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## Custody, Maintenance, and Succession: The Internalization of Women's and Children's Rights Under Customary Law in Africa

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## STUDENT NOTE

# CUSTODY, MAINTENANCE, AND SUCCESSION: THE INTERNALIZATION OF WOMEN'S AND CHILDREN'S RIGHTS UNDER CUSTOMARY LAW IN AFRICA

*Allison D. Kent\**

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Aruna looked so small and thin that I guessed he was eight years old. His mother, Hawa,<sup>1</sup> whose T-shirt was pulled down to nurse a baby covered in boils, corrected my unspoken guess by informing us<sup>2</sup> that Aruna was thirteen. Hawa explained that after neglecting Aruna his entire life by refusing to provide any resources for his sustenance, the boy's natural father and her first husband, John, was demanding his return. Hawa did

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\* J.D. May 2007, University of Michigan. I am indebted to Simeon Koroma and Vivek Maru, the co-founders and co-directors of Timap for Justice, for their guidance and teaching about justice in rural Sierra Leone. Thanks especially to Vivek and Professor A.W. Brian Simpson of University of Michigan Law School for their helpful comments on early drafts of this work. I worked for Timap for Justice in Sierra Leone from late May to early August of 2005 as a legal intern. The University of Michigan's Student Funded Fellowships provided the funds that made this internship possible. Timap means "stand up" in Krio, a Sierra Leonean language. For more information on the organization, visit <http://www.timapforjustice.org/>.

1. All names have been changed but the individuals' stories are reproduced faithfully from fieldwork notes.

2. I accompanied Sierra Leonean paralegals in their work. They are trained and employed by Timap for Justice. They are educated and, usually, long-term members of the community where they are based.

not want to let her son go easily; she preferred that Aruna remain with her or go to Freetown, the capital, to learn carpentry from her brother. She explained that during the war,<sup>3</sup> when Aruna was just a toddler, they were destitute, hiding in the bush to escape the rebels.<sup>4</sup> She pleaded with John for some money or food for their son, but he refused. Recently, though, he had expressed an interest in the boy.

A year before, when Hawa gave in to her ex-husband's demand for Aruna, John treated him so badly that Aruna kept running home to Hawa. John sent Aruna into the fields to chase birds off the rice rather than letting him continue in school, and John did not feed or clothe Aruna properly. Aruna was silent as Hawa spoke agitatedly, and Hawa's elderly father corroborated his daughter's tale. We were told that Hawa's current husband treated Aruna well.

In accordance with our dispute resolution strategy of mediation, we then heard from John, who spoke loudly and emphatically. He stated that he was the father and the boy belonged with him. Whatever he wanted to do with Aruna was his choice. In fact, this was generally true: under customary law<sup>5</sup> in rural Sierra Leone, when parents separate, the young children are usually allowed to stay with their mother until school-age, or about seven, but they are then turned over to the father and his family. If the father asserts his parental rights, however, he is often awarded custody of the children regardless of their age by the local chief who adjudicates the dispute.<sup>6</sup>

With John in our office for the second mediation on this case, we called in reinforcements. For the Mende people in Sierra Leone, a *sababu*, or "matchmaker," often arranges marriages and under customary law has ongoing responsibilities to the couple, their respective families, and any offspring, even after a separation. The *sababu* for Hawa and John's union had agreed to be present but instead sent a representative, who listened briefly and then declared that the boy needed to be returned

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3. The civil war in Sierra Leone lasted from 1991 to 2002.

4. "Rebels" refers to the Revolutionary United Front (RUF), the armed group that overran most of Sierra Leone and terrorized the population by murdering, raping, and maiming people and burning villages.

5. The customary legal system in Africa is not customary international law. For general background on customary law in Africa see T.W. BENNETT, A SOURCEBOOK FOR AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA (1991) [hereinafter BENNETT, SOURCEBOOK]; T.W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA (2004) [hereinafter BENNETT, CUSTOMARY LAW].

6. For almost twenty-five years, there has been no book published on customary family law in Sierra Leone. As a result, much of my research and the resulting conclusions are based on conversations with local elders, including chiefs, local court officers, and Timap for Justice staff members raised under customary law. I recognize that my presence as a foreigner could have an influence on the mediations I witnessed, but that bias is difficult to measure.

to his father's custody. Aruna was no longer a young child. Such was the tradition.

Hawa, the paralegals, and I were dissatisfied with this solution; it did not result from a mediation in which both sides were fully heard. The paralegals and Hawa felt the *sababu* himself needed to become involved in a just solution in this case. After further communication, the *sababu* arrived and listened carefully to both sides. He asked Hawa what support John had provided to the child, what was Aruna's condition, and what had happened when John had previously had custody of Aruna. He also permitted John to ask his son questions. I listened anxiously to the translations, and my head swung quickly when I heard the *sababu* say the phrase "human rights."<sup>7</sup> He said, "we have human rights in this country now; we need to ask the boy what he wants."<sup>8</sup> He then asked Aruna whether he was happy at home, whether John treated him well, why he ran away repeatedly when in his father's custody, and whether Aruna wanted to stay with his maternal uncle in Freetown to learn carpentry. Aruna's answers were brief but certain: his natural father treated him badly, and he wanted to go to Freetown. The *sababu*, in consultation with the paralegals, declared that in this case, the proper solution would take into account Aruna's own wishes and what was best for him. John had not cared for Aruna during the war years and now seemed to want him only because he was old enough to work in the fields. Therefore, John should not have custody of the boy. Instead, Aruna was sent to live with his uncle, as the mother's family wished.

The hours of mediation were worth it. The *sababu*, the traditional repository of authority over the marriage and its offspring, agreed with the paralegals' assessment of the just solution in this custody case: Aruna would not have to return to his natural father's home to be mistreated and denied an education. I was thrilled and intrigued; for the first time since my arrival in the tiny rural chiefdom of Bumpe Ngao, I had spontaneously heard mention of human rights and the best interests of the child from someone other than the trained paralegals I assisted. It appeared that the *sababu* not only vocalized the international human rights norms of making decisions in a child's best interest<sup>9</sup> and taking the child's opinion into account,<sup>10</sup> but also implemented these norms in Aruna's case. John was not happy, but he and Hawa's family both

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7. The phrase "human rights" was always spoken in English.

8. Author's Field Notes, Bumpe Ngao Chiefdom, Bo District, Sierra Leone (June-Aug. 2005) (on file with author) [hereinafter Field Notes].

9. Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456.

10. *Id.* art. 12.

accepted the decision of the *sababu* and paralegals as final and Aruna went to live with his uncle in Freetown.

## I. INTRODUCTION

Internalization of international norms has been described as “the process by which nations incorporate international law concepts into their domestic practice.”<sup>11</sup> Scholars believe that norm internalization may explain why and how states come to obey international law.<sup>12</sup> Some international human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>13</sup> contemplate state responsibility for conforming domestic laws and practices, including customary practices, to ensure compliance with international human rights norms.<sup>14</sup> Though states may formally have this responsibility, it is often nonstate actors at the local level who help bring

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11. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 6 (2001).

12. *Id.*

According to Koh, this process occurs through repeated interactions between states and a variety of domestic and transnational actors, which produce interpretations of applicable global norms and ultimately the internalization of those norms into states' domestic values and processes. Rather than focusing narrowly on punitive interactions between states, Koh sees “repeated participation in transnational legal process” as the key factor in the move “from one-time grudging compliance” with international norms “to habitual internalized obedience.” Repeated interactions between states and a wide range of transnational actors accordingly become the process by which norms created by international society are clarified and become enmeshed into domestic society. “To the extent that those norms are successfully internalized, they become future determinants of why nations obey.”

*Id.* (quoting Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1997)).

13. Article 2(f) of the Convention on the Elimination of All Forms of Discrimination against Women states, with regard to discriminatory legislation and practices, that state parties undertake to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women.” Convention on Elimination of All Forms of Discrimination against Women (CEDAW) art. 2(f), Jan. 22, 1980, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980). Article 5 states that state parties shall take all appropriate measures:

[T]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

*Id.* art. 5(a). For a detailed discussion on norm internalization in rural Africa, see *infra* Part IV.

14. See, e.g., HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 426 (2000) (quoting Abdullahi Ahmed An-na'im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, in HUMAN RIGHTS OF WOMEN 167, 175–76 (Rebecca Cook ed., 1994)).

domestic practices in line with human rights norms through a societal internalization approach.

In this Note, I examine the process of international human rights norm internalization into areas traditionally governed exclusively by customary law, and the resulting evolution of customary law. Assuming, *arguendo*, that customary law is to be modified, I argue that a societal norm internalization approach is the most effective means to bring customary law into conformity with international human rights law. After a brief discussion of the fieldwork on which I rely, I describe the historical influence of colonialism on the development of customary law in Africa, with a particular focus on the repugnancy clauses of the colonial era. Next, I explore the societal norm internalization approach and how it has taken advantage of the openings provided by the contestation of cultural norms on the local level in rural Africa. I then explain the evolution of customary law in independent, post-colonial Sierra Leone. In particular, I examine norm internalization in Sierra Leone in the context of child custody and maintenance by exploring the interplay between international human rights law, customary law, and the formal legal system. These cases implicate both women's and children's rights issues<sup>15</sup> and illustrate the internalization or acceptance of human rights principles in customary law. Finally, I contrast this customary law context with that in contemporary South Africa.

## II. FIELDWORK BACKGROUND

Sierra Leone has 149 chiefdoms. In each, chiefdom authorities<sup>16</sup> are responsible for adjudicating disputes utilizing customary law, but the content of that law varies by ethnic group<sup>17</sup> and sometimes by chiefdom. My work took place in the Bumpé Ngao chiefdom in Bo District, populated by the Mende tribe, and the fieldwork examples in this Note are limited to that population, although many of the customary law observances likely apply in other chiefdoms in Sierra Leone.<sup>18</sup>

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15. Customary law has often been criticized for permitting domestic violence by husbands against their wives, forced early marriage, or the resolution of rape cases by either marriage to the perpetrator or a payment to the victim's family. See, e.g., Vivek Maru, *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*, 31 YALE J. INT'L L. 427 (2006). I do not focus on these important women's and children's rights violations here because they are discussed extensively elsewhere and because they did not form the majority of the cases I observed during my fieldwork.

16. Chiefdoms are administrative units, and their authorities include the paramount chief, section chiefs, town chiefs, the local court chairmen, and other officials.

17. See Maru, *supra* note 15, at 436.

18. Mende in the Bumpé Ngao chiefdom are both Muslim and Christian. The customary law applied to the different religious groups within the Mende did not vary significantly in

The field research is the result of my work for a small Sierra Leonean nonprofit organization, Timap [Stand Up] for Justice, which provides free legal aid through paralegals supervised by lawyers to the rural poor in criminal and civil cases. The paralegals are all trained in the formal Sierra Leone legal system and relevant international law. They have at least a rudimentary understanding of women's and children's rights under international instruments, such as the Convention on the Rights of the Child. Having grown up under the customary law system, they are also familiar with the traditional legal principles of rural Sierra Leone.<sup>19</sup>

### III. HISTORICAL BACKGROUND

#### A. Customary Law and the Legacy of Colonialism in Africa

The colonial experience in Africa had a profound effect on the current legal system in the former colonies.<sup>20</sup> As Mahmood Mamdani writes:

The African colonial experience came to be crystallized in the nature of the state forged through that encounter. Organized differently in rural areas from urban ones, that state was Janus-faced, bifurcated. It contained a duality: two forms of power under a single hegemonic authority. Urban power spoke the language of civil society and civil rights, rural power of community and culture. Civil power claimed to protect rights, customary power pledged to enforce tradition. The former was organized on the principle of differentiation to check the concentration of power, the latter around the principle of fusion to

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my personal experience; rather, tenets of Islamic personal law were incorporated into what was generally termed customary law. One difference was that an imam was sometimes invited to participate as a community leader during mediations with Muslim parties.

19. In general, the level of formal education is very low in Sierra Leone. According to the 2004 Human Development Index, there is an overall adult literacy rate of 35.1%. U.N. Dev. Programme, *Country Fact Sheet: Sierra Leone Development Index 2004*, in HUMAN DEVELOPMENT REPORT 2006, [http://hdr.undp.org/hdr2006/statistics/countries/country\\_fact\\_sheets/cty\\_fs\\_SLE.html](http://hdr.undp.org/hdr2006/statistics/countries/country_fact_sheets/cty_fs_SLE.html). This rate is lower in rural areas. The level of education about international human rights norms is more difficult to gauge. The general population in the rural areas has some familiarity with basic human rights concepts. Some of this familiarity stems from the war and rebuilding experience and the corresponding presence of many international organizations engaged in demobilization and reconstruction efforts. However, most of the rural population would probably not be familiar with the content of particular international human rights instruments.

20. See, e.g., A.N. Allott, *What is to be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950*, 28 J. AFR. L. 56 (1984).

ensure a unitary authority . . . . [E]ach signified one face of the same bifurcated state.<sup>21</sup>

Customary law—the traditional approach to promoting and enforcing justice—has been defined as “those rules of conduct which the persons living in a particular locality have come to recognize as governing them in their relationships between one another and between themselves and things.”<sup>22</sup> Customary law “derives from social practices that the community concerned accepts as obligatory.”<sup>23</sup> Customary law scholar T.W. Bennett explains that in its original form, customary law was unwritten and uncodified.<sup>24</sup> In many parts of Africa, the colonial system of indirect rule maintained but altered customary law.

Under this indirect rule, African chiefs were subordinated to the colonial power, who in return enhanced the power of the chiefs vis-à-vis the local population.<sup>25</sup> For example, in Sierra Leone, “the colonists designated ‘chiefdoms’ as the primary administrative unit in the countryside, and ‘paramount chiefs’ as their rulers.”<sup>26</sup> The paramount chief is the “executive ruler of a chiefdom.”<sup>27</sup> In the colonial era, the paramount chiefs designated Members of Parliament.<sup>28</sup> After independence in

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21. MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 18 (1996).

22. A.A. KOLAJO, *CUSTOMARY LAW IN NIGERIA THROUGH THE CASES* 1 (2000).

23. BENNETT, *CUSTOMARY LAW*, *supra* note 5, at 1.

24. *Id.* at 2. In some regions, attempts were made by colonial governments to codify and record customary law. *See, e.g., infra* note 42 and accompanying text.

25. *See, e.g.,* Beverley J. Stoeltje, Kathryn Firmin-Sellers & Okello Ogwang, *Introduction, Special Issue: Women, Language and Law in Africa*, *AFR. TODAY*, Spring 2002, at vii. They explain that:

As a consequence of this history as well as the diversity of cultures and religions in Africa, multiple legal systems operate simultaneously in African societies today. In any one location, legal systems and practices reflect the combined influences of indigenous forms of governance, the manipulation of those systems by colonial powers (often known as “indirect rule”), Islam, which includes a system of law all Muslims are expected to follow, and the various Western legal systems (French, British, Belgian, etc.) established by the colonial powers wherever they established domination, plus the policies associated with globalization. Although it is common usage to use the term *custom* or *customary* law to represent the concept of the indigenous legal system, the use of this term has often been contested because it fails to acknowledge that it was precisely these indigenous systems that colonial rulers exploited and, in some cases, created.

*Id.* at xi-xii (emphasis in original).

26. Vivek Maru, *The Challenges of African Legal Dualism: An Experiment in Sierra Leone*, *JUST. INITIATIVES*, Feb. 2005, at 18, 19, available at <http://www.justiceinitiative.org/publications/jinitatives>.

27. Maru, *supra* note 15, at 431 n.10.

28. Joe A.D. Alie, *Background to the Conflict (1961–1991): What Went Wrong and Why?*, in *BOUND TO COOPERATE: CONFLICT, PEACE AND PEOPLE IN SIERRA LEONE* 15, 28 (Anatole Ayissi & Robin-Edward Poulton eds., 2d ed. 2006).

1961, political parties continued to woo the paramount chiefs and utilized them to consolidate political power.<sup>29</sup> Today there are still twelve reserved seats in the Sierra Leone Parliament for paramount chiefs.<sup>30</sup>

Customary law in Africa is not one unified system of law but rather varies by ethnic group; it can even vary in its implementation by community.<sup>31</sup> Unrestricted by codification and precedent,<sup>32</sup> customary law is constantly evolving and is influenced by external and internal factors. This malleability can be a source of strength in the process of domestic internalization of human rights norms at the rural level.<sup>33</sup> Moreover, “[t]hese systems of customary law are available and accessible to ordinary people, who utilize them to meet their needs, while the traditional authorities in these systems have adapted their roles successfully to ever changing conditions.”<sup>34</sup> Vivek Maru notes that, in the case of Sierra Leone, the customary institutions have deep cultural roots and for many of the rural poor, they are the most accessible institutions.<sup>35</sup>

In Africa, the colonial powers established Western legal systems<sup>36</sup> which often functioned alongside the customary legal system.<sup>37</sup> Today, these formal legal systems are still inaccessible to much of rural Africa, making customary law the only law of relevance.<sup>38</sup> In Sierra Leone, the formal legal system, imported from the British common law system and imposed during the colonial era, is largely irrelevant in the lives of the vast majority of the rural population.<sup>39</sup> The distance and disconnect between the formal and customary legal systems are exacerbated by widespread poverty, disparities in formal education, geographic isolation, and poor infrastructure. The rural poor simply can not afford or access the formal legal system.<sup>40</sup>

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29. See Maru, *supra* note 15, at 435 n.19. See also *id.* at 434–437 (describing the role of paramount chiefs in the Sierra Leone and the dualist nature of the justice system).

30. Bureau of Afr. Affairs, Dep’t of State, *Background Note: Sierra Leone*, Mar. 2007, <http://www.state.gov/r/pa/ei/bgn/5475.htm>.

31. See KOLAJO, *supra* note 22, at 1.

32. See BENNETT, *CUSTOMARY LAW*, *supra* note 5, at 3.

33. See *infra* Part IV (discussing human rights norm internalization).

34. Stoeltje et al., *supra* note 25, at xii.

35. Maru, *supra* note 15, at 461.

36. See Stoeltje et al., *supra* note 25, at xii.

37. See, e.g., N.J. BROOKE, *NATIVE COURT SYSTEM IN SIERRA LEONE* (1953) (describing colonial-era customary law in Sierra Leone).

38. See, e.g., Maru, *supra* note 15, at 436–37.

39. Maru discusses the dualist nature of the Sierra Leone legal system and its impact on rural justice in *Between Law and Society*. See Maru, *supra* note 15.

40. Sierra Leone is ranked 176 out of 177 countries surveyed in the 2004 Human Development Index, which “provides a composite measure of three dimensions of human development: living a long and healthy life (measured by life expectancy), being educated (measured by adult literacy and enrolment at the primary, secondary and tertiary level) and

In South Africa, a serious attempt was made to codify customary law and transform it into a precedent-based system.<sup>41</sup> In 1927, the South African Native Administration Act gave certain courts the discretion to apply customary law in legal suits between Africans.<sup>42</sup> The courts and anthropological fieldworkers sought to write down customary law, but

the authors brought a Western legal training to bear on their material. Thus customary rules were grouped into common-law categories, such as marriage, succession, and property, and common-law concepts were freely used to describe customary institutions. At the same time, the devices of precedent, codification, and restatement were used to impose Western requirements of certainty and stability.<sup>43</sup>

As part of this process, South African courts interpreted and changed customary law through their decisions, thereby creating “official” and “non-official” versions of customary law.<sup>44</sup> A.N. Allot has termed this official customary law, which also developed in Ghana and Nigeria, “judicial customary law” and notes that it “might differ substantially from the customary law actually followed by the people whose law it was, and who in theory in a customary-law system can alone give legal recognition to customary rule.”<sup>45</sup>

For example, South African “non-official” or “true” customary law does not recognize a woman as a party in disputes over *lobolo* (“bridewealth”), marriage negotiations, or custody. In a customary marriage, the *lobolo* agreement transfers the reproductive capacity of a woman to her husband’s family, with the result that her husband acquires both custody and guardianship over their children.<sup>46</sup> In the case of an unmarried woman, the guardianship of children vests in her father or male guardian, since she is regarded as a minor under customary law.<sup>47</sup> However, in 1966, a South African court in *Sekupa v. Jonkman* modified customary law by holding that the natural mother of children in a custody dispute could be regarded as a party in the action.<sup>48</sup> This change was

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having a decent standard of living (measured by purchasing power parity, PPP, income).” U.N. Dev. Programme, *supra* note 19.

41. See T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 61–62 (1995) [hereinafter BENNETT, HUMAN RIGHTS].

42. See *id.* at 19.

43. *Id.* at 63.

44. See, e.g., Ignatius Maithufi, *The Best Interests of the Child and African Customary Law*, in INTRODUCTION TO CHILD LAW IN SOUTH AFRICA 137 (C.J. Davel ed., 2000).

45. Allot, *supra* note 20, at 60.

46. See Maithufi, *supra* note 44, at 143–44.

47. See *id.* at 145.

48. See *id.* at 143–44.

possible in part due to the frequent interpretation of customary law by the formal legal system inherited from colonial rule, rather than by those who traditionally are empowered to interpret evolving customary law. By contrast, in Sierra Leone, there have been few anthropological studies of customary law<sup>49</sup> and no codification; customary law has continued to evolve separately from the formal legal system and still has no internal formal reliance on a system of precedent.

### B. Customary Law During the Colonial Era: Repugnancy Clauses

As part of the imposition of the colonial legal order, the British attempted what might be termed an early type of norm internalization through the use of the so-called repugnancy clauses.<sup>50</sup> The repugnancy clause is a legal provision stating that customary law could not be applied if it was contrary to natural justice or public policy.<sup>51</sup> Historically, most African nations colonized by the British retained a (modified) system of customary law for indigenous people, but made this system subject to the clause. These clauses gave the colonial power the ability to retain decisionmaking in cases that would normally be governed by customary law. As a result, Western notions of morality or justice could be invoked to weaken the authority of customary law.

In South Africa, cases where the proviso was invoked included cases on consent to marriage, sexual immorality, and succession by illegitimate children.<sup>52</sup> In *Human Rights and African Customary Law*, T.W. Bennett writes:

The state has always assumed that it has complete discretion in deciding whether, and to what extent, customary law should be recognized. This is a legacy of thinking from the colonial era . . . . Application and use of customary law during this period could best be considered a revocable permission that, within certain statutorily defined limits—mainly marriage, family,

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49. One exception is H.M. JOCO SMART, *SIERRA LEONE CUSTOMARY FAMILY LAW* (1983), apparently the most recent such study.

50. For an excellent article including examples of repugnancy clauses and how they were interpreted in colonial-era courts and in various cases in British colonial West Africa, see W.C. Ekow Daniels, *The Influence of Equity in West African Law*, 11 INT'L & COMP. L.Q. 31 (1962).

51. See BENNETT, *CUSTOMARY LAW*, *supra* note 5, at 67. See also KOLAJO, *supra* note 22, at 13–14. See generally Daniels, *supra* note 50. The phrasing of the repugnancy clauses sometimes varied; the wording in the 1933 Native Courts Ordinance of Sierra Leone indicated that customary law could not be applied if it was “not repugnant to natural justice, equity and good conscience.” BROOKE, *supra* note 37, at 3.

52. See BENNETT, *CUSTOMARY LAW*, *supra* note 5, at 68 n.246.

succession and land tenure—Africans might organize their lives according to their own cultural norms.<sup>53</sup>

Given that repugnancy clauses sought to overrule customary law based on natural justice and that the underpinnings of modern human rights law also lie in natural justice, it might be tempting to view repugnancy clauses as an early interaction between a Western notion of human rights and dignity and non-Western, traditional customary law. As David Sidorsky writes, there is a “continuity between the traditional theory of natural rights and recent formulations of human rights.”<sup>54</sup>

The use of colonial legal devices such as repugnancy clauses perhaps foreshadows the constant debate in international human rights over universality versus cultural relativism, often framed as a Northern or Western notion of universality and a counterpoint advanced by the global South. Given the political and philosophical objections to natural law and natural rights,<sup>55</sup> one scholar has noted that some now assume that “to argue in terms of general principles or natural justice is to engage in a political debate and to fall victim to bias and subjectivism.”<sup>56</sup> Though repugnancy clauses were arguably grounded in early conceptions of what became known as human rights, they are invariably tainted by their use as a colonial mechanism to assert power and cultural superiority over the colonized.<sup>57</sup> For example, some human rights norms, especially those that oppose widespread traditional practices or promote gender equality,

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53. See BENNETT, HUMAN RIGHTS, *supra* note 41, at 20.

54. STEINER & ALSTON, *supra* note 14, at 327 (quoting David Sidorsky, *Contemporary Reinterpretations of the Concept of Human Rights*, in *ESSAYS ON HUMAN RIGHTS* 89 (David Sidorsky ed., 1979)).

55. See, e.g., STEINER & ALSTON, *supra* note 14, at 324–26 (2000) (internal citation omitted).

56. Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1948 (1990).

57. See generally Daniels, *supra* note 50. The cultural superiority of the British and the power they had to impose that superiority on their colonial subjects is also described by Allott, *supra* note 20, at 59.

These phrases, especially the famous repugnancy clause, appeared to give the green light to appeal courts and supervising officers to delete what they did not like from the institutions of the customary law under their care. Undoubtedly the justice and morality to be applied in this task were British justice and morality; but the British judges and administrators showed themselves more sensitive to local ideas of justice than was the case with the South African administrations; and these clauses were only used to a limited degree to strike down certain features of the customary law which were felt to be unjust [such as] marriage without the consent of a spouse.

*Id.*

are often challenged by some in sub-Saharan Africa as concepts imposed by the West.<sup>58</sup>

Repugnancy clauses have survived in various forms in the laws of African states, leading to some ambiguity over how such provisions should be reconciled with customary law. Bennett argues, in the context of the new South African Constitution, that the “colonial anachronism” of the repugnancy proviso should not be utilized “to screen customary law for compliance with the Bill of Rights,” because “public policy” and “natural justice,” the phrases used in the repugnancy proviso, “while . . . informed by human rights . . . contain superordinate values that transcend even the Constitution.”<sup>59</sup> He further notes that the clause “will always be linked to colonialism.”<sup>60</sup> Therefore, in evaluating South African customary law, compliance with the Constitution itself, rather than the repugnancy proviso in its surviving form, should be paramount. Bennett also notes with approval that many decolonized African states have eliminated the repugnancy proviso altogether.<sup>61</sup>

In Sierra Leone, the repugnancy proviso remains enshrined in the statutory definition of customary law,<sup>62</sup> but it is rarely, if ever, invoked.<sup>63</sup> Whatever the significance of its origins, its practical relevance, therefore,

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58. Perhaps on no African human rights issue have viewpoints been so contentious as they are regarding female genital mutilation. Although practiced regularly in Sierra Leone, this issue is beyond the scope of my inquiry here. For more on the debate between traditional practices and gender equity, see *VOICES OF AFRICAN WOMEN: WOMEN'S RIGHTS IN GHANA, UGANDA, AND TANZANIA* (Johanna Bond ed., 2005) (particularly the contributions by Bernice Sam, Salma Maulidi, Margaret C. Oguli Oumo, and Monica E. Magoke Mhoja); Amnesty International, *Sierra Leone Women Face Abuses in Informal Legal Sector*, May 2006, <http://web.amnesty.org/library/index/ENGAFR5/0022006>.

59. BENNETT, *CUSTOMARY LAW*, *supra* note 5, at 68.

60. *Id.*

61. *Id.* See also, Derek Asiedu-Afrofi, *Judicial Recognition and Adoption of Customary Law in Nigeria*, 37 *AM. J. COMP. L.* 571, 577 (1989) (describing Ghana's abolishment of the repugnancy clause and incorporation of customary law to the common law of Ghana).

62. Local Courts Act of 1963 § 3.

63. Other African countries which have retained some version of a repugnancy clause do invoke it on occasion. In contemporary Nigeria, for example, the repugnancy proviso is still utilized in a modified form by Nigerian courts. Kolajo writes that “[f]or a customary law to be valid and consequently binding and enforceable, it must pass three tests. First, it must not be repugnant to natural justice, equity and good conscience. Secondly, it must not be inconsistent with public policy. Thirdly, it must not be incompatible with any written law in force at the time.” He notes that although the repugnancy doctrine was a British colonial import into Nigeria, “the doctrine has to be interpreted in the context of our jurisprudence which includes the totality of our customary laws.” Kolajo clarifies that a court decision that a custom is repugnant to natural justice, equity, and good conscience signifies that the customary law will not be applied in that case, not that the customary law is *per se* illegal. Legality of customary law in Nigeria in his estimation comes from the consent of those who follow the custom, giving it the force of law, but a customary law rule can be overruled by legislation. KOLAJO, *supra* note 22, at 13–14.

is extremely limited. As a result, the repugnancy clause is not a practical means of norm internalization in Sierra Leone.

Beyond the repugnancy clause, other colonial-era legal mechanisms had the potential to promote human rights norm internalization in Sierra Leone. The governors of British colonial territories were formally instructed not to assent to bills of “discriminatory character,” including any that discriminated on racial or religious grounds.<sup>64</sup> In addition, the United Kingdom extended its obligations under the European Convention on Human Rights to its dependent colonial territories, meaning that “in theory at least, human rights were protected under the European Convention.”<sup>65</sup> However, “[i]n practice it made no difference to life” on the ground that the European Convention had been extended to the colonies.<sup>66</sup> Additionally, concerns over minority rights in the soon-to-be independent Nigeria led British negotiators to incorporate a bill of rights in the new constitution.<sup>67</sup> In this way, the British colonial office “became a leading exporter of human rights, and bills of rights featured in the independence constitutions of numerous former colonies”<sup>68</sup> including Sierra Leone.<sup>69</sup> However, these instruments were “aspirational and symbolic . . . with no practical effect,”<sup>70</sup> and thus similar to the repugnancy proviso.

#### IV. NORM INTERNALIZATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RURAL AFRICAN SOCIETIES

As noted above, some international human rights treaties contemplate state responsibility for conforming domestic laws and practices, including customary practices, to ensure consistency with international human rights norms. In order for a state to ensure compliance with international human rights norms, Abdullahi Ahmed An-na'im argues that societies must first see these norms as legitimate; otherwise, the effort

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64. S.A. de Smith, *Fundamental Rights in the New Commonwealth (I)*, 10 INT'L & COMP. L.Q. 83, 94 (1961). See also A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 846 (2001).

65. SIMPSON, *supra* note 64, at 844.

66. *Id.* at 851 (discussing the extension of the Convention to the Gold Coast of Ghana).

67. See CONSTITUTION, Ch. III (1960) (Nig.), available at [www.nigeriacongress.org/resources/constitution/nig\\_const\\_60.pdf](http://www.nigeriacongress.org/resources/constitution/nig_const_60.pdf).

68. SIMPSON, *supra* note 64, at 870. See also S.A. de Smith, *Fundamental Rights in the New Commonwealth (II)*, 10 INT'L & COMP. L.Q. 215 (1961).

69. See CONSTITUTION (1961) (Sierra Leone). See de Smith, *supra* note 64, at 83 (“In 1960 a list of agreed provisions for fundamental rights, based on the Nigerian pattern, was drawn up for inclusion in the Constitution of Sierra Leone upon the attainment of independence.” (internal citations omitted)).

70. Interview with A.W. Brian Simpson, Charles F. and Edith J. Clyne Professor of Law, Univ. of Mich. Law Sch., in Ann Arbor, Mich. (Jan. 30, 2007).

may be seen and rejected as an “exercise in cultural imperialism.”<sup>71</sup> Secondly, An-na’im states that

an effort to change religious and customary laws in accordance with international human rights law should seek to persuade people of the validity and utility of the change. Such persuasion must, of course, be grounded in a complete and realistic understanding of the rationale and authority of these laws, and of the way they operate in practice.<sup>72</sup>

An-na’im emphasizes that the goal of such persuasion should not be to repudiate customary or religious law itself, but to bring it more “in conformity with international human rights law.”<sup>73</sup>

An-na’im is not alone in advocating this approach. Sally Merry, in her study of the translation of the international human rights norm against gender violence into the local “vernacular,” warns that “[h]uman rights ideas, embedded in cultural assumptions about the nature of the person, the community and the state, do not translate easily from one setting to another. If human rights ideas are to have an impact, they need to become part of the consciousness of ordinary people around the world.”<sup>74</sup>

Though culture is often portrayed by the media or on the international level as static and monolithic, anthropologists recognize that it is dynamic, “hybrid and porous,” and “a mode of legitimating claims to power and authority.”<sup>75</sup> As Merry writes, “seeing culture as open to change emphasizes struggles over cultural values within local communities and encourages attention to local cultural practices as resources for change.”<sup>76</sup> It is essential when studying the interaction between customary law and human rights law on the local level to be cognizant of how culture itself is constantly contested. No one person can claim to speak as the voice of a monolithic culture.

Many African women’s organizations working to promote the human rights of women have recognized the dynamism of culture described by Merry and used it to their advantage. Women in Law and Development in Africa (WiLDAF) is an umbrella women’s rights non-profit with membership of organizations and individuals from dozens of African countries.

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71. An-na’im, *supra* note 14, at 168.

72. *Id.*

73. *Id.*

74. SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 8 (2006).

75. *Id.* at 9.

76. *Id.*

WiLDAF members argue that nation-states invoke “culture” and “tradition” to justify discriminatory or violent actions against women and absolve themselves of responsibility . . . . In response, WiLDAF and other organizations initially used the language of human rights to [emphasize that the contested issues were legal, not cultural]. But now they have replaced their idea of culture as a static set of traditional practices with more sophisticated understandings of culture as dynamic, contested, and infused with multiple power relations, perspectives, and interpretations. Rather than dismissing “culture” as an obstacle to women’s rights, many recognize that cultural institutions can change (as they always have), and there often exist alternative cultural institutions that support and enhance women’s rights. Through education, legal reforms, and women’s activism, among other strategies, women (and men) can work to reshape the aspects of their culture that they find oppressive.<sup>77</sup>

For members of WiLDAF and other human rights activists, customary law can be viewed as a barrier to legal reforms that benefit women, at least initially.

For WiLDAF, issues of culture and tradition are most prominent in debates over customary and religious law. Most African states still operate with multitiered legal systems . . . . WiLDAF argues that current versions of customary law (and religious law) are selective, retaining only those aspects that subordinate women [such as divorce, marriage, and inheritance laws] . . . . Of course, women in any given country do not necessarily share similar perspectives about the need to change certain cultural institutions.<sup>78</sup>

In recognizing that cultural institutions change over time and in encouraging alternative cultural institutions that enhance women’s rights, local citizens who wish to promote or discourage certain practices are utilizing a societal internalization approach—fostering change from within. Such efforts are the most effective means of altering some customary law to conform with international human rights norms. If the new social practices are accepted as legitimate and obligatory by the community concerned, they can themselves evolve into customary laws.

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77. Dorothy L. Hodgson, *Women’s Rights as Human Rights: Women in Law and Development in Africa (WiLDAF)*, *AFR. TODAY*, Summer 2002, at 11–12 (internal citations omitted).

78. *Id.* at 12–13.

## V. CUSTOMARY LAW IN INDEPENDENT SIERRA LEONE

When the interior of Sierra Leone became a British protectorate in 1896, the colonial Sierra Leonean legislature passed a law recognizing the continued administration of customary law through “courts of the native chiefs.”<sup>79</sup> After independence in 1961, the Sierra Leonean Parliament passed the 1963 Local Courts Act, renaming these native courts,<sup>80</sup> reforming them by authorizing paramount chiefs to appoint court chairmen (rather than paramount chiefs sitting themselves in judgment), and giving the local courts continued formal legal recognition as the arbiters of customary law.<sup>81</sup> The act defined customary law as:

[A]ny rule, other than a rule of general law, having the force of law in any chieftom of the Provinces whereby rights and correlative duties have been acquired or imposed which is applicable in any particular case and conforms with natural justice and equity and not incompatible, either directly or indirectly, with any enactment applying to the Provinces, and includes any amendments of customary law made in accordance with any enactment.<sup>82</sup>

This very formal legal definition of customary law in Sierra Leone subordinates it to enactments of Parliament and natural law and equity. The repugnancy proviso imposed under the colonial legal system therefore survived after independence in Sierra Leone as in South Africa, and though seldom invoked, it theoretically restricts the validity of customary law based on natural justice or equity-based notions of human rights.

The 1991 Sierra Leone Constitution defines the laws of Sierra Leone as comprised of the Constitution itself, laws made by Parliament, statutory instruments, the existing law, and the common law.<sup>83</sup> Common law here refers to both customary law, which is not defined, and the English common law. The Constitution prohibits discriminatory laws,<sup>84</sup> with an exception for laws that regulate, among other areas, “adoption, marriage, divorce, burial, devolution of property on death or other interests of personal law,”<sup>85</sup> and allows for the application of customary law to “members

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79. Maru, *supra* note 15, at 435 n.19. See also BROOKE, *supra* note 37, at 5 (citing the Protectorate Courts ordinance No. 20 of 1896).

80. Local Courts Act of 1963 § 3.

81. *Id.*

82. *Id.* § 2.

83. CONSTITUTION § 170 (1991) (Sierra Leone), available at <http://www.sierra-leone.org/Laws/constitution1991.pdf>.

84. *Id.* § 27.

85. *Id.* § 27(4)(d).

of a particular race or tribe.”<sup>86</sup> As Amnesty International has reported, “this means that discriminatory laws on such matters [traditionally governed by customary law] are *not* necessarily unlawful under the Constitution.”<sup>87</sup>

Sierra Leone’s legal regime also consists of its international legal obligations. Though Sierra Leone has ratified numerous international human rights treaties,<sup>88</sup> in many cases the treaty provisions have not been incorporated into domestic law.<sup>89</sup> In addition, international human rights organizations often criticize Sierra Leone for violating human rights enshrined in these treaty obligations through the observance of customary law.<sup>90</sup>

The local courts are the only institution permitted to adjudicate customary law in Sierra Leone under the 1963 Local Courts Act.<sup>91</sup> In fact, Section 40 of the Act protects the exclusive jurisdiction of the local courts by allowing the imposition of fines or a maximum three-month imprisonment for any person who exercises judicial power within the area of jurisdiction of a local court.<sup>92</sup> The Act granted jurisdiction to the local courts for civil cases and criminal cases “where the maximum punishment which may be imposed does not exceed a fine of two hundred Leones or imprisonment for a period of one year or both.”<sup>93</sup> In practice, the local courts also adjudicate disputes for which they have no jurisdiction, such as cases where the charge could bring a maximum punishment of more than one year of imprisonment.

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86. *Id.* § 27(4)(e).

87. Amnesty Int’l, *Briefing Paper—Sierra Leone: No One to Turn To: Women’s Lack of Access to Justice in Rural Sierra Leone*, Dec. 6, 2005, at 4, available at [http://web.amnesty.org/library/pdf/AFR510112005ENGLISH/\\$File/AFR5101105.pdf](http://web.amnesty.org/library/pdf/AFR510112005ENGLISH/$File/AFR5101105.pdf) (emphasis in original).

88. For a comprehensive list of UN human rights treaties to which Sierra Leone is a party, see Sierra Leone, Ratification History, [http://www.bayefsky.com/html/sierraleone\\_t1\\_ratifications.php](http://www.bayefsky.com/html/sierraleone_t1_ratifications.php).

89. Sierra Leone has not only lagged in incorporating treaty provisions into domestic law, but it also rarely submits reports on its treaty compliance to the respective treaty bodies. For example, Sierra Leone ratified CEDAW in November 1988, but it has not yet submitted a report to the CEDAW Committee on its compliance. See State Reports, CRC-Sierra Leone, <http://www.bayefsky.com/docs.php/area/reports/state/154/node/5/treaty/crc>.

90. See, e.g., Amnesty Int’l, *supra* note 87.

91. Local Courts Act of 1963 § 40.

92. *Id.*

93. Local Courts Act of 1963 § 13, amended by Local Courts (Amendment) Act of 1965 § 5, available at <http://www.sierra-leone.org/Laws/1965-29.pdf>. The monetary limit for jurisdiction has been outdated for decades but has not been formally changed by legislation since 1965. Today 200 Leones is the equivalent of \$.07.

Customary law officers<sup>94</sup> have the power to review the decisions of local courts. However, there are only three such officers for the entire country,<sup>95</sup> and significant practical difficulties—including expense, travel, and lack of knowledge—face a party who wishes to appeal a local court judgment, so review by customary law officers occurs rarely. The local court chairman in Bumpé proudly claimed that only one of his cases was ever appealed to the customary law officer during his tenure, and that his decision had been affirmed in that case.<sup>96</sup> Theoretically, individuals also have a right of appeal from a local court into the formal court system, but this is rarely exercised, again due to lack of knowledge and resources.<sup>97</sup> The Local Courts Act also bars lawyers from the local courts.<sup>98</sup>

In practice, village and section chiefs<sup>99</sup> have traditionally applied customary law, despite their lack of jurisdiction under the formal legal system.<sup>100</sup> If a dispute is not solved within a family or between the families involved, a party generally will bring the case to the village chief for adjudication. If a party is not satisfied with the village chief's determination, she can then appeal up the chiefdom hierarchy to a section chief or to the paramount chief himself, or, as noted *supra*, she can take the dispute to a formal local court in the chiefdom. As long as both parties come to the chief voluntarily and he acts as a mediator—not imposing any punishment or fine—the chief has not violated the Local Courts Act. However, village chiefs will often adjudicate claims for a fee, issue

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94. As Maru notes, these customary law officers are lawyers and members of the executive branch, serving in the Attorney General's office, who supervise local court chairmen and review the decisions of the officially sanctioned local courts. "The same men double as the only public prosecutors working in the formal courts in the provinces." See Maru, *supra* note 15, at 437.

95. See *id.* at 437.

96. See Field Notes, *supra* note 8.

97. See, e.g., LAWYERS' CENTRE FOR LEGAL ASSISTANCE & GLOBAL RIGHTS, A HANDBOOK FOR PARALEGALS IN SIERRA LEONE 80 (2004). It states, in relevant part:

Although the right of appeal is guaranteed by the Constitution, the ability of most citizens to do so is seriously compromised by poverty. Navigating through the lengthy appeals process is complicated, and is only possible for those with money to hire a counsel over the long term and, more frustrating for those outside Freetown, traveling and supporting themselves while they are away from home to attend hearings.

*Id.*

98. Local Courts Act of 1963 § 15. Given that there are only about 100 practicing lawyers in the entire country of Sierra Leone, the vast majority in the capital, even if this formal prohibition were changed, most parties still would not be able to take advantage of a lawyer's services.

99. Chiefdoms are divided into sections, each of which contains a number of villages; the section chief is the head of the section and is subordinate to the paramount chief of the whole chiefdom.

100. See Field Notes, *supra* note 8.

summons, conduct hearings, pronounce judgments alone or with a group of elders, or collect fines in violation of the Local Courts Act.<sup>101</sup>

## VI. NORM INTERNALIZATION IN INDEPENDENT SIERRA LEONE

African customary law is often described as based on an essentialized view of culture and tradition,<sup>102</sup> yet this view ignores the practical reality of customary law. While local court chairmen in Sierra Leone are recognized as the sanctioned authorities on the application of customary law in a chiefdom, their interpretations are not monolithic or static but rather evolve with the changing values of the community. Nor are the local court chairmen the only actors who implement customary law. Local village chiefs often adjudicate disputes between members of the community under customary law,<sup>103</sup> or a local women's leader may be called upon to settle a conflict. Within families, elders often settle disputes based on their understanding of cultural norms and traditions.<sup>104</sup> With such a wide variety of participants constructing customary law, it is clear that though the local court chairman is formally recognized by the state as the repository of customary law, he is not the sole locus of its interpretation and application. Space for variation and change exists on the local level. The very derivation of customary law "from social practices that the community concerned accepts as obligatory"<sup>105</sup> recognizes that the community's attitude and acceptance is what ultimately transforms the customs or traditions into law.

Kaniya, located in Bumpe Ngao chiefdom, is an example of the changing nature of local institutions which has opened up space for a more fluid vision of culture that promotes women's rights, potentially facilitating the internalization of human rights norms. In Kaniya, the local court chairman regularly consulted with one of the paralegals of Timap for Justice for her advice on cases before him, and the paralegal was also able to go to the chairman for assistance in her cases. In one notable case,<sup>106</sup> a young mother of three came to a paralegal for assistance. Her husband had recently married a second wife, and while he and his new bride slept on a large, comfortable wooden bed, he relegated his first wife to sleep with her suckling baby and other children on the bare, damp, dirt floor with no sheets in the next room, denying her even oil for

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101. See generally Maru, *supra* note 15.

102. See Andrew Apter, *Africa, Empire and Anthropology: A Philological Exploration of Anthropology's Heart of Darkness*, 28 ANN. REV. ANTHROPOLOGY 577, 580 (1999).

103. See Maru, *supra* note 15, at 431.

104. See Field Notes, *supra* note 8.

105. BENNETT, CUSTOMARY LAW, *supra* note 5, at 1.

106. See Field Notes, *supra* note 8.

a lamp. The first wife was discontented, as well as concerned with the health of her children.

In a mediation session, the young husband proved resistant to the paralegal's efforts to encourage him to treat his wives equally, as dictated by customary law. The paralegal sought assistance from the local court chairman, who investigated the situation himself.<sup>107</sup> His sense of justice was also offended, as it was clear that the young man, a diamond miner, had the means to build his first wife a bed and provide basic supplies. The young man rebuffed requests from dismayed family elders and the court chairman to provide a bed and sheets for his first wife. The court chairman then told him that if he did not provide her with a bed, the chairman would use his authority under customary law to order the husband to switch sleeping quarters with his first wife and sleep on the ground himself. Needless to say, the young man provided his first wife with sheets, a bed, and kerosene for her lamp within days.

The court chairman's approach to the case was based on customary law, which, in Sierra Leone, often internalizes Islamic law when the parties to a dispute are Muslim.<sup>108</sup> The following verses from the Quran are instructive:

If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.<sup>109</sup>

Amira Mashhour notes that "[a]lthough the concept of 'justice' that is used in these two verses is not clearly defined in the Quran, the commentators of the Quran 'unanimously' interpret justice—in this context—to mean equal treatment [of one's wives] in respect to food, clothing, and housing."<sup>110</sup> This interpretation of equal treatment in basic needs was the essence of the court chairman's argument.<sup>111</sup> Under cus-

107. As a respected and relatively affluent Muslim man in the chiefdom, the court chairman himself had multiple wives and was not hostile to polygamy per se.

108. Hanatu Kabbah, *Sierra Leone Legal System and Legal Research*, GLOBALEX, Nov. 2006, [http://www.nyulawglobal.org/globalex/Sierra\\_Leone.htm](http://www.nyulawglobal.org/globalex/Sierra_Leone.htm). The incorporation of Islamic law into customary law where the participants are Muslim has a long history, having been noted by scholars in 1962. See Daniels, *supra* note 50, at 56.

109. A. YUSUF ALI, *THE HOLY QU'RAN: TEXT, TRANSLATION AND COMMENTARY* Sura 4, verse 3 (1983).

110. Amira Mashhour, *Islamic Law and Gender Equality—Could There be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. 562, 570 (2005).

111. See A.M. SERAJUDDIN, *SHARI'A LAW AND SOCIETY: TRADITION AND CHANGE IN SOUTHEAST ASIA* 129, 131 (2001).

tomary law, as under Islamic law, the equal treatment of wives is strongly encouraged but not mandatory. The court chairman's strong insistence on the husband's respect for the needs of his first wife and their children in this case, and his similar reasoning in prior cases, indicated a progressive interpretation of customary law. In addition to the principles of Islamic law internalized in customary law, the court chairman may also have been influenced by international human rights norms<sup>112</sup> learned through his ongoing interactions with the female paralegal.<sup>113</sup>

Many grassroots organizations and activists, including Timap and members of WiLDAF, embrace societal internalization as a strategy to promote positive social change from within. While not aiming overtly to bring customary international law in line with international human rights law, Timap paralegals recognize that the just resolution of many disputes often has the additional benefit of promoting human rights.<sup>114</sup> The local court chairman's actions in this case show evidence of some human rights norm internalization in rural Sierra Leone within the evolving customary law system. When summoned by the paralegal for assistance, the chairman relied upon the customary and Islamic law principle of treating wives equally and providing for children. He did not formally invoke women's or children's rights language when speaking to the husband, although in speaking privately, the chairman sometimes did refer to these principles. Regardless of his motivations, the chairman's intervention and resulting demand that the first wife and her children receive the same treatment as the second wife promoted the rights of the first wife and her children by improving their access to material needs.

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[C]lassical [Islamic] jurists regard the polygamy permission clause of verse IV:3 as having legal force and the strong words of the justice clause as being only a private recommendation . . . . Although the Shari'a law permits polygamy, it strictly regulates the conduct of the husband in relation to his wives and confers certain important rights on [the wives]. Each of the several wives is entitled to equal and impartial treatment from the husband. The principle of equal treatment between wives applies among other things to time passed [by the husband] in the company of each wife and the food, clothes, and lodgings provided to them.

*Id.*

112. International human rights norms that would apply in this situation include one norm found in Article 6 of the Protocol to the African Charter on Human and People's Rights of Women in Africa, which states that while monogamy is encouraged, "the rights of women in marriage and family including in polygamous marital relationships are promoted and protected." Protocol to the African Charter on Human and Peoples' on the Rights of Women in Africa art. 6, *adopted* July 11, 2003, CAB/LEG/66.6 (entered into force Nov. 25, 2005).

113. As the government had not provided training since the war began, Timap for Justice provided legal training to the local court chairmen which included human rights law at the request of the local officials. My presence as a Western outsider may also have played a role in the chairman's response.

114. See Field Notes, *supra* note 8.

Paralegals in these situations are not trained or encouraged to change customary law; their goal is merely to promote justice through assisting individuals, families, and communities.<sup>115</sup> As actors within the customary law context who also value the strength of their communities and traditions, the paralegals recognize that customary law is the dominant source of law for their work in rural Sierra Leone and often is the tool best suited to promote justice. However, the paralegals' work is also informed by their training in international human rights law and the formal legal system, which can be used to resolve particular cases. Due to this training, it is not surprising that the paralegals would invoke principles such as women's and children's rights, as in this case and the case of Aruna detailed *supra*. However, it is noteworthy when non-paralegals such as the court chairman and the *sababu* rely on these principles during a mediation. When a respected leader of the community is willing to utilize principles that may not be explicitly recognized by traditional customary law, it evidences his personal recognition of the legitimacy of these principles and demonstrates that customary law is constantly evolving to incorporate these norms.

In many cases, customary law, formal Sierra Leone law, and international human rights law align rather than oppose each other in bringing about justice. In addition, as Maru writes,

some of the values often attributed to international human rights (with their origins in the European legal tradition) are also present in the traditions of Sierra Leone, and it's a matter of evolution and contestation between the various values "internal" to traditional Sierra Leonean culture as much as it is an interaction between [Sierra Leonean] culture and the outside world.<sup>116</sup>

Each source of law may present different remedies or justification for action, or one may provide a remedy where another does not.<sup>117</sup> The paralegals and their allies within the communities use many approaches, often in conjunction, taking advantage of the dynamism of culture and the evolving nature of customary law when faced with a justice issue.

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115. Timap for Justice, Guiding Principles for All Staff, <http://www.timapforjustice.org/work/> ("Solving justice problems: The aim of our work is to help people achieve concrete, practical solutions to their justice problems.").

116. E-mail from Vivek Maru, co-founder and co-director, Timap for Justice, to author (Feb. 21, 2007) (on file with author).

117. A good example of this phenomenon is the law on child support payments. See discussion *infra* Part VII.

## VII. CUSTODY, MAINTENANCE, AND BEST INTERESTS OF THE CHILD IN INDEPENDENT SIERRA LEONE

We walked five miles in the morning to a town called Foya where we held a monthly mobile clinic for residents from Foya and the surrounding areas. A mother of two shy, young children, a boy and a girl, approached for help.<sup>118</sup> She explained that her husband had disappeared, and she had been caring for the children alone without any support or maintenance from the husband or his family for months. We requested that the husband's brothers explain that family's perspective. One of the brothers was a teacher at a local school and thus was well-known to the paralegals and comparatively affluent in the region. He acknowledged that the family did not help support the woman or her children, but added that she had refused to return to his brother, and "in Africa, if a woman divorces a man, she deserves to suffer."<sup>119</sup>

A female paralegal, a former teacher and colleague of this man, tried to refocus the mediation. The paralegal explained that the issue we were examining was not who bore the blame for the separation—under both customary and formal law, a woman could not be forced to remain in a marriage, so that was a moot point. Rather, we were concerned about the well-being of the children and their maintenance; the children should not be the ones to suffer from the divorce. The brother acknowledged that this was true, and agreed that the children's well-being was the responsibility of his extended family on behalf of his brother.<sup>120</sup> This case required a few further sessions so the husband's family could "hang heads" and decide how they wished to provide for the children. It was ultimately agreed that the older boy would live in a nearby town with one of the teacher's wives and families in order to attend school<sup>121</sup> and be fed and housed, while the younger girl would remain with her mother until school-aged with help for food from the husband's family.

This arrangement conformed to Mende customary traditions of custody and maintenance in cases of separation or divorce. Under this custom, the husband's family is expected to provide support for all children but also has decision-making power over the children's residence once they reach school-age. Younger children are generally allowed to

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118. See Field Notes, *supra* note 8.

119. This is a traditional Mende saying which was perhaps voiced for my benefit as a foreigner.

120. The brother described his brother as an "irresponsible monkey, always swinging from place to place."

121. In this case, the primary school was located five miles away from the village; in addition to this difficulty, the mother had no money to pay for school uniforms or school supplies.

continue living with their mother.<sup>122</sup> In this case, after a discussion between various members of the husband's extended family, the mother, and the paralegals about what situation was best for the children, all parties recognized that the mother's financial situation prevented her from feeding and educating the children. The paralegals and the husband's brothers approached the question of the best interest of the children in terms of providing for future physical and educational needs. Unlike a Western negotiation on child custody, there was no mention of emotional bonding between the children and their mother. While the mother initially asked the paralegals to assist her in obtaining maintenance from her husband's family to care for her children herself, during the mediations the mother did not vocalize any other needs or state a preference for the children to continue in her custody. Rather, the mother relinquished her custody claim over the older child when her former brother-in-law agreed to take responsibility for her son's upkeep and schooling.<sup>123</sup>

Amstrong has noted a similarity to this process among the Shona in Zimbabwe when making arrangements for child custody:

It is not only the paternal family which believes in its right to the children, but the mother and the maternal family as well. Therefore, it appears that in most cases there is no "dispute," it is simply assumed that the children of divorced parents will go with the father's family . . . [E]ven when the mother is going to have custody of the child for a while, it is assumed that the child will go back to its father's family eventually. So that, even if the best interests of a child in the short term are to be with its mother, in the long term it needs to make the connection with its father's family.<sup>124</sup>

The Mende beliefs appeared to be consistent with Armstrong's observations of the Shona. Some of Armstrong's interviewees linked paternal custodial rights to paternal ancestral spirits or the payment of bridewealth, but more often, "custom" was linked to economic resources.<sup>125</sup> Since women have fewer economic resources and it is very difficult to obtain an order for (or effective enforcement of) child support payments, the child's "best interests are perceived to lie with the parent

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122. See, e.g., SMART *supra* note 49.

123. Her acquiescence was perhaps due to respect for cultural norms, which mandate that children over a certain age belong to the husband's family, as well as concerns over her own financial ability to continue to care for them properly without assistance, rather than a desire to relinquish physical custody.

124. Alice Armstrong, *School and Sadza: Custody and the Best Interests of the Child in Zimbabwe*, 8 INT'L J.L. & FAM. 151, 174 (1994).

125. *Id.* at 175.

who can better provide for the child materially.”<sup>126</sup> In her research, Armstrong saw evidence that taking custody of the child was often a substitute for a father’s paying maintenance.<sup>127</sup>

In the case above, the paralegals and the members of the two families accounted for the best interests of the children when making the custody arrangements. How the best interests of the child as a human rights principle is applied, however, is very different in a context where the basic material needs of food, clothing, and schooling are difficult to fulfill. In addition, this case illustrates two of the strengths of children’s rights under the customary legal system. First, the formal system in Sierra Leone requires a father to support his children. However, under the outdated statute applicable in these situations, child support payments are limited to 100 Leones a week, about .04 U.S. dollars.<sup>128</sup> Under customary law, a father also has parental responsibility for maintenance, but there is no monetary limit, so a fair sum can be agreed upon.

Second, a father shares the responsibility for his children with his family under customary law.<sup>129</sup> Here, the father was nowhere to be found, and yet his brothers, the paternal uncles of the children, readily acknowledged their own responsibility for the children in their brother’s absence. Indeed, the dispute was only over how that responsibility should be exercised, not whether the brothers owed a duty to the children. Under the formal legal system, responsibility for children is individual rather than familial and collective. Had the mother taken her case through the formal system, she would have been legally unprotected if she could not locate the children’s father.

The best interest of the children was not the only factor considered in this mediation. While acknowledging his responsibility as an uncle, the teacher also explicitly referred to what he viewed as the mother’s bad behavior in refusing to take back her husband after his frequent comings and goings. Perhaps he meant to exonerate or excuse his family in neglecting their duties towards the children up to that point. When asked, however, whether his family was trying to make the children suffer for the faults of their mother, the teacher quickly vocalized his family’s

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126. *Id.*

127. *Id.*

128. *See* Maru, *supra* note 15, at 454. For comparison, during other child support mediations in Bumpé from May to August 2005, monthly maintenance agreements were the equivalent of about five to ten dollars a month, which was deemed fair given the low cash income of most rural inhabitants. In contrast, the World Bank defines extreme economic poverty in the developing world, including sub-Saharan Africa, as living on less than one dollar per day. *See* The World Bank PovertyNet, [http://web.worldbank.org/WBSITE/EXTERNAL/ TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20153855~menuPK:435040~pagePK:148956~piPK:216618~theSitePK:430367,00.html](http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20153855~menuPK:435040~pagePK:148956~piPK:216618~theSitePK:430367,00.html).

129. *See* Field Notes, *supra* note 8.

responsibility for the children. Perhaps not surprisingly, Armstrong also found some cases in Zimbabwe in which the parties invoked

an implicit argument that a woman who behaves “badly” in terms of traditional expectations cannot be a good mother to her children, and conversely that it is in the best interests of the child to be in the custody of a person who does conform to traditional expectations. In the case of women, the traditional expectations are that she must be married, submissive, follow her husband’s orders and defer to his decisions, avoid independent action, be a hard worker, etc.<sup>130</sup>

In this mediation, the paralegals again drew on a variety of sources of law in order to arrive at a just outcome. In this case, the internal customary law principles and children’s rights principles under international human rights law again worked in tandem, while the formal legal system’s approach was ignored as irrelevant or unhelpful.

#### VIII. CUSTOMARY LAW IN POST-APARTHEID SOUTH AFRICA

Contemporary South Africa provides another example of internalization of international human rights norms into areas traditionally governed by customary law. South Africa’s constitutional revolution accompanied the fall of apartheid and provides an important window into the interaction between international human rights law and traditional customary law in contemporary African society.

Adopted in 1996, the South African Constitution attempts to enshrine human rights protections and was intended to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”<sup>131</sup> The founding values of the Constitution are the rights to equality, human dignity, and liberty. Not only has the “new” South Africa ratified many international human rights treaties<sup>132</sup> and made reference to international law a mandatory part of the constitutional interpretation of its Bill of Rights,<sup>133</sup> but it also explicitly adopts many international human rights norms. For example, socioeconomic rights such as access to housing<sup>134</sup> are justiciable in South Africa.

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130. Armstrong, *supra* note 124, at 167.

131. S. AFR. CONST. 1996, pmbl.

132. For a comprehensive list of human rights treaties to which South Africa is a party, see South Africa, Ratification History, [http://www.bayefsky.com/pdf/southafrica\\_t1\\_ratifications.pdf](http://www.bayefsky.com/pdf/southafrica_t1_ratifications.pdf).

133. S. AFR. CONST. 1996 § 39(1)(b).

134. *Id.* § 26.

The 1996 Constitution also explicitly recognizes traditional customary law and leaders.<sup>135</sup> Traditional leaders participated in the constitutional negotiations,<sup>136</sup> and a battle during the negotiations pitted women's rights advocates against traditional leaders who felt that subjecting customary law to the Bill of Rights, particularly the equality provision, threatened established customs.<sup>137</sup> The outcome was that the final South African Constitution, while recognizing customary law, also clearly indicates that customary law, like all other South African law, is subservient to the Bill of Rights.<sup>138</sup> Chapter 12 of the Constitution concerns traditional leaders and customary law. It recognizes "the institution, status and role of traditional leadership, according to customary law"<sup>139</sup> and provides that "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."<sup>140</sup>

The right to culture is also enshrined in the Constitution in Sections 30 and 31, and "although neither section in fact makes any reference to customary law, it is generally taken to be a significant element of the African cultural tradition."<sup>141</sup> Culture in an anthropological sense is "a repertoire of assorted practices and discourses that individuals generate through disputes over signs and meanings" that is not static, but rather negotiated and constructed.<sup>142</sup> The right to culture in international and constitutional law, however, typically refers to "a concrete norm or practice specific to a particular social group,"<sup>143</sup> and it has been asserted "to counter the ubiquitous drift towards Western values and attitudes."<sup>144</sup>

In addition to Chapter 12, Section 39(2) of the Constitution mandates that, "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."<sup>145</sup> Section 39(3) reinforces the primacy of the Bill of Rights by stating that "[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."<sup>146</sup>

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135. *Id.* at ch. 12.

136. CATHERINE BARNES & ELDRED DE KLERK, *CONCILIATION RES., SOUTH AFRICA'S MULTI-PARTY CONSTITUTIONAL NEGOTIATING PROCESS* (2002).

137. *See* BENNETT, *HUMAN RIGHTS*, *supra* note 41, at 20–23.

138. S. AFR. CONST. 1996 § 39(3).

139. *Id.* § 211(1).

140. *Id.* § 211(3).

141. BENNETT, *CUSTOMARY LAW*, *supra* note 5, at 78.

142. *Id.* at 79.

143. *Id.* at 80.

144. *Id.*

145. S. AFR. CONST. 1996 § 39(2).

146. *Id.* § 39(3).

Ultimately, when a provision of customary law violates a right in the Bill of Rights, it can be struck down as unconstitutional,<sup>147</sup> unless it passes the Section 36 limitations clause analysis.<sup>148</sup>

The South African Law Commission (SALC)<sup>149</sup> has also prompted the internalization of human rights norms in South Africa. Established in 1973, SALC is an advisory body whose current mandate is to make recommendations to the South African Parliament on the legal changes necessary to bring laws into conformity with the new South African legal order through reports and draft bills.<sup>150</sup> Customary law has constituted a focus for SALC.<sup>151</sup> SALC members, who include legal scholars, justices, and a member of the Commission on Gender Equity, developed recommendations for reform of customary law, including formal recognition of customary courts and changes to their jurisdiction and appeals process.<sup>152</sup> SALC recommended that customary courts should generally have civil jurisdiction over matters arising out of customary law, with an explicit exception for matters related to dissolution of marriage, custody and guardianship of minors, and maintenance.<sup>153</sup> SALC noted that women's groups strongly supported this recommendation, but traditional leaders opposed it as a limitation on their authority. SALC determined that "[t]his suggestion takes into account the values of equality and non-sexism in the *Constitution* and the principle of the 'best interests of the child.'"<sup>154</sup>

The Constitution itself also mandated the formation of "Chapter 9" bodies,<sup>155</sup> which play a vital role in the promotion, protection, and monitoring of human rights in South Africa.<sup>156</sup> These independent state institutions include the South African Human Rights Commission and the Commission for Gender Equity. Justice Yvonne Mokgoro of the Constitutional Court emphasized the important role these institutions play in

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147. See, e.g., *Bhe and Others v. Magistrate 2005* (1) BCLR 1 (CC) (S. Afr.).

148. S. AFR. CONST. 1996 § 36.

149. The South African Law Commission was recently renamed the South African Law Reform Commission. The original name has been used in this piece as that was the name in use when the relevant reports were issued.

150. See South African Law Reform Commission, Welcome, <http://www.doj.gov.za/salrc/index.htm>.

151. See S. AFR. LAW COMM'N, PROJECT 90, TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF TRADITIONAL LEADERS (2003), [http://www.doj.gov.za/salrc/reports/r\\_prj90\\_tradlead\\_2003jan.pdf](http://www.doj.gov.za/salrc/reports/r_prj90_tradlead_2003jan.pdf).

152. *Id.*

153. *Id.* at xi.

154. *Id.* at 10 (emphasis in original).

155. The bodies are named for their establishment under Chapter 9 of the 1996 Constitution.

156. S. AFR. CONST. 1996 §§ 181, 184, 187.

improving customary law for women.<sup>157</sup> Justice Mokgoro also stressed the significant number of nongovernmental organizations that work on the grassroots level to disseminate human rights information.<sup>158</sup> Many of these groups conduct trainings for traditional leaders and attempt to bring customary law into conformity with the Constitution through sensitization, advocacy, and legal test cases.<sup>159</sup> All of these efforts by various state institutions and nonprofit actors are examples of attempts to internalize international and constitutional human rights norms into customary law.

The *Bhe* case in the Constitutional Court of South Africa in 2004 exemplifies internalization of human rights norms by reforming customary law through the formal legal system.<sup>160</sup> In *Bhe*, the plaintiffs challenged the constitutional validity of the principle of primogeniture in the context of the customary law of succession,<sup>161</sup> and the Black Administration Act 38 of 1927 (the BLA),<sup>162</sup> which dealt with intestate estates of deceased Africans. Justice Langa wrote of the relationship between the South African Constitution and customary law in South Africa:

Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.

Sections 30 and 31 of the Constitution entrench respect for cultural diversity. Further, section 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights.

In similar vein, section 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights. Finally, section 211 protects

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157. Interview with Yvonne Mokgoro, Justice, Constitutional Court of S. Afr., in Ann Arbor, Mich. (Jan. 2006).

158. *Id.*

159. *Id.*

160. *See Bhe and Others v. Magistrate 2005 (1) BCLR 1 (CC) (S. Afr.)*.

161. The rule of primogeniture, common in customary law in communities across Africa, is that the first born male of the deceased is the intestate heir, followed by other male relatives if there are no male children. Women are excluded from inheriting. *See, e.g., id.* at para. 77. As the majority of rural Africans' estates are governed by customary law, this principle generally excludes women from inheriting property.

162. *Id.* at para. 3.

those institutions that are unique to customary law . . . . It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.<sup>163</sup>

The *Bhe* court decided that the customary law principle of primogeniture constituted unfair discrimination on the basis of gender and birth. Customary law also violated the equality and human dignity provisions of the Bill of Rights, as it excluded widows from inheriting from their intestate husbands, daughters from their parents, and extramarital children from their fathers.<sup>164</sup> The court also concluded that the “limitation it impose[d was] not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.”<sup>165</sup>

In determining that this particular customary law violated the Bill of Rights, the court displayed a sophisticated understanding of customary law in contemporary South Africa. It discussed at length the context in which the rule operated and what purpose it served, noting that it was designed to preserve the extended family unit, and that the family head who inherited was traditionally obligated to assume all responsibilities of maintenance and support for family members under his guardianship.<sup>166</sup> However, the court also noted that circumstances had changed such that “the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependents of the deceased.”<sup>167</sup> This change was due in part to the emergence of modern urban communities and nuclear family structures, as opposed to traditional, extended family structures. The court noted that although the “inherent flexibility” of the customary law system is one of its strengths,<sup>168</sup> “the rules of succession in customary law have not been given the space to adapt and to keep pace with changing social conditions and values [because they were written down in legislation, textbooks, and court decisions] without allowing for the dynamism of customary law.”<sup>169</sup>

The court drew on evidence presented by SALC and the Gender Research Project at the Centre for Applied Legal Studies that these

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163. *Id.* at para. 41 (internal citations omitted).

164. *Id.* at paras. 91–93.

165. *Id.* at para. 95.

166. *Id.* at paras. 75–76.

167. *Id.* at para. 80.

168. *Id.* at para. 45.

169. *Id.* at para 82.

customary rules were no longer universally observed.<sup>170</sup> The Court emphasized that “official customary law as it exists in the text books and in the [Black Administration] Act is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognizes and acknowledges the changes which continually take place.”<sup>171</sup> In striking down the traditional rule of primogeniture enshrined in the legislation, the court thus recognized that official, statutory customary law was not necessarily a true reflection of what is often termed “living” customary law, and that it was this official version that was incompatible with the Bill of Rights.<sup>172</sup>

South Africa has grappled intensely with the interaction between customary law and international human rights norms in the decade since the adoption of its Constitution. These efforts are primarily a response to the domestic internalization of the human rights norms enshrined in the new legal order of South African constitutional democracy. Learned observers of customary law, like Justice Mokgoro, acknowledge that there is much room for improvement in the practical daily integration of human rights norms into customary law in rural communities. However, the work of the Chapter 9 institutions, legal advocates such as those involved in *Bhe*, nonprofit organizations, sensitized individuals, and court decisions have begun to change the customary law context in South Africa through forms of societal internalization.

## IX. CONCLUSION

Customary law in Sierra Leone and South Africa, especially that relating to child custody, maintenance, and succession, is evolving to incorporate more international human rights norms. South Africa clearly has the advantages of more robust legal institutions, a more developed nonprofit sector, including legal aid organizations, and a constitution that enshrines human rights norms. It is not surprising, therefore, that court decisions have been a prime vehicle for the internalization of women’s and children’s rights in South African customary law.

While Sierra Leone does not enjoy the same momentum for change in customary law that South Africa received from its Constitution, some of the same factors—nonprofit organizations, sensitized individuals, and legal advocates—have influenced Sierra Leonean customary law. Indeed, the Timap paralegals’ human rights and formal legal training and subsequent work in communities plays an important role in the process of

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170. *Id.* at paras. 84–85.

171. *Id.* at para. 86.

172. *Id.*

human rights norm internalization in rural Sierra Leone. Other trained local actors, whether there are part of local nonprofit organizations, local government, or international institutions, also play a part in internalization.<sup>173</sup>

For proponents of the internalization of international human rights norms into customary law in rural Sierra Leone, the lack of codification and precedent in customary law there represents an opportunity. By contrast, the South African system codified customary law, “rob[bing] it of its inherent capacity to evolve in keeping with the changing life of the people it served, particularly of women.”<sup>174</sup> Sierra Leone customary law can thus be influenced by human rights norms that are deemed acceptable to the community, even if those norms have not been utilized in prior customary law decisions. It is also important for advocates of change to recognize that principles of international human rights norms are already found within the customary system and to support those traditional principles of justice and alternative cultural institutions which resonate with human rights norms, thus supporting natural evolution of customary law.

Each time a paralegal in Sierra Leone inquires about what is best for a child while mediating a dispute between families, or a *sababu* asks a child for his opinion on a matter that concerns his future—like which parent should exercise custody—the process of human rights norm internalization moves forward. The challenge for human rights advocates lies in persuading those living under customary law of the desirability of such human rights norms and illustrating how such norms coincide with traditional principles of justice, rather than in imposing these norms and potentially prompting a cultural backlash.

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173. For example, in both Sierra Leone and South Africa, the respective Truth and Reconciliation Commissions' hearings were played on the radio in local languages. Radio programs have been a primary means of communication about human rights in both countries.

174. *Bhe and Others v. Magistrate*, 2005 (1) BCLR 1 (CC), at para. 90 (S. Afr.).