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LEGAL PLURALISM AND A BILL OF RIGHTS – THE SOUTH AFRICAN EXPERIENCE

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I Introduction

Given that the Australian legal system does not recognise the existence of a continuing indigenous legal system, does not directly recognise indigenous law and does not have a justiciable Bill of Rights, an article examining the interaction between indigenous law and a Bill of Rights might seem irrelevant to us. Nevertheless, the experience of South Africa in recognising and developing a pluralistic legal system since colonial times and in addressing the interface between indigenous law and a [Constitution](#) containing a Bill of Rights, is instructive for Australia for two reasons.

First, the South African experience demonstrates that questions of sovereignty and of legal pluralism can be separated. Resistance to recognition of indigenous law in Australia is often based on the argument that such recognition is incompatible with the sovereignty of the Commonwealth. Proponents of this argument point to decisions in *Coe v Commonwealth (No 2)*,^[1] *Walker v New South Wales*^[2] and *Thorpe v Commonwealth (No 3)*,^[3] in which the High Court affirmed that no indigenous sovereignty, and thus no indigenous legal system, survived colonisation. However, this is to ignore the fact that more than one legal system can operate within the same sovereignty – in other words, that recognition of indigenous law does not require recognition of indigenous sovereignty (it being acknowledged that there are a variety of views, even among proponents of indigenous rights, of the strategic worth of pursuing demands for sovereignty). Legal recognition of indigenous law could be achieved

by State or Commonwealth legislation within the framework of the received legal system, as has been done in numerous countries sharing a similar colonial history as Australia within the international Commonwealth.

The second reason why the South African experience is instructive is because it illustrates how indigenous legal systems co-exist and interact with a Bill of Rights. In Australia the claim is frequently made that rules of indigenous law are incompatible with fundamental rights. Leaving aside the hypocrisy of this argument in the context of a legal system where received common and statute law are not subject to a justiciable Bill of Rights, the jurisprudence that has developed in South Africa shows that recognition of indigenous law is consistent with fundamental rights and, that where clashes emerge between rules of indigenous law and a Bill of Rights, the courts are capable of resolving them without calling into question the institution of indigenous law as a whole.

This article examines the status of customary law in South Africa and the choice of law rules contained in both statute and case law that are used to determine when customary law is applicable. It also examines recent cases decided by the Constitutional Court, in which challenges were launched to rules of customary law, and consequential legislative reforms. The article concludes with some discussion of similar issues that would need to be addressed were indigenous law to be recognised in Australia, including how recognition should take place, how the legal system should determine who is 'Aboriginal' for the purposes of indigenous law; what choice of law rules could be used to determine the applicability of indigenous law; and, finally, how the legal system should address conflicts between indigenous law and human rights law, with particular reference to traditional punishments such as spearing. In so doing, reference is made to the Australian Law Reform Commission's 1986 report on *The Recognition of Aboriginal Customary Laws*,^[4] and the very recent Discussion Paper by the Law Reform Commission of Western Australia entitled *Aboriginal Customary Laws*,^[5] published in February 2006. It should however be emphasised that these issues are vast and complex, meriting discussion in articles of their own – as is evidenced by the voluminous nature of the Commonwealth and West Australian law reform reports and discussion papers. Full discussion of them lies outside the scope of this article, the primary purpose of which is to give readers an insight into customary law in South Africa.

II The Status of Customary Law in South Africa

The recognition of indigenous law in South Africa rests upon a legislative foundation. As in Australia, it has long been accepted under South African common law^[6] that indigenous sovereignty was eclipsed during the colonial period, sometimes by cession but more usually by conquest. However, tribal governments continued to exist and to exercise authority under the sovereignty of the colonial governments, and this remained the case when the four British colonies of the Cape Colony, Natal, Transvaal and Orange Free State united to form the Union of South Africa in 1910. In order to achieve uniformity in relation to the applicability of customary law, the South African parliament enacted the *Native Administration Act 37 of 1927* (since re-named the *Black Administration Act* and referred to hereafter as the 'Act'). Although, as is discussed below, this Act is in the process of being repealed, its existence (and that of the colonial legislation it replaced) indicates that the recognition accorded to customary law was recognition of that law as part of the South African legal system, not as the manifestation of any residual indigenous sovereignty. Such authority as indigenous rulers (kings, chiefs and headmen) continued to enjoy was delegated to them by colonial authorities as part of a policy of 'indirect rule' necessitated by the small number of colonial administrators relative to the population.^[7] Section 1 of the Act vested the Governor-General (and subsequently the President) with the title of 'Supreme Chief', and s 2(7) empowered him to recognise and appoint chiefs of tribes and to make regulations prescribing their duties, powers, privileges and conditions of service. Furthermore, the President could depose such chiefs as had been recognised or appointed.^[8] The power to appoint and depose – which was not constrained by customary laws of succession to chieftainship^[9] – gave to the received legal system control over the most fundamental institution of indigenous society, and served to emphasise the completeness of the loss of indigenous sovereignty.

However, within this context of overall control by the received legal system, the Act left significant authority with indigenous government structures, and preserved the operation of indigenous customary law. The Act confers jurisdiction on courts presided over by chiefs and headmen, approximately 1500 of which have been officially recognised.^[10] Under s 20, criminal jurisdiction is conferred on chiefs and headmen in respect of crimes at common, statutory and customary law, other than crimes listed in the Third Schedule of the Act (essentially serious crimes such as murder, rape, culpable homicide, robbery and assault with intent to do grievous bodily harm). Furthermore, chief and headmen's courts may only punish by imposing fines.^[11] Civil jurisdiction is governed by s 12(1) and is limited to claims arising out of customary law and also excludes matrimonial causes. Chiefs' and headmen's courts also operate according to indigenous procedure, which in general is directed towards mediation and reconciliation as much as adjudication,^[12] and may involve input by the whole community, not just the judge, litigants and witnesses.^[13]

Just as important as the recognition of the jurisdiction of indigenous courts to administer customary law is the fact that the legal system provides for *all* courts in the country to apply customary law where appropriate. The choice of law rule is contained in s 1 of the *Law of Evidence Amendment Act* 45 of 1988, the relevant section of which provides:

1 Judicial notice of law of foreign states and of indigenous law

(1) Any court may take notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

This enactment enhances the status of customary law in that whereas under its predecessors^[14] only commissioners' courts had been able to take judicial notice of customary law, all courts may now do so. Furthermore, the 1988 Act removes a previous restriction that customary law was applicable only in 'suits or proceedings between Blacks', which means that it is possible for customary law to be applied in cases involving whites.

Ascertainment of Customary Law

How do the courts ascertain customary law, and how do they determine when it is applicable?

As a preliminary point, it must be recognised that there is no such thing as 'South African customary law' – there are as many systems of customary law as there are communities applying it. Furthermore, while each of the major tribes forms a legal community, even this level of differentiation is insufficient if one is to obtain an accurate picture of the diversity of customary law systems: The 'tribe' should be seen as a broad construct, referring to an ethnic grouping located within a specific geographic area, within which there are a variety of sub-tribes, clans and families, each permitted to develop their own customary law.^[15] Indeed, most modern scholars see the rigid tribal taxonomy produced by colonial authorities as reflecting those authorities' perceptions and serving their political and administrative convenience (and later, the policy of *apartheid*, a fundamental element of which was the division of the black population into separate 'nations'), rather than as reflecting the infinitely more fluid reality of African society.^[16]

Furthermore, the rapid urbanisation that has occurred within South Africa during past decades, which has led to the intermingling in urban areas of people from various tribes and the subsequent creation of a population who lived their entire lives in urban areas divorced from tribal roots, suggests that recognition should now be accorded to what has been called 'new custom' – that is, customary law that has been developed by unofficial courts established by urban black South Africans.^[17] It is best therefore to recognise that particular communities may

develop their own variations of customary law, and that such communities may derive from a relatively small area.

Much has been made of the dichotomy between 'official' customary law (which has been codified into legislation, confined by precedent and subject to academic analysis) and 'authentic' customary law (that which exists as oral tradition within black communities).^[18] The extent to which written customary law fails to reflect authentic oral tradition is open to debate. However, it would be a mistake to conclude that codification, precedent-setting and text-writing are inherently incompatible with 'true' customary law. As Allott states, the formal, written rules of common law marriage, for example, do not tell the whole story about that institution, yet such rules are an indispensable part of it.^[19] So too in the case of customary law, the remedy for such discrepancies as may exist between 'official' and 'real' customary law can be minimised by remedying the inefficiencies of the former in keeping pace with contemporary developments.

The recognition of customary law by the received legal system raised the problem of how its substance was to be ascertained. Such a problem did not, of course, exist within indigenous communities themselves – as Allott states, '[i]n the [customary] African courts the customary law is supposed to be in the breasts of the judges'.^[20] By contrast, the application of customary law by judicial officers who were not members of those communities required some method by which courts could be satisfied that the oral rules of customary law that were alleged to be applicable truly reflected the norms of indigenous communities.^[21] The result was that customary law that was not already incorporated into formal sources (that is, into a code or an existing case precedent) has generally had to be proved as a question of fact,^[22] usually by means of expert evidence^[23] by anthropologists^[24] and elders belonging the litigants' tribes.^[25]

How does a court decide whether to apply indigenous customary law or South African common law? The scope of the discretion, and the way in which it should be exercised, is governed by the long-standing authority of *Ex parte Minister of Native Affairs: In re Yako v Beyi (Yako v Beyi)*^[26] in which it was held that s 11(1) of the *Black Administration Act 37 of 1927* (a predecessor of s 1 of the *Law of Evidence Amendment Act 45 of 1988*) did not require that a judicial officer consider either common law or customary law as prima facie applicable.^[27] Rather, the discretion was an open one, and the judicial officer should 'determine which system of law it would be fairest to apply in deciding the case between the parties'^[28] and similarly should bear in mind that 'the dominant consideration is his own reasoned view as to the best system of law to apply in order to reach a just decision between the parties'.^[29] Quite apart from its general vagueness,^[30] this formulation presents the fundamental problem that, while inviting presiding officers to answer the choice of law question in such a way as to achieve what they conceive of as a 'fair' or 'just' outcome, it offers no guidelines as to what 'fairness' and 'justice' means in this context. Indeed, Schreiner JA expressly declined to lay down guidelines as to how the discretion was to be applied,^[31] although he commented that it would not be inconsistent with the Act for a judicial officer to take into account the extent to which the litigants were 'urbanised or detribalised'^[32] and that justice might require that a court take into account 'the whole personality of the person injured, including his or her social standards'.^[33]

Bennett suggests that the choice of law discretion should be guided by the fundamental principle underlying legal pluralism, which is that the members of each community are entitled to have their own law applied to them and that therefore 'their expectations must be accommodated by application of the system of law which they could reasonably have anticipated [would apply] in the circumstances of the case.'^[34] In this process the techniques of private international law are useful, but only to a limited extent, as they are employed in the context of choice of law *between jurisdictions*, whereas the issue at customary law is which of a number of personal law systems *within a jurisdiction* is applicable.^[35] Furthermore, private international law technique involves the characterisation of a legal issue followed by the use of the relevant connecting factor – for example, if the validity of a marriage is the issue, the connecting factor is the *lex loci celebrationis*, which will lead to identification of the *lex causa*. By contrast, in the case of choice of law between customary and the received law, the appropriate legal system is indicated by factors associated with the parties themselves rather than by reference to the branch of substantive law involved,

and so a contractual dispute, for example, might be decided under customary law between litigants A and B, but under common law between litigants C and D because of their differing personal circumstances.[\[36\]](#)

According primacy to the intention of the parties is not problematic where the parties have entered into an express choice of law agreement.[\[37\]](#) However, such cases are rare, and the courts are more usually confronted with a situation where only one of the parties indicates which legal system he or she expects to be applied – usually this is apparent from the way in which the plaintiff presents his or her summons[\[38\]](#) (or the defendant his or her defence).[\[39\]](#) In such instances it is clear that the court cannot allow an expression of preference to be determinative,[\[40\]](#) as the choice of law question may be the very issue in dispute in cases where a litigant seeks to have applied whichever system of law favours him or her. Here too precedent offers no firm guide – in *Yako v Beyi*, Schreiner JA stated that while in some cases it would be fairest to apply whichever system gave the plaintiff a right of action, in others fairness might require that the court apply whichever system provided a defence to the action.[\[41\]](#) He reaffirmed this position in *Umvovo v Umvovo*[\[42\]](#) where he stated that

‘although the existence of a remedy under one legal system and not under the other would be a major factor in the exercise of the discretion, it must not be treated as if it were the only consideration, leading automatically to the application of the system providing the remedy. In the circumstances of a particular case justice may best be served by applying the legal system which gives no remedy.’[\[43\]](#)

In practice, the courts have, since *Umvovo*, ceased to base their choice of law determination on the existence of a remedy. This development is to be applauded because, as Bennett points out,[\[44\]](#) the fact that a legal system does not provide a remedy for conduct which is alleged to be unlawful simply indicates that that legal system regards the conduct as lawful, not that such conduct is beyond its purview.

In the absence of an agreement between the parties, their expectation should, Bennett suggests, be discovered by taking into account as many connecting factors as are relevant in the circumstances of the case,[\[45\]](#) with the courts basing their decisions on the aggregate impression thus created.[\[46\]](#) This is indeed what occurred in the decades following the decision in *Yako v Beyi*, and it is instructive to survey the factors – none of them conclusive – that have been taken into account by the courts in determining which system of law to apply:

The broadest is the factor of ‘lifestyle’,[\[47\]](#) by which is meant the litigants’ cultural orientation, which is in turn indicated by a number of factors, such as whether the person resides in a rural area and with the tribal community or has left to pursue an independent life in an urban area (although here it should be noted that urbanisation does not necessarily imply detribalisation), and his or her occupation, religion, mode of habitation, dress *et cetera*.[\[48\]](#) This very broad criterion does however have its limitations, primarily deriving from the fact that it is rarely possible to conclude that a person’s lifestyle is wholly ‘tribal’ or wholly ‘Western’, and this has led some to reject the lifestyle criterion derived from the circumstances of an individual’s conduct in favour of formal registration by a person as a member of a community.[\[49\]](#) Finally in this regard, identification of lifestyle (however accomplished) is of no use in cases where opposing litigants have different lifestyles. In such a case this criterion brings one no closer to determining the applicable choice of law.[\[50\]](#)

The nature of the transaction may provide a strong pointer in cases where the transaction is known only to one system of law.[\[51\]](#) Thus, for example, a court would have no difficulty in concluding that a *lobolo* (bridewealth) agreement will be governed by customary law,[\[52\]](#) while a contract of insurance, and other commercial transactions, will be subject to common and statute law.[\[53\]](#) On the other hand, this factor will be of limited use where the transaction is of a type known to both legal systems,[\[54\]](#) in which case the court will need to have recourse to the other connecting factors in arriving at its decision.

The form a transaction takes may well signal which system of law the parties expected to apply.[\[55\]](#) Thus a

marriage entered into by performance of indigenous rites will be governed by customary law, while the execution of a will according to the formalities of the received law will indicate that indigenous law was excluded in favour of common and statute law.

Finally, the place in which an event occurs or in which property is located may indicate the applicable law.^[56] However, caution is warranted here: The very fact that in South Africa the duality of the legal system is based on the concept of personal law – that is, that a person is entitled to the application of his or her communal law irrespective of wherever he or she is – suggests that geographic location should not figure prominently in choice of law decisions. This is so because in some situations – for example in respect of liability for civil wrongs or rights to movable property – the place in which the transaction takes place or the property is located may be wholly fortuitous.

Constitutional Provisions

The end of apartheid and the emergence of a new, democratic constitutional order in South Africa required a re-evaluation of the status of indigenous law. Section 211 of the final [Constitution](#)^[57] explicitly recognised the role of indigenous organs of government and of customary law, providing as follows:

Recognition

211 (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the [Constitution](#).

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts may apply customary law when that is applicable, subject to the [Constitution](#) and any legislation that specifically deals with customary law.

Role of traditional leaders

212 (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

...

In addition, [s 15\(3\)](#) of the [Constitution](#) expressly recognises marriages entered into under customary law subject to the [Constitution](#), a provision which gives security to indigenous marriages, which are frequently polygamous.

[Section 8\(1\)](#) provides that the Bill of Rights binds all three branches of government, thus establishing that its terms are of both 'vertical' and 'horizontal' application, and that therefore rules of private customary law as applied by the courts must be consistent with the Bill of Rights. The subjection of customary law to the Bill of Rights by [s 211\(3\)](#) and [s 8\(1\)](#) means that whether a rule of customary law which is inconsistent with the Bill of Rights will survive judicial review depends upon whether the rule can satisfy the general test laid down in [s 36\(1\)](#) for valid limitations of rights – namely that the limitation 'is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'

Before it came into force, the 1996 [Constitution](#) had to receive certification from the Constitutional Court that it was compatible with a number of fundamental constitutional principles contained in South Africa's first post-apartheid [Constitution](#) (the interim [Constitution](#) of 1993),^[58] and which Parliament, sitting as a Constitutional Assembly, was required to comply with in drafting a final [Constitution](#). In so doing, the court noted the potential for conflict between the Bill of Rights and rules of customary law, but in its declaratory decision *Certification of the [Constitution](#) of the Republic of South Africa*,^[59] held that the constitutional principles required that customary law, like common law and statute law, be subordinate to the Bill of Rights.

Case Law

A number of cases involving the constitutionality of indigenous governmental structures and rules of indigenous law have been heard since the enactment of the interim and final post-apartheid Constitutions.

The first significant case involved the issue of procedural rights in indigenous courts. As Bennett noted, the fact that legal representation was not permitted under the rules of such courts exposed their proceedings to attack under those provisions of the Bill of Rights guaranteeing the right to legal representation.[\[60\]](#) This issue was litigated in *Mhleleka and Feni v Head of the Western Tembuland Regional Authority*[\[61\]](#) in which the procedures governing the operation of indigenous courts established under the *Regional Courts Authority Act 1982* (Tk) were challenged. The Transkei High Court held that the denial of the right to legal representation in such courts was inconsistent with [s 35\(2\(c\)\)](#) of the [Constitution](#).

In *Moseneke v Master of the High Court*,[\[62\]](#) the Constitutional Court held that [s 23\(7\)\(a\)](#) of the *Black Administration Act 37 of 1927* and regulations made under the Act were inconsistent with the final [Constitution](#), in that by providing that the estates of black persons who died intestate were to be administered by a magistrate rather than by the Master of the High Court, the provisions breached the right to racial equality contained in [s 9\(3\)](#) of the Bill of Rights, contained in Chapter 2 of the [Constitution](#). The Court further held that the provisions could not be justified under the limitations clause contained in [s 36\(1\)](#). The Court addressed the practical problems arising from its declaration of constitutional invalidity by using the power granted to it under [s 172\(1\)\(b\)](#) of the [Constitution](#) to suspend that part of its order for two years so as to give Parliament the opportunity to correct the law, while providing that in the interim families of deceased black people could ask either the Master or a magistrate to administer the deceased's estate.

The *Moseneke* case involved a challenge to the administration of the law rather than a substantive rule of indigenous customary law. However, such a challenge occurred in the most recent Constitutional Court decision on customary law, *Bhe v Magistrate, Khyelitsha*,[\[63\]](#) in which a fundamental doctrine of customary law was called into question. In *Bhe* the Constitutional Court heard a challenge to the validity of the entirety of [s 23](#) of the *Black Administration Act No 37 of 1927*, which required that where a black person died intestate, their estate should devolve in accordance with the rules of customary law. Under customary law, succession is based on male primogeniture among intra-marital children, and a challenge was brought against both [s 23](#) and the male primogeniture rule on behalf of two minor extra-marital female children of a deceased black person who contested the right of the father of the deceased to succeed to their father's estate. The basis of the challenge was that both [s 23](#) and the male primogeniture rule breached the rights not to be discriminated against on the basis of gender or birth and the right to dignity contained in sections [9\(3\)](#) and [10](#) respectively of the Bill of Rights.

The court had no difficulty in finding that the Act and the rule prima facie infringed the protected constitutional rights. The Act was found to be unconstitutional because by subjecting only black people to customary law rules of intestate succession (in other words, by requiring them to 'opt out' of indigenous customary law by executing a will), they were treated differently from members of any other race who died intestate, and whose estates would devolve according to the otherwise generally applicable *Intestate Succession Act 81 of 1987*. The customary law rule of succession on the basis of male primogeniture among intra-marital children was found to be inconsistent with the rights not to be discriminated against on grounds of gender and circumstances of birth, and also with the right to dignity.

This case is of significant interest to students of legal pluralism. It might be thought that by branding the application by [s 23](#) of the customary law of succession to intestate black decedents as unconstitutional, the court struck a fatal blow against customary law. Surely if customary law is no longer the default system for black people, its scope of operation will be drastically curtailed? Or, to express it differently, if customary law does not automatically apply to black people, then to whom will it apply? The flaw in this line of thinking is to equate

'customary law' with 'black law', which has not been the position in South African law for a number of years. As discussed above, the choice of law rule embodied in s 1 of the *Law of Evidence Amendment Act* 45 of 1988 is racially neutral, and is interpreted as requiring a court to pay attention to *all* the circumstances of the case when deciding which law is applicable. Furthermore, there is nothing in that provision which prevents customary law being found to be the applicable law in a case to which a non black person was a party. That being the case, the now overruled s 23 of the *Black Administration Act* 37 of 1927 should be understood as an anachronistic survivor of an era when customary law was seen as applicable only to black people, and its invalidation by the court in *Bhe* as having the effect of simply bringing the law of succession into line with all other branches of the law, where the applicability of customary law is not determined simply according to the race of the parties but as being a product of all the circumstances of the case.

The *Bhe* decision is also of interest because if the court's handling of the question of whether the male primogeniture rule could be saved under the s 36(1) 'reasonable limitations' provision of the [Constitution](#). The court noted that the customary law rule of primogeniture reflected the fact that inheritance of the deceased's property was not the central purpose of the law of succession, which instead served the dominant purpose of preserving the family unit with an identifiable head, whose duty it was to provide for the members of the family. Seen in this light, the rule operated to transfer headship of the family from the deceased to his nearest male relative, and to confer upon that person both the duty to provide for the deceased's spouse and children as well as the right to the deceased's property in order to assist in the discharge of that duty. However the court held that the overarching duty of interpreting customary law in conformity with the Bill of Rights meant that the inferior treatment accorded to females and to extra-marital children by customary law could not stand. The exclusion of females from inheritance reflected a patriarchal order that consigned women to perpetual subordination to men. Furthermore, the rationale underlying customary law no longer reflected the realities of contemporary society, where the extended family had been replaced by the nuclear family, and where the oldest male relative of a decedent might live a long distance away from the family to whom, under customary law, he owed a duty of support. The court further held that customary law had to evolve to meet the needs and values of an increasingly urban society in order to become 'living customary law', and that the male primogeniture rule was not justifiable in a free and democratic society based on equality, human dignity and freedom. This aspect of the decision shows that far from signalling the death-knell of customary law, the subordination of it to a Bill of Rights (in common with all other types of law) can help ensure its continuing relevance.

Having found s 23 of the *Black Administration Act* 37 of 1927 and the male primogeniture rule unconstitutional, the court ordered that until Parliament enacted a new regime governing succession under customary law, all intestate estates were to devolve in accordance with the *Intestate Succession Act* 81 of 1987, with a deceased person's descendants, male and female, intra-marital and extra-marital, being treated equally.

Legislative Reform

The Government acted with alacrity to remedy the law in the wake of the decisions in *Moseneke* and *Bhe*, introducing into Parliament the *Repeal of Black Administration Act and Amendment of Certain Laws Bill* [\[64\]](#) in mid-2005. The essential effect of the Bill will be to repeal the *Black Administration Act* 37 of 1927 in its entirety (not just those parts which have been declared unconstitutional), so as to put institutions of indigenous government, tribal courts and the customary law of succession on a new footing. Some parts of the 1927 Act, most importantly s 1, which gives the President the power to appoint and dismiss tribal chiefs, will be repealed with immediate effect. Others, such as those governing the jurisdiction of traditional courts under ss 12 and 20, and the law of succession under s 23, will be repealed with effect from the date that new legislation governing those matters comes into force. It is expected that when legislation governing traditional courts is enacted, it will substantially draw upon the South African Law Commission's recent *Report on Traditional Courts and the Judicial Function of Traditional Leaders*. [\[65\]](#)

The picture of contemporary customary law in South Africa would be incomplete if mention was not made of the *Traditional Leadership and Governance Framework Act 41 of 2003*, which reformed indigenous government institutions. The years preceding the enactment of this legislation had seen fierce debate between those who saw the concept of tribal government as an anachronism that was incompatible with a democratic polity, and those who saw the overthrow of apartheid as an opportunity to re-invigorate indigenous institutions.^[66] Clearly ss 211 and 212 of the [Constitution](#) required that traditional forms of government be retained, and so there was no question of their abolition. However, it was also clear that indigenous government could not remain unchanged in light of the enactment of a [Constitution](#) containing a Bill of Rights. The 2003 Act therefore sought to reconcile traditional government structures with the mandates of the new [Constitution](#). It did this by providing for formal recognition of traditional communities existing under customary law,^[67] requiring that each community have a traditional council, at least a third of whose members must be women, and consisting both of members appointed by the community's traditional leader and those elected by the community, who had to comprise at least 40% of the council.^[68] Among the functions of a council are those of 'administering the affairs of the traditional community in accordance with customs and tradition'^[69] and of 'assisting, supporting and guiding traditional leaders in the performance of their functions'.^[70] This leaves the precise power relationship between the traditional leader and the traditional council unstated – perhaps deliberately, in view of the multiplicity of indigenous governmental structures in South Africa – but it reflects what is in any event usual practice among indigenous communities in South Africa, which is consultative rule by a traditional leader who takes advice from within tribal structures.^[71]

The 2003 Act also formalises governmental recognition of kings, queens and other traditional leaders (while making it clear that lines of succession are determined in accordance with customary law),^[72] and creates a statutory process for removal on stated grounds.^[73] The Act confirms the long-standing role of traditional leaders, which is to govern their communities in accordance with customary law and applicable legislation,^[74] and creates codes of conduct for traditional leaders and traditional councils.^[75] The effect of the legislation is to skilfully place customary monarchical governmental structures within the new constitutional order by formally creating traditional councils (thereby adding a democratic element) and requiring that a minimum proportion of their membership be female (thereby starting to address the gender imbalance that exists in customary governmental structures).

III Lessons for Australia

What lessons does the South African experience have for Australia? Should indigenous law be formally recognised as part of the legal system in Australia, and what difficulties would be associated with such a step?

Perhaps the strongest argument in favour of recognising indigenous law is that based on Australia's international human rights obligations. The past half-century has seen an increasing level of demand for self-determination by indigenous peoples. Such demands are frequently founded upon the provisions of international human rights documents: Article 1 of the ICCPR and of the ICESCR both recognise the right of peoples to self-determination,^[76] while Article 27 of the ICCPR, which protects the cultural rights of minorities, has also been seen by indigenous peoples as supporting their claims of self-determination. The United Nations' draft *Declaration on the Rights of Indigenous Peoples*^[77] is also of relevance to the recognition of indigenous law: Paragraph 1 affirms the right to self-determination, while paragraphs 28 and 33 expressly recognise the right of indigenous peoples to retain and develop their customary laws and legal systems.

These arguments were referred to in the Australian Law Reform Commission's 1986 report, *The Recognition of Aboriginal Customary Laws*.^[78] The Commission's major recommendations were that recognition should be extended to Aboriginal law.^[79] Among the reasons advanced for this conclusion was that of Australia's

international human rights obligations.^[80] The Commission further held that such recognition would have to take the form of legislative or judicial action by the received legal system rather than as the product of a residual indigenous sovereignty.^[81] Judicial recognition seems unlikely, given the High Court's affirmation of the loss of indigenous sovereignty and the supercession of indigenous law in *Coe v Commonwealth*,^[82] *Mabo v Queensland (No 2)*,^[83] *Coe v Commonwealth (No 2)*,^[84] *Walker v New South Wales*^[85] and *Thorpe v Commonwealth (No 3)*.^[86] This leaves legislative enactment as the only practical avenue for the recognition of indigenous law, and such means were therefore the primary focus of the ALRC report. Of the methods of incorporation it canvassed, the Commission favoured incorporation by reference;^[87] functional recognition of indigenous institutions as the equivalent of institutions in the received law;^[88] and accommodation of indigenous law in the administration of the received law.^[89] The Commission recommended against wholesale codification of indigenous law because of the danger that codification would be unable to accommodate variations between Aboriginal communities and because codification would take development of the law out of the hands of its owners. The Commission also recommended against the exclusion of the received (that is, common and statute) law from Aboriginal areas, on the ground that this would deprive Aboriginal people of rights under the received law.^[90]

Although twenty years have elapsed since the Commission's report, little has been done to implement it,^[91] as was recognised in the 1994 Commonwealth government report on the extent to which steps had been taken to implement the Commission's recommendations.^[92] Lack of progress in implementing the Commission's recommendations was a consistent theme adopted by speakers at the 1995 Indigenous Customary Law Forum.^[93] More promising developments have however occurred at State and Territory level: Both the Northern Territory Law Reform Committee^[94] and the Law Reform Commission of Western Australia^[95] have recommended that Aboriginal customary law be recognised as a source of law.

Practical Considerations

While there may be positive signs that State governments are willing to consider recognition of indigenous law, practical difficulties would attend such a project. In contrast to South Africa, where a significant proportion of the population continues to live in a traditional context in rural areas, the demographic distribution of Australians identifying themselves as indigenous is very different, with almost half residing in urban areas, large or small, rather than in Aboriginal Reserves.^[96] This makes more contentious the question of determining to whom, and in what circumstances, indigenous law would apply – in other words, what choice of law rules accompany recognition of indigenous law. These issues are complex, as is indicated by the volume of material contained in the Commonwealth, State and Territory reports referred to above, and full treatment of them is clearly beyond the scope of this article. The remainder of this article thus only gives highlights of just some of the key issues that would need to be addressed.

Who is 'Indigenous' for Customary Law Purposes?

A preliminary issue that would need to be addressed is how the law would determine who is an indigenous person – a relevant question if, as is likely, choice of law rules referred to indigenous identity as a criterion of their operation. A number of fundamental principles are relevant in this regard. First, the compulsory allocation of persons to groups through legislation is inconsistent with the individual's freedom of association. Furthermore, if the allocation is coupled with discrimination in the sense that, the enjoyment of legal rights is made contingent upon allocation to a particular group, then it is also prima facie inconsistent with the right to equality. Second, it follows that if compulsory allocation to racial groups by law is impermissible, freedom of association implies that the individual should be entitled to state whether they choose to associate with a particular group for legal purposes. However, the third consideration is that because association contains an element of mutuality (in other words, both the individual, and the group with which that individual wishes to associate, have an interest in the

relationship), the individual's claim of membership is not enough – the group itself must accept the individual's claim before the individual can be said to be a member of the group. However, one should also note that the prohibition of forced association applies to groups as much as to the state – where a group derives benefits by increasing its membership, it might be tempted forcibly to 'claim' individuals as members. This too is clearly inconsistent with freedom of association.

In Australia, legislation provides little assistance in defining membership of an indigenous community. The definition provided in Commonwealth legislation is circular – for example, [s 3](#) of the *Aboriginal Councils and Associations Act 1976* (Cth) and [s 4](#) of the *Aboriginal and Torres Strait Islander Act 2005* (Cth) simply define 'Aboriginal' as a person who is 'of the Aboriginal race of Australia'. Case law is, however, of more use: In *Mabo v Queensland (No 2)* [\[97\]](#) Brennan J held that:

Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

Similarly, in *Shaw v Wolf*, [\[98\]](#) the Federal Court heard a challenge to the validity of the election of certain regional members of the Aboriginal and Torres Strait Islander Commission (ATSIC) elected in Tasmania. One of the issues raised in the case was whether certain successful candidates were Aborigines. Justice Merkel held that a person was an Aborigine if they (i) were objectively of Aboriginal descent, (ii) bona fide identified themselves as an Aborigine, and (iii) were regarded as an Aborigine by the relevant Aboriginal community. Note that the objective element of descent was not in itself sufficient to lead to the legal consequence that a person was an Aborigine – there could be no compulsory designation based on biological factors, and both self-identification and group acceptance were also necessary. [\[99\]](#)

A more liberal test has been proposed in the recent report by the Law Reform Commission of Western Australia. Noting the difficulty posed to infants by the requirement of self-identification, the Commission recommended that legislation should provide that the question of who is Aboriginal should be determined on a case-by-case basis, taking into account genealogical evidence, evidence of genetic descent, evidence of self-identification and evidence of acceptance by an indigenous community. [\[100\]](#) The important point here is that none of the factors would be decisive in themselves, and evidence would not have to be adduced in relation to all of them to found a claim of aboriginality.

In what Circumstances would Customary Law Apply?

Assuming that the issue of indigenous identity is addressed, the main question would be what choice of law rules would govern the applicability of indigenous law. Such rules would have to be crafted in the context of the reality that, whereas for some indigenous people customary law is a vital component of every day life within their communities, for others who have left such communities, or who may indeed be the descendants of those who left communities decades ago, such law has no impact at all. [\[101\]](#) Even more difficult is the case of those whose lives are spent partly in indigenous communities and partly in urban Australia (in particular in rural towns), and who reject traditional authority without feeling accepted in mainstream society. What law would apply to them? As Brennan notes, the compulsory application of indigenous law to people who had disassociated themselves from traditional society would be substantively unfair. [\[102\]](#) But this raises the issue of whether people should be able to 'opt-out' of the indigenous legal system, and how the legal system would prevent the self-identification component of aboriginality being cynically used by individuals seeking to bring themselves within the jurisdiction of whichever legal system best suited them at any given time.

One useful analysis of how customary law might be accommodated within the broader legal system is that provided by Coombs, who canvassed the views of the Yirrkala community of East Arnhem Land on the question. [\[103\]](#) The

proposal put by that community was that the administration of law within Yirrkala lands would be under the control of a law council composed of clan elders. The council would name members of the community to form a community court to resolve alleged infractions of the law. On the key issue of the jurisdiction of the law council, the Yirrkala proposed that geography would be the essential criterion of jurisdiction, and that anyone resident in or visiting Yirrkala territory would be subject to its laws, and that submission to jurisdiction would be a requirement to obtain a permit to enter the territory. However, the Yirrkala proposal also accepted that in some instances (not precisely defined, but certainly including homicide), State or Commonwealth law would govern, albeit preceded by a preliminary hearing by an indigenous court, which would then advise the magistrate or judge hearing the case under received law.

Although geography cannot be the sole determinant of jurisdiction, the Yirrkala proposals point to the type of solution that the legal system should be working towards. Clearly what is needed is a set of rules which can be applied to determine whether indigenous law is applicable when that point is put in issue. In other words, there would have to be some mechanism by means of which parties who dispute the jurisdiction of an indigenous authority could apply to the court system for a determination of which legal system was applicable. In many, perhaps most, cases arising on indigenous lands, the parties would be quite satisfied to have their dispute regulated by customary law, but in some instances, for example where a person of Aboriginal ethnicity no longer chooses to identify themselves as Aboriginal, the opportunity must be given for such a person to adduce evidence as to why Aboriginal law should not be applicable. Clearly much will depend upon what presumptions as to the applicability of indigenous law are in force, and upon whom the onus should rest in arguing that one or other legal system should apply. It is also likely that in relation to some areas of law specific choice of law rules would be embodied in legislation. However, there would in all likelihood still be a need for a default set of choice of law rules, which would govern cases not covered by specific legislation. As examples of these, one can mention areas of customary law identified in the recent report of the Law Reform Commission of Western Australia, including indigenous rules relating to duty of care,^[104] contract,^[105] succession^[106] and marriage.^[107]

Here the South African experience, and its incremental identification through case law of key factors to be considered in determining choice of law questions – namely the identity of the parties, the place where an event or transaction occurs, and the nature of the event or transaction – provide a useful model for a generally applicable set of default choice of law rules. The following is a suggested set of rules which could be used to govern the applicability of indigenous law (it must be emphasised that this is just one model among many that might be used – a full examination of this issue lies outside the scope of this article):

- In light of the argument in favour of recognition of indigenous law, there would be a rebuttable presumption that indigenous persons intend indigenous law to apply in cases arising between indigenous parties on indigenous lands (such as Aboriginal reserves).
- The above presumption would be rebutted in cases where a party is able to discharge the onus of showing that there was no common intention between all parties that indigenous law should apply. This may be proved by reference to an express agreement that indigenous law should not apply, or may be implied from the lifestyle of a party, or the form or subject matter of the transaction.
- Where the parties agree that indigenous law is to apply, but disagree as to which community's law applies, neither community's law would enjoy a presumption of applicability, and the court would decide the issue after hearing arguments from both parties.
- Indigenous law would be presumed not to have been intended to apply in cases involving indigenous people outside indigenous lands, or between non-indigenous people and indigenous people wherever they arise. This presumption would be rebutted where a party discharged the burden of showing that there was common intention that indigenous law would apply, such intention again being inferred from an express agreement or being implied

from the lifestyle of the parties or the form or subject matter of the transaction.

- Indigenous law would not apply in cases involving serious criminal offences or offences in relation to which there is clearly no indigenous law (for example, revenue offences). Which offences those would be would need to be negotiated with indigenous communities prior to the enactment of statutory rules governing the applicability of indigenous law. The Yirrkala study shows that there is a recognition among Aboriginal communities that certain issues lie beyond what they themselves see as the proper ambit of contemporary customary law. There should however be a formal process whereby members drawn from local communities sit as assessors when such offences are tried in Magistrates Courts or State Supreme Courts.

The practical effect of applying such rules would be that, with the exception of the excluded criminal offences, indigenous law would be the default system in cases between indigenous people arising within areas designated as Aboriginal or Torres Strait Island lands. An indigenous person (defined according to the test discussed earlier) seeking not to have indigenous law apply to them would have the option of seeking an order from a court that the general law rather than received law was applicable to the case, but would have the burden of proving the facts indicating the inappropriateness of the applicability of indigenous law to them. By contrast, a non-indigenous person would not be subject to indigenous law in respect of any event (whether giving rise to civil or criminal liability), even if occurring on Aboriginal lands unless, if the matter was put in issue by any party, a court held that indigenous law was applicable (for example, because the person had expressly or impliedly agreed that they should be subject to indigenous law, either generally or in respect of the specific event or transaction). Indigenous people outside indigenous lands could regulate their legal relations according to indigenous law, but agreement to have that law apply would need to be proved by the party asserting it.

Indigenous Law and Human Rights

Apart from jurisdictional and choice of law issues, an issue that would attract significant controversy would be the interaction between indigenous law and human rights. Perhaps the most contentious debate in this area is that relating to corporal punishment inflicted in accordance with indigenous law. As a preliminary point, it may be noted that concerns about the incompatibility of indigenous law with human rights has not been matched by equal concern by governments that common and statute law should be invalid if incompatible with human rights. Be that as it may, the issue is an important one which must be faced by those arguing for the recognition of indigenous law.

The potential for conflict between indigenous rights and other internationally protected rights was noted by the Australian Law Reform Commission's 1986 report^[108] and the 2006 Discussion Paper of the Law Reform Commission of Western Australia.^[109] Although finding that recognition of indigenous law involved some measure of acceptance of cultural difference, the Australian Law Reform Commission also asserted that certain of the rights protected by the ICCPR (the examples given by the Commission being the right to life, the right not to be tortured and the right to an interpreter), were of universal application. It should also be noted that Article 1 of the *Draft Declaration on the Rights of Indigenous Peoples* states that indigenous peoples have the right to the enjoyment of all rights and freedoms protected by the Charter, the Universal Declaration and international human rights law, while Article 33 states that customary law must be developed 'in accordance with internationally recognised human rights standards.'

As stated above, the issue of the relationship between fundamental rights and indigenous law has attracted particular controversy in respect of traditional punishments, such as spearing. There might also be rules of indigenous law which are incompatible with the protection afforded to equality on the basis of gender by human rights law. However, for the purposes of this paper, attention is focused on the former issue. Legal scholars in Australia have adopted a variety of positions on this question: In his comment on the issue, Zdenkowski^[110] acknowledged, but did not resolve, the issue of the conflict between such an approach and human rights doctrines.

Although noting that limits might be placed on what customary punishments would be recognised, he also noted that such restrictions would in turn raise the issue of paternalism. The issue was addressed squarely by McLaughlin[111] and Blay, [112] who reached opposing conclusions. McLaughlin adopted an unambiguously universalist approach, stating that '... it is unconscionable to place indigenous rights under the banner of human rights, but then to exclude the operation of those human rights within customary law.' [113]

By contrast, Blay argued that whereas the principle contained in Article 7 of the ICCPR that no-one be subject to 'torture, cruel, inhuman or degrading treatment or punishment' may be universal, what amounts to such punishments may be culturally-specific, and that, for example, imprisonment may be seen as more cruel by an Aborigine than would spearing in the thigh. [114] Certainly the theory of punishment underlying Yirrkala law, for example, is that more damage is done both to the offender and to the community by imprisonment than by corporal punishment. [115] Blay further argued that the exclusion of 'pain or suffering arising only from, inherent in or incidental to lawful sanctions' from the definition of torture in Article 1 of the *Convention Against Torture* can, because of the ambiguity inherent in the term 'lawful sanctions', be interpreted as excluding from the definition of torture punishment which is lawful under indigenous law, [116] and that therefore such punishments should be granted recognition even in the light of the international documents. [117] It is suggested that this line of reasoning be rejected. Reading the exclusion provision in the definition of torture such a way as to exclude from 'torture' whatever is lawful within a jurisdiction, undermines the entire purpose of the document, [and amounts to a virtual invitation to parties to enact legislation legalising torture. Clearly sense can be made of the exclusion only if it is interpreted as covering only such pain or suffering arising from lawful sanctions *other than torture*. In other words, it is recognised that even lawful sanctions falling short of torture might contain an element of pain or suffering, [118] but that once such pain or suffering reaches a certain threshold, the punishment *becomes torture in itself*, and is thus prohibited by the Convention, even if that punishment is valid in the legal system of the jurisdiction. Seen in this light, the Convention cannot possibly be seen as permitting punishments which amount to torture (or, it follows, to cruel, inhuman or degrading treatment or punishment).

How then do we resolve the conflict between the universalist's rejection of indigenous punishments which offend international human rights instruments, and the cultural relativist's acceptance of them as a manifestation of the right to self-determination? In the first place, while disagreeing with Blay's conclusions on the issue of 'lawful sanctions', his point that what constitutes 'cruel and inhuman punishment' is to some extent indeterminate is well made, and it may be that, taking into account both the physical and psychological effects of punishments imposed under indigenous and the received law, the former may, in fact, not be cruel and inhuman, notwithstanding its corporal nature. This is a question best answered by criminologists and anthropologists. However, what does one make of punishments which *are* found to impose physical or psychological pain to an extraordinary degree? In other words, where it is the severity of the punishment rather than its type that is problematic? Once severity becomes an issue, the question which must be addressed is what are the limits of consent by a member of a culture to punishment imposed by that culture? This is an issue upon which there is not yet certainty even at common law. [119]

The answer must surely depend on some test relating to the seriousness of the injury inflicted, taking into account the risk it poses to life, the permanence of its effects and whether it requires medical attention. [120] Assuming then that, assessed on some objective – probably medical – standard, a particular punishment *is* found to be excessive, one will then (and only then) finally have to make the choice between conflicting rights posited at the beginning of this paragraph. The answer one arrives at ultimately depends upon one's stance in relation to the question of universalism versus cultural relativism. In the author's opinion cultural relativism negates the entire concept of human rights, and leads ultimately to the justification of any human rights breach, no matter how egregious, on the basis of differing cultural values. For that reason, the clash would have to be resolved in favour of human rights obligations, which was indeed the conclusion reached by the South African Constitutional Court in the cases on gender discrimination previously discussed. This too was the conclusion of the Law Reform Commission of

Western Australia, who concluded that traditional punishments that were inconsistent with international human rights norms should not be legalised.^[121] The Commission also recommended that the *Criminal Code* (WA) be amended so as to more clearly distinguish between the degrees of harm caused by assault and thus which punishments could be lawfully consented to.^[122]

It may however be found that the conflict on this issue is more apparent than real. Indigenous law is not static, as is shown by the fact that while the death penalty was reportedly imposed as a punishment by some indigenous communities in the 19th century and even into this century, nowadays such is not the case.^[123] Certainly under Yirrkala law, for example, the death penalty has been abrogated by disuse, and that group also averred that they would be willing to abandon other forms of corporal punishment which are, in any event, usually nowadays be replaced by compensation.^[124] In light of this, it may be that clashes between indigenous law and notions of human rights prevalent in received law may arise less frequently than opponents of the recognition of indigenous law might think.

IV Conclusion

The South African experience is instructive for Australia for a number of reasons. First, it illustrates how, since colonial times, indigenous law has operated in tandem with received common and statute law, through the mechanism of statutory recognition of indigenous systems of government and a flexible statutory choice of law rule which has allowed the courts to develop criteria for determining when customary law should apply. There is no reason why Australian legislatures should not afford similar recognition to indigenous law and vest the courts with jurisdiction to apply it, as indeed was recommended by the Australian Law Reform Commission and the Law Reform Commission of Western Australia. Second, recent statutory reforms in South Africa provide a model for how a society grappling with the stresses placed upon indigenous people by the forces of tradition and modernity, and the tensions between rural and urban life, can maintain indigenous forms of government within a modern democratic state. Finally, the constitutional provisions and court decisions on their interaction with customary law, demonstrate how it is possible for a legal system to reconcile respect for custom and respect for fundamental human rights, thereby enhancing the relevance of indigenous customary law, and thus its viability.

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^[1] [1993] HCA 42; (1993) 118 ALR 193.

^[2] [1994] HCA 64; (1994) 182 CLR 45.

^[3] [1997] HCA 21; (1997) 71 ALJR 767.

^[4] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

^[5] Law Reform Commission of Western Australia *Aboriginal Customary Laws: Discussion Paper Overview*, Project No 94 (2006). The Discussion Paper is available at <http://www.nt.gov.au/justice/docs/lawmake/ntlrc_final_report.pdf> at 30 March 2006.

^[6] Roman Dutch law is the common law of South Africa, however it has been heavily influenced by English common law. The extent of this influence varies between areas of the law, but public law has been particularly susceptible to English influence, given that the institutions of responsible government have operated in South Africa since the mid-19th century.

[7] T W Bennett, *A Sourcebook of African Customary Law for Southern Africa* (1991), 55–6.

[8] Section 2(7)bis.

[9] *Mathibe v Union Government* [1925 AD 81](#); *Minister of Native Affairs v Buthelezi* 1961 (1) SA 766 (D).

[10] Bennett, *Sourcebook of African Customary Law* above n 7, 63.

[11] Section 20(2). Default in payment of a fine is punishable by imprisonment imposed by a magistrate's court under s 20(5).

[12] J F Holleman, *Issues in African Law* (1974) 16–18.

[13] Bennett, above n 7, 70–7.

[14] Section 11(1) of the *Black Administration Act* 37 of 1927 and s 54A(1) of the *Magistrates' Courts Act* 32 of 1944.

[15] Bennett, *A Sourcebook of African Customary Law* above n 7, 24–37.

[16] *Ibid* and the sources cited therein.

[17] Raymond Suttner, 'Legal pluralism in South Africa: A Reappraisal of Policy' (1970) 19 *International and Comparative Law Quarterly* 134, 145. For a study of unofficial urban African courts see John Hund and Malebo Kotu-Rammopu, 'Justice in a South African Township: The Sociology of Makgotla' (1983) 16 *Comparative and International Law Journal of Southern Africa* 179.

[18] See, for example J Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1 and Bradford Morse and Gordon Woodman (eds), *Indigenous Law and the State* (1987). On the debate in South Africa see Chuma Himonga and Craig Bosch 'The Application of African Customary Law under the [Constitution](#) of South Africa: Problem Solved or Just Beginning?' (2000) 117 *South African Law Journal* 306.

[19] A N Allott, 'What is to be Done with African Customary Law?' (1984) 28 *Journal of African Law* 56, 68.

[20] A N Allott (ed), *Conference on the Future of Customary Law in Africa* (1960) 14–15.

[21] Bennett, *A Sourcebook of African Customary Law*, above n 7, 137. For a general discussion of legal pluralism see M B Hooker *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975).

[22] T W Bennett, *The Application of Customary law in Southern Africa: The Conflict of Personal Laws* (1985) 19.

[23] *Ibid* 29–30.

[24] As in *Sibasa v Ratsialingwa & Hartman* [NO 1947 \(4\) SA 369](#) (T).

[25] Bennett, *The Application of Customary Law* above n 22, 30.

[26] 1948 (1) SA 388 (A).

[27] *Ibid* 397.

[28] *Ibid*.

[29] Ibid 400–401.

[30] N J J Olivier, *Indigenous Law* (1995) 206; J D van der Vyver, 'Human Rights Aspects of the Dual System Applying to Blacks in South Africa' (1982) 15 *Comparative and International Law Journal of Southern Africa* 306, 312–14.

[31] 1948 (1) SA 388 (A) 398.

[32] Ibid.

[33] Ibid 399.

[34] Bennett, *A Sourcebook of African Customary Law*, above n 7, 105.

[35] This is discussed in A J G M Sanders, 'The Role of Comparative Law in the Internal Conflict of Laws' in A G J M Sanders (ed), *The Internal Conflict of Laws in South Africa* (1990), 58.

[36] Bennett, *A Sourcebook of African Customary Law*, above n 7, 106–108.

[37] Ibid 108-109. See the decision in *Mbonjiwa v Scellam* [1957 NAC \(S\) 41](#). Note, however, that the court is still exercising its discretion – it has been made clear that the parties do not by their agreement oust the discretion of the court (*Moima NO v Matladi* [1937 NAC \(N & T\) 40](#); *Lebona v Ramokone* 19467 NAC (C & O); *Ciya v Malanda* 1949 NAC 154 (S)).

[38] See, for example, *Mkize v Makatini* [1950 NAC \(NE\) 207](#); *Mvemve v Mvemve* [1950 NAC \(NE\) 284](#) and *Ngidi v Ciya* 1965 BAC (NE) 50.

[39] See, for example, *Moima NO v Matladi* [1937 NAC \(N & T\) 40](#).

[40] *Ciya v Malanda* 1949 NAC 154 (S).

[41] *Ex Parte Minister of Native Affairs: In Re Yako v Beyi* 1948 (1) SA 388 (A), 399-400. In *Yako v Beyi* the plaintiff had claimed damages for seduction under South African common law, which conferred on her the advantage firstly that under it she had *locus standi* to bring the claim unassisted by her male guardian (who would have had to bring the case on her behalf under customary law) and secondly that under the common law she could be awarded greater damages than under customary law. In this instance the court found that the common law claim should be allowed.

[42] 1953 (1) SA 195 (A).

[43] Ibid 201.

[44] Bennett, *A Sourcebook of African Customary Law*, above n 7, 71.

[45] Ibid 108.

[46] Ibid.

[47] Ibid 74–5, 109–110.

[48] As examples of cases where this criterion was applied see *Sibanda v Sitole* 1951 NAC 347 (NE); *Mbuli v Mehlomakulu* 1961 NAC 68 (S) and *Mvubu v Chiliza* [1972 BAC 66](#) (NE).

[49] Sanders, above n 35, 59–60.

[50] Bennett, *A Sourcebook of African Customary Law*, above n 7, 75 and 110.

[51] *Ibid* 74 and 110.

[52] *Lobolo* is a payment made by the prospective bridegroom to the bride's family. As examples of cases where payment of *lobolo* indicated an intention on the part of the litigants to be governed by customary law see *Peme v Gwele* [1941 NAC \(C & O\) 3](#) and *Fuzile v Ntloko* [1944 NAC \(C & O\) 2](#).

[53] See for example *Maholo v Mate* [1945 NAC \(C & O\) 63](#); *Dhlamini v Nhlapo* [1942 NAC \(N & T\) 62](#) and *Nhlanhla v Mokweno* 1952 NAC 286 (NE).

[54] Bennett, *A Sourcebook of African Customary Law*, above n 7, 74.

[55] *Ibid* 110.

[56] *Ibid*. See also *Mokoba v Langa* [1952 NAC \(S\) 76](#).

[57] South Africa has had two post-apartheid Constitutions: the interim [Constitution](#) (the *Republic of South Africa Constitution Act* 200 of 1993), and the final [Constitution](#) (the *Constitution of the Republic of South Africa Constitution Act* 108 of 1996).

[58] *Republic of South Africa Constitution Act* 200 of 1993.

[59] [1996 \(4\) SA 744](#) (CC); 1996 (10) BCLR 1253 (CC).

[60] T W Bennett, *Human Rights and African Customary Law under the South African Constitution* (1995), 78-79.

[61] 2001 (1) SA 574 (Tk).

[62] [\[2000\] ZACC 27](#); [2001 \(2\) SA 18](#) (CC).

[63] 2005 (1) SA 580 (CC).

[64] Bill 25 of 2005. The text of the Bill, with an accompanying explanatory memorandum, is available at <<http://www.info.gov.za/gazette/bills/2005/b25-05.pdf>> at 30 March 2006.

[65] South African Law Commission, *Customary Law: Report on Traditional Courts and the Judicial Functions of Traditional Leaders*, Project No 90 (2003).

[66] For a discussion of this debate and a summary of the main provisions of the Act see Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (2005).

[67] Section 2.

[68] Section 3.

[69] Section 4(1)(a).

[70] Section 4(1)(b).

[71] W D Hammond-Tooke, *Command or Consensus: The Development of Transkeian Local Government* (1975) 65.

[72] Sections 9 and 11.

[73] Sections 10 and 12. The grounds are conviction of an offence with a sentence of more than 12 months imprisonment, proven incapacity, wrongful appointment and transgression of a rule of customary law warranting removal.

[74] Section 19.

[75] Section 27 as read with the Schedule to the Act.

[76] Article 27 of the 1966 *International Covenant on Civil and Political Rights* (GA Res 2200 A (XXI), 16 December 1966) (hereafter the ICCPR), confers upon minorities 'the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, [and] to use their own language.' This is now amplified by the 1992 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (G.A. Res 47/135 of 18 December 1992), which confers upon people the right to enjoy their culture (Art 2), obliges States to protect cultures (Art 1), and requires States to create favourable conditions for the development of such cultures (Art 4(2)). Articles 1(1) of both the 1966 ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (GA Res 2200 A (XXI), 16 December 1966) (hereafter the ICESCR) protect the right to self-determination. Aboriginal rights received recognition under the *International Labour Organisation's Convention on the Protection and Integration of Indigenous and other Tribal and Semi-tribal Populations in Dependent Countries* (Convention 107 of 1957), Art 7(1) of which required signatories to encourage the institutions and customary laws of indigenous populations. The 1957 *Convention* was revised by the *Convention on Indigenous and Tribal Peoples* (ILO Convention 169 of 1989), Art 8(1) of which requires that 'due regard shall be had to [...] customs or customary laws.'

[77] The latest version of the text can be found at

<[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument)> at 30 March 2006.

[78] Australian Law Reform Commission, above n 4.

[79] *Ibid* vol 1, 142.

[80] *Ibid* vol 1, 126–41.

[81] *Ibid* vol 1, 142–3.

[82] [1979] HCA 68; (1979) 53 ALJR 403, 408 and 409.

[83] [1992] HCA 23; (1992) 175 CLR 1, 69.

[84] [1993] HCA 42; (1993) 118 ALR 193, 199–200.

[85] [1994] HCA 64; (1994) 182 CLR 45, 47–50.

[86] [1997] HCA 21; (1997) 71 ALJR 767.

[87] The enactment of a statute which incorporates indigenous law either generally or in relation to a specific issue without stating what that law is, thus leaving it to the courts progressively to discover an apply that law.

[88] For example by recognising traditional Aboriginal marriages as amounting to marriage for the purposes of the received law (one instance of this is s 7(1A) of the *Family Provision Act 1979* (NT), which accords traditional

marriages the same status as marriages under the [Marriage Act 1961](#) (Cth) for purposes of claims for maintenance made against a deceased estate).

[89] For example by interpreting statutes in such a way as to take account of Aboriginal values (as was done in *R v Bara Bara* [1992] NTSC 110; (1992) 2 NTLR 98), or by the courts using their discretionary powers in relation to court procedures and the rules of evidence to take account of Aboriginal sensibilities.

[90] Australian Law Reform Commission, above n 4, vol 1, 150.

[91] For an overview of the potential offered by *Mabo (No 2)* for the recognition of indigenous law see H A Amankwah 'Post-Mabo: The Prospect of the Recognition of a Regime of Customary (Indigenous) Law in Australia' (1994) 18 *University of Queensland Law Review* 15.

[92] Office of Indigenous Affairs, Department of the Prime Minister and Cabinet, *Aboriginal Customary Law – Report on Commonwealth Implementation of the Recommendations of the Australian Law Reform Commission* (1994).

[93] Commonwealth of Australia, *Indigenous Customary Law Forum: Canberra, 18 October 1995* (1996).

[94] Northern Territory Law Reform Committee. Committee of Inquiry into Aboriginal Customary Law *Report of the Committee of Inquiry into Aboriginal Customary Law* (2003). The report is available at <http://www.nt.gov.au/justice/docs/lawmake/ntlrc_final_report.pdf> at 30 March 2006.

[95] Law Reform Commission of Western Australia, above n 5.

[96] According to the 2001 Census, 48% of Australians identifying themselves as indigenous live in urban centres. The relevant Census data is obtainable at <<http://www.abs.gov.au/Ausstats/abs@.nsf/0/14E7A4A075D53A6CCA2569450007E46C?Open>> at 30 March 2006.

[97] [1992] HCA 23; (1992) 175 CLR 1, 70.

[98] (1998) 83 FCR 113.

[99] Interestingly, Merkel J had cause to re-visit the issue of group identification in *Commonwealth v Yarmirr* [1999] FCA 1668; (1999) 101 FCR 171, 496–8 which related to a native title claim to the sea and sea-bed off Croker Island. In this case he drew the distinction between identification with a race on the one hand and with a group or community on the other, noting that whereas biological descent was always a requirement of the former, one could belong to a community or group without a biological link because, for example, the group or community's rules regarding descent might have the effect that persons of a different race marrying into it would be taken as becoming members of the group or community.

[100] Law Reform Commission of Western Australia, above n 5, 7.

[101] Ibid 8.

[102] Frank Brennan, *One Land, One Nation: Mabo – Towards 2000* (1995) 140–8.

[103] Herbert Coombs, *Aboriginal Autonomy: Issues and Strategies* (1994) 118–30.

[104] Law Reform Commission of Western Australia, above n 5, 54–5.

[105] Ibid 56–7.

[106] Ibid 57–9.

[107] Ibid 65.

[108] Australian Law Reform Commission, above n 4, vol 1, 132–41.

[109] Law Reform Commission of Western Australia, above n 5, 11.

[110] George Zdenkowski, 'Customary Punishment and Pragmatism: Some Unresolved Dilemmas – The Queen v Wilson Jagamara Walker' [1994] *AboriginalLawB* 33; (1994) 3 (68) *Aboriginal Law Bulletin* 26.

[111] Rob McLaughlin, 'Some Problems and Issues in the Recognition of Indigenous Customary Law' [1996] *AboriginalLawB* 45; (1996) 3 (82) *Aboriginal Law Bulletin* 4.

[112] Sam Blay, 'The International Covenant on Civil and Political Rights and the Recognition of Customary Law Practices of Indigenous Tribes: The Case of Australian Aborigines' (1986) 19 *Comparative and International Law Journal of Southern Africa* 199.

[113] McLaughlin, above n 111, 9.

[114] Blay, above n 112, 207–8.

[115] Coombs, above n 103, 125–6.

[116] Blay, above n 112, 209–10, 214–15.

[117] Ibid, 217–19.

[118] For example, limited periods of solitary confinement used as a disciplinary measure.

[119] The leading decision is *R v Brown* [1992] UKHL 7; [1993] 2 All ER 75. For academic comment on the case, highlighting the court's failure to highlight a clear rule on what level of injury might be consented to see Bill Thompson, *Sadomasochism* (1994), Marianne Giles, 'R v Brown: Consensual Harm and the Public Interest' (1994) 57 *Modern Law Review* 101 and Brian Bix, 'Assault, Sado-Masochism and Consent' (1993) 109 *Law Quarterly Review* 540.

[120] In the course of his dissenting judgment in *Brown*, Slynn LJ suggested that seriousness of injury should be the criterion by which capacity to consent was determined (at 121j – 122d), and in reaching a conclusion on the facts of the case took into account the fact that the injuries were not of such a nature as to require medical treatment (at 122j).

[121] Law Reform Commission of Western Australia, above n 5, 11.

[122] Ibid 30.

[123] K Maddock, 'Aboriginal Customary Law' in Peter Hanks and Brian Keon-Cohen (eds) *Aborigines and the Law* (1984) 224.

[124] Coombs, above n 103, 125 and 128.