do they see it as a set of largely immutable rules, the content of which can be ascertained, recorded and then applied? Or do they see custom as a flexible and adaptable system, in which basic principles and processes can be ascertained and used as a basis for reaching decisions, but having no rigidly fixed rules that would have to be applied in a given situation?


(4) Testing and determining methodologies

Are the researchers prepared, before they commit themselves to a theoretical perspective or view of custom, to conduct ground research to test their hypotheses and seriously to question their preconceptions about custom and what they expected to find?

I would suggest that, unless they are prepared to carry out such an analysis of their objectives, the data on custom will be very superficial, no matter how hard researchers try to be gender aware and sensitive to the social target groups.

(5) Gender aware research

The notion of gender aware research is an issue that raises yet more questions. What, precisely, is meant by being ‘gender aware’? It may mean making sure that the right proportions of men and women are interviewed; that questions have to posed in a gender-neutral fashion to ensure that informants reveal their perception of the gender dimensions of issues; that interview techniques have to be adjusted to meet supposed differences between male and female respondents. Or gender aware research may mean creating questions that are sensitive to the lived realities of men’s and women’s lives, question which explore the different roles and activities that men and women fill in their communities, in daily life and in the family.

Gender aware research involves all of these factors, and others. But it goes beyond these somewhat superficial concerns, as it demands that we understand the social fabric in which people’s lives are cast and lived out. We cannot understand the nature and form of custom and practice if we do not understand the social, cultural and gender milieu in which they operate.

There are other critical factors affecting the gathering and interpretation of data. Gender hierarchies and internal power structures within families and groups affect the way in which information is communicated, i.e. who communicates the information and on what basis. Unless constant efforts are made to discover how families or groups actually order and structure their relationships, inferences about what is going on may easily be drawn without discovering the reality.

Researchers carrying out gender aware research must actively address their gender biases and assumptions and try to assess the extent to which their view of the subject matter of research may be clouded or confined. It is also important to note that ‘gender aware’ implies not only being ‘aware of female needs’ but also being alert to socially embedded assumptions (perhaps the better word is prejudices) that we hold about male and female roles in society. It means being critical about male and female paradigms which are persistently being recycled without serious re-examination of their validity.

When going into the field, researchers will take their prejudices and life experiences along with them. Hence, being gender aware means constantly asking: am I falling into the error of reading this situation, this information, in the light of my own socialization and gender prejudices? Am I interpreting this data or framing the questions in the light of what I expect to find from my previous training on the subject (perhaps from what I already ‘know’ of the customs through reading judgments, textbooks, journal articles and other sources)?

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(6) Social target groups

When choosing to research customary law, critical questions must be asked about where the data is to be obtained. These questions, which are linked to earlier ones about the nature and content of custom, involve asking whether the data is to be obtained only from rural areas, where seemingly pure versions of custom might be found. Yet how does one, even in a remote rural area, find the true repositories of custom? Are they only to be found among the tribal chiefs and male elders? What of the experiences of ordinary people in the community? Are their views and experiences of significance in ascertaining the content of custom?

In other words, is the collection of data to be oriented to questions and answers - based on somewhat abstract and hypothetical questions - or is it to be issue and experience based? One might further ask whether there is value in gathering the views of government administrators and officials of various classes and forms on how customs and practices are put into effective operation in day-to-day problems and cases.

(7) Variations in customs

The question needs to be addressed whether, within one ethnic or tribal group, a custom can vary across different social and economic groups in a way that reflects the different forces that shape individual lives. The problem inherent in a broad data collection framework is the potential of finding conflicting information, which then poses the attendant question of authenticity. Which form of custom is to be accepted as authoritative? Carefully confining the target groups limits the possibility of variation but obscures the realities and ever-present variations.

Which groups of individuals are to be targeted? What of the so-called marginalized groups? Ought their versions and perceptions about custom be taken into account?

III FINDING A FRAMEWORK FOR DATA COLLECTION

So far this paper has done little to suggest an effective way of conducting research that will meet the objectives set out at the beginning. All that has been presented is a list of problems to be addressed, if research is to be conducted within the defined parameters.

(1) Finding a method

Without pretending that the task is an easy one, it is possible to make a start on gathering customs and practices in a gender aware manner and within a broad social framework which targets a wide variety of social and ethnic groups. Accomplishing this aim may, however, mean having to abandon existing methods in favour of a somewhat different approach. This paper now presents suggestions for the principal steps to be followed in carrying out such research.

(2) Steps in the process

(a) Determine a general area of research, i.e. pick an issue that is of immediate concern. Because it is impractical to collect all customs, a specific issue should be concentrated upon. Even selecting a relatively narrow issue, such as inheritance practices, reveals a great deal about family relationships, decision-making and the varieties of customs and practices that are applied to resolve problems.

(b) Decide where to investigate that issue, i.e. select certain geographical areas and ethnic groups. No research project, except one with vast resources, can collect adequate data
from all ethnic groups. The key is not to pretend that the work is representative, but to be frank about the limitations.

(c) Go into the selected areas and explore how the chosen issues are dealt with, both by the courts and the community. As far as courts are concerned, exploration can begin with the lowest level of the system, including even informal adjudication structures, before continuing to the highest courts in the land.

(d) Using the conceptual tool of a semi-autonomous social field,\(^5\) interrogate the system - legal, administrative, political, social and family - about how such issues are handled. What are the factors influencing and motivating decisions? How are people treated within the various systems or fields. How are decisions made about which ‘customs’ to apply and why are those decisions made? Through this process various versions of custom can be uncovered.

(e) Map the findings made at the various levels, i.e. build up profiles of how, in reality, the community or mediation bodies deal with the issues. This is a grounded process of data collection.

(f) Observe the actual daily practices in relation to the issues chosen and correlate these observations with the versions of custom given by individual informants. The researcher is thus able to identify differences between an idealized account of traditional custom and the reality mediating actual practice.

(g) Read court and administrative records, where available, and consider whether they correlate with other sources of data on customs and practices. Are the findings similar? If they are not, then the researcher needs to explore the reasons for discrepancies. Are the sources historical in origin, the result of precedent or some other skewing factor?

(h) Conduct interviews with members of the community at various levels of the social system to obtain their perceptions of the customs and how they are applied. Are there differences in custom that correlate with a person’s position in the social and gender hierarchy?

(i) Identify individuals who have experienced the chosen issue or communities that are tackling it, and ascertain how they have dealt with the issue.

(j) Try to identify different strategies that have been employed, and, depending on the circumstances, how custom has been discarded or embraced. This area of inquiry becomes a key to understanding the evolution of custom.

(k) Follow up finalized, litigated cases to discover how the parties eventually resolved issues after formal determinations had been made. This is an important step, because in some cases the parties will literally undo a court’s decision to revert to a more acceptable solution of the problem.\(^6\)

(l) Look for both trouble and non-trouble cases to see how problems were resolved in the shadow of an understanding of custom or the general law by parties who did not resort to any mode of formal or informal dispute resolution. Non-trouble cases often reflect how individuals resolve issues without recourse to mediators, by drawing on a variety of sources of information and their position in the power structure.

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\(^6\) WLSA (n2).
(m) Look for case/situation studies with a number of ‘actors’ and map their varying (depending on the claim that they are making) versions of the custom. This inquiry gives an holistic picture of an issue or dispute and a profile of the various approaches and factors influencing the outcome of a matter.

(n) Make sure that both male and female perceptions of custom are collected. Some of the means of doing so are by convening focus interviews and conducting individual interviews with both men and women, the elderly and the young. Group interviews including both men and women should also be carried out, as the interaction between the participants and their emerging perspectives on an issue can be very revealing.

(o) Ensure that generational perspectives are taken into account, and, where these produce different versions of the customs regulating the same issue, explore why this should be so. Sometimes, when different claims being made and different needs have to be met, an individual’s version of a custom will change to reflect his or her role and dependency on perceived support structures.

(p) Consider the impact of social and economic status on an individual’s ranking within conventional perceptions of power hierarchies in customary institutions, such as the family. This inquiry may explain a particular version of a custom.

(q) Ensure that the research is carried out by fully informed researchers, who know the purpose of the research and are able to probe further into issues that arise during the project. In other words, an open-ended question technique using interview guides, rather than predetermined questionnaires, must be employed. Moreover, researchers must be involved in both the collection and analysis of data.

IV CONCLUSION

The main point of this paper is to stress that as few assumptions as possible should be made. Research should involve as broad an exploration as possible within a defined area. Only when that process has been completed, can the researcher start to address the form and content of the custom in the area concerned and in relation to the issues selected.

Certainly, this type of method, when first contemplated, seems too ambitious. If it is used on single issues, even ones quite narrowly defined, however, the techniques can be mastered and developed. More importantly, each country has to adopt and adapt the research methods that are appropriate to its own particular situation.
M STRATEGIES FOR RESEARCH INTO CUSTOMARY LAW AND WOMEN'S RIGHTS

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I INTRODUCTION

Although we have all come from different countries with different customs and practices, I believe we share a major common premise, namely, that customary law is flexible and dynamic and that it needs to be rediscovered from time to time. It is therefore commendable that the Namibian Law Reform and Development Commission decided to embark on a nation-wide project to ascertain the living customary law of Namibia.

It is a formidable task, not only because customary law covers a wide ambit of personal and family laws but also because Namibia has many nationalities within which there are sub-groups and communities that no doubt have different customs and practices. The variations need to be captured and appreciated if meaningful law reform is to take place. Strategy is required.

The research project is also a formidable task because it must not only cut across ethnic groups but must also across sex and age groups. Customary law as reported in anthropological texts and court precedents has been condemned for being biased in favour of men. Men provided the information on customs: as elders and chiefs they acted as interpreters for anthropologists; they were the anthropologists and they sat in judgment in all the courts. The product is therefore said to be a skewed version of customary law.

In this new exercise by the Law Reform and Development Commission, the same error of sidestepping women and the young must not be made. Through lack of representation, women’s rights to property and succession, to decision-making processes in the home and to a division of labour have been undermined. The woman’s position under customary law needs to be excavated. Numerous strategies may be adopted for research, some of which are discussed below.

An investigative analysis of the laws, customs and practices of the people must ensure that all sectors of the community or as many of them as possible are covered. In addition, however, it is essential to consider the approaches to be adopted for disseminating information, influencing policy-makers and reaching the judicial system, so that living law is recognized and does not trail behind ancient precedents (which are out of step with present social, economic and political circumstances).

II THEORETICAL FRAMEWORK

Numerous theories are available on research in general and research into women’s laws in particular. In order to understand and correct the gender imbalances in customary law it is vital to have a working knowledge of some of these theories. Women and Law in Southern Africa (WLSA) found it helpful to invite experts to its regional meetings to enlighten researchers on the Women in Development (WID), Women and Development (WAD) and Gender
and Development (GAD) approaches to research into women’s rights. We also analyzed legal perspectives, such as legal centralism and normative legal theory and also legal pluralism and semi-autonomous social fields. Chapter 2 of the Zimbabwe Report on Inheritance in Zimbabwe gives a lucid account of what was found positive or wanting with each approach, and why, eventually, a pot-pourri of all the considered theories was adopted.

Basically, we found legal centralism and normative legal theory too theoretical and technical, since they concentrate on the law as applied by the courts and they ignore people’s practices on the ground. We found the theory unrealistic in a study of customary law. It is based on the existence of state laws and regulations to the exclusion of other regulatory frameworks, while we know that customary law is alive and exists without the state’s enforcing mechanisms. We found legal pluralism preferable in that it acknowledges the existence of different sources of law and accommodates semi-autonomous social fields, such as churches, pension funds and families themselves.

On the gender related theories, we found that the WID approach advocates equal treatment of men and women and is useful for addressing legal inequalities; but it overlooks inequalities based on attitudes and socially constructed roles. The WAD approach assumes that, if women are given equal opportunities to their male counterparts, their position improves; but it appears from research that this approach does not seem to have an impact on male perceptions of females under customary law. The GAD approach is relevant, in as much as it takes into account gender social constructs, but it lacks profundity. It does not go beyond advocating the empowerment of women and the deconstruction of social attitudes.

None the less, a broad understanding of these and other theories is essential to enable researchers to make conscious choices in designing research instruments and conducting the actual research. We found it beneficial to borrow what we considered useful from each theory provided that the totality harmonized.

III STRATEGIES

(1) Funding

Because donors invariably want to control their donations, they try to determine the size of the research teams, the duration of the research phases, areas of emphasis in the project and the use to which results will be put (the more so if one donor funds the whole project). If researchers are to retain some autonomy, there must be more than one donor. Because Africa and women and children’s rights seem to be drawing interest from the North and the West, sourcing donors should not be too difficult.

(2) Research teams

WLSA’s experience is that the strength of a team lies in the diverse professional backgrounds of its members. Problems may initially be encountered, as members grapple to understand each other’s perspectives, but there are long-term benefits once theoretical perspectives are understood and both the social and legal aspects and the content of the research are understood.

Catering for different perspectives is a useful mechanism at the data analysis stage and when formulating recommendations. WLSA Zimbabwe admits that its research into maintenance was too legalistic, for it was based on an erroneous assumption that knowledge of the law would go a long way to alleviating women’s problems. The research into
inheritance is more realistic, in as much as in-depth interviews were conducted to ascertain the ‘whys’ of certain practices from a sociological view point.

A multi-disciplinary combination of researchers is also useful both in preparing for the research and in implementing activism in the field. We found that, although the lawyers among us tended to be academically oriented and the social scientists behaviourally oriented, the two perspectives complimented each other very well in the field. If an interviewee had a legal problem, the lawyer was able to advise where to go and what to do. If an interviewee had an emotional problem, the social scientist knew how to handle it.

At the beginning of the inheritance research, a proposal by one team member, a former social welfare officer, that we all take instruction in grief management from the Island Hospice, seemed ridiculous. But the suggestion subsequently proved invaluable on the few occasions when we interviewed newly widowed men and women.

Because customary law is largely a set of behavioural forms, it is essential to draw from respondents the sociological indicators affecting their practices and to bear them in mind when findings are articulated in legal terminology.

(3) Sampling

An important decision, that must be taken at the very beginning, is whether to conduct demographic surveys or in-depth interviews, i.e., whether to collect quantitative or qualitative data. Both approaches have their plus points and their deficiencies, and the method selected will largely depend on the attitude of the policy-makers and the use for which the data is intended.

Demographic surveys yield data that is easy to analyze, and in some countries policy-makers are more persuaded by numbers, in the belief that the greater the number, the more representative the responses. The problem with this method is that the data tends to be superficial, because respondents have no room to explain their answers, although explanations are vital to an understanding of the dynamism of customary law. Because of the large samples, surveys take time and require many people to administer the questionnaires.

In-depth interviews and case studies are not as representative as surveys, because the samples tend to be small, but they provide a greater insight into why people behave the way they do, what they perceive as their problems and how they think these problems can be solved. While interviewers will have a general guide on how interviews should proceed, interviewees are mostly allowed to tell their stories. Because of the open-ended nature of this approach, the data collected is diverse and hence not so easy to analyze.

Namibians will have to weigh the advantages and disadvantages of each approach and choose the one most suitable to their country. In WLSA we were unable to agree, with the result that, in the case of the maintenance research project, Mozambique and Botswana conducted surveys, while other countries conducted in-depth interviews. In all the six countries in WLSA, the inheritance research project was qualitative, for at that time we believed we would miss a lot of information if we conducted surveys. We were also of the view that, if interviewees were allowed to speak and if we quoted them in our reports, we could still persuade policy-makers of the authenticity of our data and thereby influence the development of the law.

Whichever method is selected, the samples should include men and women and they should cut across social strata to ensure that recommendations are for the good of society generally and not only for an urban elite or the rural masses or a middle-income group.
Different countries have different ways of categorizing people in terms of their income. In Zimbabwe we have large and small-scale farming communities; in urban areas we have high density suburbs for low-income earners and low density suburbs for high-income earners; we have mining compounds, rural resettlement areas and communal lands. We try to cover all these areas in our research.

(4) Gender

Customary law is all about socially constructed gender roles, so gender perspectives unavoidably run through all research. As stated in the introduction, women have been poorly represented in the customary law applied by the courts, and today it behoves any researcher into customary law to discover the woman's perspective. In WLSA we are trying to make women the focal point of our research. Instead of analyzing the law and then deciding how women fit into it, we are attempting to understand women's problems and then how the law addresses them or how they are dealt with by society. Customary law and semi-autonomous fields are equally relevant to this approach.

In order to obtain an holistic view of customary law, men are included in the samples. Even if research is conducted with the aim of improving the lot of women, because women do not live in isolation, men must also be heard. If both sexes are included in research, misconceptions can be dispelled, results are taken more seriously and recommendations are easier to implement. Improving the woman's lot, be it in property distribution, land rights or custody issues, necessarily reduces what the men perceive as their entitlement, and men can be helped to adjust by being involved in discussions.

(5) Links with government

Since the Law Reform and Development Commission is already an arm of government, this is a superfluous strategy, but for other organizations the link ensures easy access to court records and court personnel.

(6) Links with non-governmental organizations

These links help with the exchange of information, and, where activities are similar, they avoid duplication of effort.

(7) Re-packaging data

Many research reports lie idle, never to be used, because at the time data was collected no plans were made for using the results. It is essential to have an action team (especially if the research is being conducted in phases), so that, as some researchers tackle one phase of research, others can be busy repackaging and disseminating the information already collected and pressing policy-makers to take action. Disseminating information through the media, school curricula, workshops or other available means is a vital 'after data collection' stage, which educates people and enables them to participate in the decision-making process.

(8) Workshops

Workshops are necessary at every stage of the research. They provide an opportunity for the researchers to learn, revise and plan. Researchers learn from others in similar research fields, from theoretical experts and from one another. They can revise time plans and methodological
frameworks, depending on what is emanating from the field, and they can plan for future developments.

In WLSA, workshops were used at the inception of the research project in 1989 in order to discover from the people what their priorities were. In all six countries, inheritance and maintenance were in the forefront. Four out of six countries considered maintenance their major problem area, and, because we wanted to conduct research as a region and compare our results afterwards, we all started with maintenance before proceeding to conduct research into inheritance.

We have now started a third phase - analyzing family forms - which emanated from our findings in the previous two studies. If research is to be conducted in phases, Namibia may wish to adopt the same approach by ascertaining from its people what the priorities are.

(9) Researching the courts

As stated in the introduction, it is generally accepted that the law as applied in the courts is a skewed version of customary law and that a dichotomy now exists between what law the courts apply and what people actually do. The question that arises is whether this gap can be bridged. If the courts changed their interpretive techniques, it should be possible, but broadly speaking our judges are positivists. They look for rules and precedents which they feel bound to apply. They act on the basis that communities are homogeneous and that the same customary rules apply uniformly to all people (which is not what has become evident from research findings).

Customary law does not apply and should not be made to apply across the board, in the same way as general law, without explanation. It is not correct to assume that, where oral evidence of customary law has been taken and where there are contradictions, one witness must be right and the other wrong. Customary law does not always operate on hard-and-fast rules. Its strength lies in its flexibility, since traditionally the family fabric was held in higher regard than individual desires, and ‘rules’ could be changed for the common good.

One way of reaching the courts is by making research findings available to them, so that they can interpret the law realistically and make policy-based decisions with a bearing on how people actually live. In this way, the law will serve rather than frustrate the people to whom it applies.

IV CONCLUSION

Research into customary law is complex, because the law is so nebulous. Unlike the general law, it has no fixed set of rules from which to measure the behaviour of a whole nation. Communities behave differently and none of them is either right or wrong. The challenge is to unearth the origins of customs and practices, to analyze their application (both by the people and by the courts), to assess the power relations inherent in these practices and to ascertain the emergence of a living law. The ultimate challenge is to decide what to do with the findings.

Human rights movements are currently concerned with gender equality, the rights of women and children and the protection of the family. In the process of investigating customary law, it is therefore imperative to bear these features in mind in order to determine whether customary law embraces the human rights cause.
THIRD DAY: JURISPRUDENCE AND COURT ADMINISTRATION

CUSTOMARY LAW IN A PLURAL SETTING - SOME THEORETICAL AND METHODOLOGICAL OBSERVATIONS

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I INTRODUCTION

In my paper, I intend to take a jurisprudential approach towards the phenomenon of legal pluralism and the task of law reform. My references will be to the position in Botswana.

Jurisprudence invites us to look at law in a three-dimensional way, namely, law as a construct of rules, law as a living process and law as a matter of moral concern.

II LEGAL PLURALISM AS A CONSTRUCT OF RULES

Botswana has a plurality of laws, yet, at the same time, a single legal system. This apparent contradiction is perhaps best explained with reference to Hans Kelsen’s analytical concept of the Grundnorm. According to Kelsen, a multiplicity of legal norms will constitute a system when the validity of these norms can be traced back to a final, single norm, which is the Grundnorm or basic norm. It is characteristic of the basic norm that its validity cannot be derived from a higher, which is to say, a more effective norm.

For most of the colonial period, the Grundnorm in respect of the Bechuanaland Protectorate, turned out to be the Foreign Jurisdiction Act of 1890, a British Act of Parliament that applied to all the British dominions and protectorates alike. In terms of it, an Order in Council was issued on 9 May 1891 empowering the High Commissioner of South Africa to exercise over the southern Africa protectorates all the Crown’s powers, subject only to instructions he might receive from London. A month later, the High Commissioner, duly empowered by the Order in Council, issued Administration Proclamation of 10 June 1891 for the Bechuanaland General. This Proclamation in turn laid the basis for the country’s plural legal system, within which the powers of the indigenous tribal chiefs and the application of the indigenous laws would, in a formal sense, be considerably curbed.

On 30 September 1966, the Bechuanaland Protectorate became the independent Republic of Botswana. From that day onwards, the Grundnorm of the country’s legal system has been, or at least appears to be, the Independence Constitution. Any colonial provisions

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1This paper has been based on notes for a future publication, provisionally entitled ‘Towards a Common Law for Botswana’.
still on the statute book - and they include the ‘reception clause’, which imported mutatis mutandis the law of the Cape - now derive their validity from the Independence Constitution, as do the post-Independence laws. Likewise, the country’s customary laws and institutions, or rather what is officially left of them, today derive their validity from the Independence Constitution.

As we know, Independence did not result in restoration of customary laws and the powers of the chiefs. To the contrary, the new, independent government went on to undermine their sphere of influence even further. To what extent, one may ask, did international pressure play a role here? Could the Independence Constitution really be termed an instrument of the people, and is post-Independence law-making really that free?

Here it is important to note that public international law, in the form of either customary international law or treaty law, binds an individual state. Notably in the commercial field, international rules are known for limiting states’ independence, even to the extent of shifting the Grundnorm abroad. No law reform agency can ignore this reality without impunity.

III LEGAL PLURALISM AS A LIVING PROCESS

Kelsen’s theory of law is a powerful exercise in logic. Life, however, all too often defies logic, or rather it has a logic of its own which, to legal positivists or system-builders, may seem rather whimsical. Hence, Karl Friedrich von Savigny’s concept of the Volksgeist (the spirit of the people), and Eugen Ehrlich’s notion of the ‘living law’ (as opposed to ‘book law’) hold little attraction for legal positivists. Reformers of the law would be advised not to share this aversion. In the words of Roscoe Pound, who contributed so much to the sociology of law, the task of law reform is ‘social engineering’, rather than system-building.

Indeed, the teachings of the historical, sociological and anthropological schools of jurisprudence are indispensable to law reform. A realization of the organic connection between law and culture and a knowledge of real, changing life in its variety of forms, interests and activities is essential if law is to represent society’s aspirations. Laws at variance with social aspirations must either adapt or die.

I should mention here two recent Botswana studies - Maintenance Laws and Practices in Botswana (1992) and Women, Marriage and Inheritance (1994) - which, in a remarkably lucid and methodical fashion, illustrate the friction between official legal pluralism, on the one hand, and unofficial legal pluralism, on the other. They show that, while customary values die hard, they may take on new forms, and that the ‘feeder’ communities for customary laws may no longer be the rural areas but rather urban centres. Observations like these, of course, place a big question mark behind the customary law ‘restatements’ of yesteryear.

IV LEGAL PLURALISM AS A MATTER OF MORAL CONCERN

The life of law consists of more than rules and processes. Underlying these are moral values or ideals. The responsibility for giving effect to the moral values of society, while at the same time balancing conflicting interests within society, lies with government.

References:

2 Obtainable from the National Institute of Development and Documentation (NIR), University of Botswana, Private Bag 0022, Gaborone, Botswana.
Botswana has a democratic form of government, voted in on a programme of nation-building, economic development and respect for human rights. To have a unified legal system for the whole of the country is the ideal, one that is found world-wide, and one that lies at the root of the modern nation-state. Max Weber explains it in terms of an historical evolution from ‘charismatic’ to ‘traditional’ authority, and from there to a form of authority which he calls ‘legal domination’, which is of an impersonal nature and rests on the rule of law.

While in principle most Batswana would agree with the concept of ‘legal domination’, when it comes to the methods and pace of its implementation, opinions differ. This being the case, it is fair to say that too hurried a harmonization of indigenous African and transplanted European values will probably create more problems than it will solve. As Allott has pointed out so forcefully, ‘consensus law is effective’, to which we may add that, according to African tradition, consensus law is also the moral or ‘natural’ law.

The way ahead lies in disciplined law reform. Law reform is what Karl Llewellyn would have called a ‘law-job’, requiring special ‘law-crafts’. It is therefore best left in the hands of a professional law reform authority, which, I regret to say, Botswana lacks.

In promoting disciplined law reform, the country’s university, by way of training and research, has a vital role to play. The university owes it to the people to be at all times at their service. As for the teaching of law, it should be geared towards producing ‘social engineers’ rather than rule-centered ‘private practitioners’. A teaching of mere ‘positive law’ has long since ceased to be scientific. Functionalism and morality are equally important ingredients of legal studies. They should form part of every law course, rather than being cramped into a single, advanced course in jurisprudence (which, by the time the students come to take it, they have been conditioned to loathe). In addition, students should be introduced in an on-going way to the reality of legal pluralism and they should at an early stage be equipped with the techniques for comparing laws.

V CONCLUSION

The study of law as a social discipline is still relatively young. This holds true in particular for the study of legal pluralism and the comparison of laws. Yet, even for these subjects, jurisprudence has progressed sufficiently to provide us with a basic travel kit, which, with the help of the other social sciences, may take us a long way.

3A N Allott The Limits of Law (1980).
ADMINISTRATION OF CUSTOMARY LAW IN THE COURT SYSTEM

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I INTRODUCTION

Zimbabwe has a single legal system within which plural systems of law operate. Since the country’s colonization in 1890, general law (Roman-Dutch common law and statute law) has operated side by side with customary law (the various indigenous and traditional systems of law). Customary law has never been applied to criminal, constitutional and commercial matters. It was and still is reserved for personal-law matters, such as intestate succession, marriage, divorce, legitimacy and property rights.

From the beginning, customary law has not been consistently applied, due largely to the wording of the various Charters and Orders-in-Council, which empowered the courts to recognize customary law. For instance, in 1889 the Charter issued to the British South Africa Company by the British Crown urged the courts to ‘have careful regard to customary law’. A 1891 Proclamation enjoined the courts to ‘follow the laws and customs of the natives concerned’ and an 1898 Order-in-Council declared that the courts were to be ‘guided’ by customary law. The different wording meant that in some cases courts felt compelled to apply customary law when a dispute between Africans arose, and in other cases they considered themselves free to apply either general law or customary law. The result was a conflicting set of precedents.

At present parties can choose whether or not customary law should apply to the determination of their dispute. When they are not in agreement, the Customary Law and Local Courts Act 2 of 1990 provides criteria to be used by the court in deciding which law should apply. The content of customary law is not easy to ascertain, however, and, although successive statutes have urged the courts to have recourse to texts, oral testimony and other available sources, research has shown that these sources are at variance with one another. Thus the courts tend to draw from precedents, even where these precedents are doubtful or have become outdated and irrelevant. Progressive judgements seem to appear only in landmark cases for which there are no precedents.

II COURT STRUCTURES

Before discussing the courts’ administration of the law, it seems appropriate to give a brief indication of what the court structure was like at Zimbabwe’s Independence in 1980, and what changes have since occurred.
Formerly, the Appellate Division formed the apex of the court structure. It received appeals from both the Court of Appeal for African Civil Cases (CAACC) and the General Division of the High Court.¹

After Independence, with the abolition of tribal courts and the elimination of the divisions in the High Court, the court structure was changed radically. A separate court, the Supreme Court, was established to hear appeals from the High Court and the magistrates' courts and to determine constitutional-law matters.

It was felt that the previous triadic structure was constructed on racial lines and that choice of law rules should be based rather on individual inclination and the circumstances of the case than on a person's race. The chiefs were jettisoned from the judicial system because, as Ncube points out:

'During the colonial period chiefs had been extensively used as agents of colonial rule and naturally became mere functionaries of the oppressive colonial state. Accordingly, during the struggle for independence they were ridiculed and sometimes became targets of the guerillas of the liberation struggle .... it was therefore no surprise that in 1981 the Primary Courts Act stripped them of their judicial functions.'²

| SUPREME COURT |
| HIGH COURT |
| MAGISTRATES' COURTS |
| COMMUNITY COURTS |
| VILLAGE COURTS |

This post-independence structure was governed by the Customary Law and Primary Courts Act 6 of 1981, as regards the application of customary law in the courts. The lowest level of courts, namely the village and community courts, were the primary courts, and they were widely spread throughout the country so that ordinary people had ready access to them.

The primary courts were presided over by civil servants, and, while village courts had a limited monetary jurisdiction of $200 and could not dissolve marriages, community courts had unlimited jurisdiction and could dissolve customary-law marriages. Both courts were, of course, precluded from determining cases pertaining to general law.³

¹In issues that were essentially matters of African custom, with which this court was not familiar, the proper courts in which to pursue the issues would either be the district commissioner's court or the tribal courts, set up under the African Law and Tribal Courts Act 1969.


³Section 11 of the Act sets out the jurisdiction of both courts.
The chiefs were naturally unhappy that they had been stripped of their judicial functions at Independence, and they kept pressing the government to re-incorporate them into the judicial structure. They insisted that their role as chiefs was meaningless if they had no powers of adjudication or land allocation, and they stressed how unbecoming it was for elderly litigants to appear before the young civil servants who had been appointed as presiding officers of the village and community courts.⁴

Government eventually acceded to the chiefs’ request that their judicial functions be returned by promulgating the Customary Law and Local Courts Act 2 of 1990 (which became effective only from March 1993). In terms of this Act, the lowest two levels of courts are the primary and community courts. They are local courts presided over by headmen and chiefs, respectively. The functions of the previous community courts were subsumed under the magistrates’ courts. (The former have no relationship with the present community courts. A different name for the newly formed chief’s courts would have avoided this confusion!)

Discussion of the application of customary law will generally relate to magistrates’ courts and the Supreme Court, for the jurisdiction of chiefs and headmen is so restricted that it is insignificant. The monetary jurisdiction of the primary courts is $500,00 and for the community courts $1,000,00. Neither court has jurisdiction to determine the validity of a will, to dissolve any marriage, to hear maintenance cases or to decide rights in respect of land or

⁴Ncube (n2) 65.
other immovable property. In effect, therefore, to obtain redress in most of their disputes, elderly litigants still have to appear before young civil servants sitting as magistrates.

The former presiding officers of the community courts, whose jurisdiction was unlimited in customary-law matters, are now assistant magistrates in the magistrates’ courts. They try customary-law cases only in terms of s 82(1) of the Magistrates’ Court Act [Cap 181]. Legally qualified magistrates have jurisdiction in both customary and general-law cases.

The re-introduction of chiefs and headmen into the judicial system is of little assistance to the public, first, because of their limited jurisdiction, and, secondly, because they are not courts of record. Dissatisfied litigants may appeal to the magistrates’ court, where a trial must be started afresh. It actually saves time to initiate an action in a magistrate’s court in the first instance. The introduction of small claims courts, whose jurisdiction is $2 000.00, may further erode the viability of the local courts.

III ADMINISTRATION OF CUSTOMARY LAW

Many academics cringe at the suggestion that customary law be written, for fear that it lose its dynamic character and be stultified. It is preferable that customary law be allowed to change with the times. The Zimbabwe Customary Law and Local Courts Act recognizes this dynamic quality law by defining customary law as ‘the customary law of the people of Zimbabwe, or of any section or community of such people, before the 10th June, 1891, as modified and developed since that date’ (emphasis added).

This definition presupposes, however, that the content of the law before 10 June 1891 can still be identified, that it was static and uniformly applied to all ethnic groups and that modification since then can also be identified. This assumption is a myth, as many academics and researchers, including WLSA, have observed. It is evident that no two sources present customary law and practices in the same way and that the courts are in no better position to determine its content. During their research project on inheritance, WLSA found that the law as ‘lived’ was at variance with the law as applied by the courts, because, while courts embroil themselves in rigid rules of precedent, the approach of ethnic groups may differ and families may have developed their own problem-solving processes.

Nowhere is this divergence more evident than in the appointment of heirs to deceased estates. Research in both rural and urban settings, encompassing the two major ethnic groups in Zimbabwe, showed that, historically, when a man died, his estate was distributed amongst his children, the eldest son receiving more in recognition of the fact that he would assume his father’s position as head of the family and thereby became responsible for fulfilling the family’s general needs. Distribution took into account the size of the estate, what each child had already obtained and contributions the children had made to the estate. Hence, if the eldest child was a prodigal or was away from home, and if a younger son had stayed at home to assist his parents in the fields, herding cattle or doing other productive rural work, the younger son would be likely to receive more cattle and the right to carry on living in the homestead.

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5Section 14 of the Act prescribes the jurisdiction of the local courts.
6As amended by Part II s 4 of Customary Law Local Courts Act 2 of 1990.
7Act 20 of 1992. The small claims courts presently operate only in Harare and Bulawayo.
8WLSA (Women and Law in Southern Africa) is a research project with offices in Botswana, Lesotho, Mozambique, Swaziland, Zambia and Zimbabwe.
after his father’s death. In one research area (Nkayi Matabeleland), key informants and group discussions indicated that the youngest son stayed on at home, even after marriage, to look after his parents on a day-to-day basis, while older sons married and set up house elsewhere. The inheritance research discovered that families try to distribute assets in a manner most beneficial to the deceased’s family as a whole and that they may even appoint a widow as heir, not only because she assisted in the accrual of the wealth but also because she raised children.

An analysis of Supreme Courts judgments, however, shows that the position of the eldest son has been elevated beyond traditional expectations. He inherits both the status and the entire estate of the deceased. If family members appoint someone other than the eldest son as heir, although lower courts recognize the appointment, the Supreme Court either reverses the decision or refers the matter back to a lower court for reconsideration. 9

One wonders how it can happen that the Supreme Court will reject an appointment made by the lower courts (the magistrates’ courts and formerly the community courts). Part of the answer may lie in the diversity of customs and practices of various people and the lack of proper guidelines as to the appointment of intestate heirs under customary law. Section 69 of the Administration of Estates Act [Cap 303] provides that estates of persons married under customary law or (if a deceased was single) whose parents were married under customary law shall be ‘administered and distributed according to the customs and usages of the tribe or people to which he belonged’. If there is dispute among the relatives, a magistrate may take oral evidence on the customs of the deceased’s people and supplement such evidence with his own knowledge. His decision is subject to an appeal to the Supreme Court. If the deceased was based in an urban area and if his parents had no links with tribal processes, they may well nominate his wife as his beneficiary. Yet, if such a matter found its way to the Supreme Court, the decision would be set aside as ‘uncustomary’, because anthropological texts and case-law authorities say that it cannot be done. Where then is the dynamism of customary law? Who should provide oral evidence of the customs and practices, if a family’s evidence of its own practice is not good enough? With family and rural resettlement onto small-scale farms, many people are divorced from their tribes and do not live under chiefs.

In other spheres, customary law has slowly but surely given way to general law. Grounds for divorce, for example, are now the same, irrespective of whether the parties were married under customary law or general law. Again, regardless of the type of marriage, on divorce, apportionment of property between the spouses is governed by the Matrimonial Causes Act, 1985. Similarly, whether an individual is subject to customary law or the general law, liability to maintain a child is now governed by the Maintenance Act [Cap 35]. As regards custody and guardianship, African women were freed from perpetual minority by the Legal Age of Majority Act of 1982, and they may now assume rights of custody and guardianship over their children.

Administrators of customary law are guided by court decisions and statutes. Although in some cases officials (for example those in the Master’s Office) are empowered to apply customary law, they do not do so, because they lack the requisite training to assess evidence and they do not have adequate knowledge to supplement whatever evidence is placed before them. (They are not, after all, judicial officers.) Section 12(2)(a) of the Wills Act 13 of 1987,

9 In *Murisa v Murisa* SC 41/92, the lower court appointed the widow as heir in terms of the general wishes of the family. The Supreme Court held that this was ‘uncustomary’ and it referred the matter back to the magistrate’s court for further investigation.
for example, authorizes the Master of the High Court or other officers administering a deceased estate to accept an oral will if

‘such a declaration is regarded as a valid will according to any law or custom to which the testator was subject when he made the declaration’.

Needless to say, the provision has never been utilized. Apart from the problems of ascertaining the customs applicable to the deceased, there is an inherent danger of false declarations or conflicting declarations being made to the Master.

The administration of customary law is further complicated by the promulgation of statutes that do not indicate whether they are to supersede customary law but are subsequently interpreted by the Supreme Court as if they do. In Chihowa v Mangwende,10 for example, the Supreme Court ruled that, by virtue of the Legal Age of Majority Act, female children could now inherit from their fathers’ estates. On the basis of this judgment, community courts started appointing eldest children, regardless of sex, as heirs to their fathers’ estates. In a subsequent case,11 however, the Supreme Court held that female children could inherit only in the absence of male issue, which meant that sons were to be preferred over daughters, whatever their age. More recently,12 the Supreme Court decided that female children could not inherit in a patrilineal society. Here it was held that the customary law of kinship and succession has nothing to do with the status of women (thus nullifying the argument based on the Legal Age of Majority Act), but that it ‘has everything to with the patrilineal nature of society’. The judgment is legally sound, but, unless the legislature intervenes, its effect will be to take women several steps backwards. In under a decade, Zimbabwe has moved full cycle, and we are now back to the law that existed before the Chihowa v Mangwende judgment.

IV CONCLUSION

Customary law is not easy to administer or apply. It is too diverse and dynamic, and, as currently applied by the courts, is not serving litigants well. People are more interested in the present and have altered their customs and practices in many respects to suit their present social and economic circumstances. The courts attempt to accommodate changing circumstances, but they are often restricted by the doctrine of precedent and the literal rule of statutory interpretation.

Hence there is some disparity between ‘living law’ and the law as administered by the courts. This disparity is often blamed on the courts, which are said to lag behind the times, but discourses on customary law have shown that it is not a fixed set of rules with predictable, directional changes nor is it uniformly practised by different ethnic groups. With intermarriage so common and cultures mixing through urban migration, resettlement, social dynamics, education and a new social awareness it is not easy to apply customary law to everyone’s satisfaction.

The courts are caught between two contradictory approaches. On the one hand, their attitude is positivist, implying that law is identifiable and definable and that the judge’s function is simply to interpret, not to make it (hence the courts’ dogmatic adherence to precedents). On the other hand, the courts realistically acknowledge that their decisions

10SC 84/87.
11Vareta v Vareta SC 126/90.
12Mwazozo v Mwazozo SC 121/94.
involve policies dictated by the economic, social and political conditions of society. The Legal Age of Majority Act has had a resounding impact on customary law, because the judiciary recognized the need to place women on an equal footing with men. The government itself appreciated the important role of women in the liberation struggle, and, in an attempt to introduce a more equitable relationship between the sexes, legislated many ‘uncustomary’ laws.

In Zimbabwe customary law is gradually being submerged by general law in the area of marriage (lobola is no longer a legal requirement and non-payment is not enforceable through the courts), divorce, maintenance, status and custody and guardianship of children. The process has generally enhanced the position of women and is due largely to legislative intervention and judicial activism.13

The major difficulty lies in the courts’ positivist approach, which prescribes an across-the-board application of precedent, as if all ethnic groups were homogeneous entities. In Mudzinganyama v Ndambakwana,14 for instance, the Supreme Court found that a general law of succession existed in Zimbabwe, even though research has shown that Ndebele and Shona practices differ. Lawyers are to be applauded for showing interest in practical research, as they have an important role to play in ensuring that laws are relevant to the people for whom they are intended. Lawyers are better placed than other professionals to link ‘living law’, legislation and judicial practice.

13Zimnat v Chawanda has been applauded for concluding that a customary-law wife is entitled to claim loss of support on the death of her husband. The decision combined a general-law claim for damages and customary notions of marriage.

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