

THE NATAL AND KWAZULU CODES: THE CASE FOR REPEAL

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ABSTRACT

Since the new South African Constitution came into force, most of the discriminatory legislation of the colonial and apartheid eras has been repealed. The Natal Code of Zulu Law (Proc R151 of 1987) and the KwaZulu Act 16 of 1985 on the Code of Zulu Law are notable exceptions. Although particular sections of the Codes violate various provisions in the Bill of Rights, this article argues that the Codes should be repealed in their entirety on the ground that their very existence and their continuing application offend the right to equality in s 9 of the Constitution. The inquiry concentrates on the question whether the discriminatory nature of the Codes is nevertheless fair, and, if unfair, whether it may be justified under s 36 of the Constitution (the limitation clause). A factor considered in both the unfairness inquiry under s 9 and the justification inquiry under s 36 is the purpose of the Codes, both now and at the time of their inception. It is our view that possible arguments based on protection of the right to culture and legal certainty are unlikely to survive constitutional scrutiny, and, accordingly, the Codes should be repealed.

I INTRODUCTION

The Natal Code of Zulu Law is a product of early colonialism¹ and its counterpart, the KwaZulu Act on the Code of Zulu Law, is a product of the apartheid era.² In South Africa's new constitutional order, they stand out as incongruous elements. Speaking of a similar legacy of the past regime, the Black Administration Act 38 of 1927, Sachs J remarked: 'It is painful that the Act still survives at all. The concepts on which it was based, the memories it evokes, the language it continues to employ, and the division it still enforces, are antithetical to the society envisaged by the Constitution'.³ Although the Justice Laws Rationalisation Act 18 of 1996 removed most legislation of this nature, the two Codes were spared. This article explores the case for their repeal.

II ORIGINS OF THE CODES

The origins of the Natal Code lie in a decision – which was advanced for the time – to recognise customary law. When Britain annexed Natal in

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1 Although the Code owes its current existence to that notorious institution of apartheid, the Black Administration Act 38 of 1927.

2 See notes 23-27 below and accompanying text.

3 *Moseneke v The Master* 2001 (2) SA 18 (CC) para 21.

1843, Roman-Dutch law was declared the law of the land.⁴ Although it was clearly impossible to impose this system on the large number of Africans in the colony, Britain's civilizing mission demanded 'amalgamation of the different races' under a single system of European law and governance.⁵ A conflicting strand of thinking in colonial policy, however, demanded respect for local institutions. Hence, in 1848, a Royal instruction announced that: 'Her Majesty had not interfered with or abrogated any law, custom or usage previously prevailing among the native inhabitants, except so far as the same might be repugnant to the general principles of humanity recognised throughout the whole civilised world'.⁶ Accordingly, Ordinance 3 of the following year provided that the courts were to apply customary law provided that it was 'not repugnant to the general principles of humanity observed throughout the civilized world'.⁷

In 1852, the Natal administration established a commission to investigate the situation of the colony's African population. In the Commission's view, uniform management was essential if they were to be effectively governed. It found that magistrates in the colony were administering different types of customary law, based on their own ideas of what that law happened to be. It also found – which was probably more disquieting – that Africans were noting and commenting on the contradictory decisions. Hence, in order to achieve the aim of uniform decision-making, the Commission recommended that customary law be reduced to writing: 'a full and complete digest of the rules and principles ... for the guidance of Magistrates'.⁸

Lieutenant-Governor Pine accepted the Commission's findings. He could personally confirm that magistrates were experiencing great difficulty in administering customary law, mainly because they had only a sketchy knowledge of the subject. Contemporary experts in colonial development also supported the case for codification, because they believed that reducing local customs to writing would encourage the transformation of indigenous law into a more civilized system.⁹ At this

4 Ordinance 12 of 1845 (Cape).

5 The Crown's general policy at the time was that 'in the eye of the law there shall not be any distinction or qualification whatever founded on mere distinction of colour'. See D Welsh *The Roots of Segregation: Native Policy in Colonial Natal, 1845-1910* (1971) 25, citing the Colonial Secretary.

6 8 March 1848.

7 Under Ordinance 3, traditional rulers were given judicial powers over certain disputes arising within their areas of jurisdiction, subject to supervision of colonial magistrates. The Ordinance also declared the Lieutenant-Governor Supreme Chief of the African people. He now replaced the former Zulu monarch and, in this role, operated a court of appeal from decisions of traditional rulers and magistrates. See D Welsh 'The State President's Powers under the Bantu Administration Act' (1968) *Acta Juridica* 81, 89-90.

8 Commission *Report* 29-30 cited by Welsh (note 5 above) Chapter 9.

9 See extract from a letter by the Colonial Secretary of 1898 cited by Welsh (note 5 above) 165.

point, however, further progress was barred, for the project met the steadfast opposition of Theophilus Shepstone, Diplomatic Agent and Secretary of Native Affairs for the Colony.

Shepstone, who had been responsible for co-opting traditional leaders to colonial government, was a self-proclaimed authority on African life. He was completely opposed to the idea of codification, on the ground that it would impart an artificial rigidity to customary law. Hence, for over 20 years, he managed to stall the project by saying that it was impossibly difficult to achieve.¹⁰ Eventually, however, the Natal Legislative Council procured a section in the Native Administration Law of 1875 that forced Shepstone to begin the job.¹¹

The resulting product was a disappointment. As a statement of current social practice, which is the basis for all customary law, the Code was far from accurate.¹² Moreover, the rules were framed in such a vague and generalised fashion that magistrates were still left free to follow their own interpretations. In consequence, the colonial government decided to prepare another version,¹³ and a new draft of the Code appeared in 1878. Like its predecessor, however, it bore little relation to the reality of customary law.¹⁴ More amendments were necessary, and these had to be performed by the colony's Legislative Council. Because very few members of the Council knew anything about customary law, the process was both lengthy and ill informed. Eventually, in 1891, however, a more acceptable Code appeared.¹⁵

While the various drafts of the Code were being debated, the Zulu kingdom continued to maintain a precarious independence from Britain. Finally, in 1887, the territory was annexed. In the same year, the 1878 draft version of the Code was made law for Zululand.¹⁶ It was only in 1927 that a single law became applicable to both Zululand and Natal: the Native Administration Act declared the 1891 Code law for the entire province.¹⁷

Because of the procedural difficulties involved in amending the Code, it remained in force notwithstanding its many flaws. The answer to this problem was seen to lie in transferring legislative power away from Parliament to the executive. 'One or two experienced hands' would then be able to keep the Code abreast of social change.¹⁸ Hence, in 1927, the

10 Welsh (note 5 above) 164.

11 Section 10 of Law 26 of 1875.

12 See AJ Kerr 'The Reception and Codification of Systems of Law in Southern Africa' (1958) 2 *J of African L* 82, 92.

13 In terms of Law 44 of 1887.

14 See Kerr (note 12 above) 97.

15 Law 19 of 1891.

16 Proclamation 2 of 1887.

17 Section 24(2) of Act 38 of 1927. See *Ntuli* 1921 AD 276.

18 John Shepstone's comment to South African Commission on Native Affairs (1903-5) Evidence, 984. See also EH Brookes *The History of Native Policy in South Africa from 1830 to the Present Day* (1924) 72.

Native Administration Act¹⁹ vested law-making power in the Governor-General (who then delegated his power to the Department of Native Affairs). Thereafter, the Code could be amended by the simple expedient of issuing executive proclamations. By this means it was significantly revised in 1932.²⁰ More changes followed in 1967²¹ and again in 1987.²² The latter is the current version of the Natal Code.

For purposes of applying the 1932 and 1967 versions of the Code, Zululand was treated as part of Natal. In 1972, however, the territory gained partial autonomy from South Africa under the Bantu Homelands (subsequently National States) Constitution Act 21 of 1971. As an entity separate from Natal, KwaZulu now had certain legislative powers over the people and territory under its jurisdiction.²³ Acting on these powers, the government appointed a Commission to inquire into the legal status of women. Instead of implementing the Commission's proposals by amendment to the existing Code, however, the cabinet decided to review the enactment as a whole.²⁴ Hence, in 1981, KwaZulu issued its own Code of Zulu law, which was much the same as the Natal Code but with certain improvements to female status.²⁵ This Code was amended in 1984²⁶ and then revised and reissued in 1985.²⁷

III APPLICATION OF THE CODES

Laws may be considered applicable to territory or persons. Systems of customary law, especially their private law provisions, are, in principle, applicable to persons. As a result, those who are associated with such systems remain bound wherever they happen to be.²⁸ Other laws are applicable to territories. This proposition is especially true of public laws, which are generally deemed binding on everyone within a state, depending, in some cases, on whether an individual is resident, physically present or a citizen of the state concerned.

19 Section 24(1) of Act 38 of 1927.

20 Proclamation 168 of 1932.

21 Proclamation R195 of 1967.

22 Proclamation R151 of 1987 (9 October 1987 *Reg Gaz* 4136).

23 As defined in Proc R70 of 1972. See *Attorney-General v Mngadi* 1989 (2) SA 13 (A) 18-9.

24 With the exception of chapter 2. See JC Bekker & JJJ Coertze 'The KwaZulu Act on the Code of Zulu Law, 1981' (1983) 46 *THRHR* 285.

25 Act 6 of 1981. For an assessment of the effect of the Code on the status of women, see CRM Dlamini 'The New Legal Status of Zulu Women and Traditional Institutions' (1984) 13 *Speculum Juris* 74.

26 Act 13 of 1984.

27 Act 16 of 1985. Further amendments were made by Act 9 of 1990.

28 Section 11(2) of the Black Administration Act 38 of 1927, which was the precursor to the current s 1(3) of the Law of Evidence Amendment Act 45 of 1988, could have been interpreted to regulate application of Zulu customary law, because the section was phrased in broad terms ('[i]n any suit of proceedings between Blacks who do not belong to the same tribe'). This was never the practice of the courts, however.

Both the Natal and KwaZulu Codes purport, in the main, to be codifications of the Zulu customary law of persons, marriage, succession and delict. They might therefore have been expected to apply to Zulu people, wherever they happened to be. The Codes also contain certain public law provisions that were intended to give effect to government policy. One would therefore expect these provisions to apply to everyone within the territories of Natal or KwaZulu regardless of an individual's system of customary law. These expectations were not realised either in the practice of the courts or the state's administration.

The courts have consistently applied the Natal Code to all Africans living within the borders of the province. Leaving aside, for the moment, the question of race, their approach was correct when they were applying public law provisions. For private law provisions, however, this approach was quite wrong, because most of these provisions concerned personal relationships, and, for such matters, the Code should have been applied to the inhabitants of Natal only if consistent with their cultural orientation.²⁹

The courts nevertheless upheld a principle of territoriality. Thus, where people normally subject to Sotho law settled in Natal, they were deemed to be subject to the provisions of the Code even though, notionally at least, it reflected Zulu law.³⁰ The contradiction between principles of personality and territoriality became apparent in another situation. Where people from Natal moved to other parts of South Africa, the Code ceased to apply. Although no authoritative decision was taken on this point, dicta again indicated that the Code applied only within the borders of the province.³¹

The same approach seems to have been maintained towards application of the KwaZulu Code. Public law provisions applied within KwaZulu, and, as far as conflicts with systems of customary law outside the territory were concerned, it seems to have been assumed that the Code should also be applied on the basis of territoriality. As far as conflicts with laws in Natal were concerned, however, a new criterion for application appeared: citizenship.

Whenever the KwaZulu Code diverged from the laws applicable in

29 The reason for this aberration may have been the status of the colony when the Code was first issued. Because Natal was a separate political entity, independent of the other colonies, protectorates and republics in southern Africa, the Code was applied only within the area over which the Natal legislature had jurisdiction.

30 *Molife* 1934 NAC (N&T) 33 and *Ndhlovu v Molife* 1936 NAC (N&T) 33 held that the only way in which such persons could guarantee continued application of their law would be to enter into an agreement to that effect. It was not clear in these cases, however, whether the litigants became subject to the Code on the basis of mere residence within Natal or whether a more permanent attachment, such as domicile, was necessary.

31 *Zwana v Zwana* 1945 NAC (N&T) 59; *Mashapo v Sisane* 1945 NAC (N&T) 57.

Natal, provision was made for the Code to apply to KwaZulu 'citizens'.³² This term was defined in s 1 of the Code to mean anyone who was a citizen of the territory in terms of the National States Citizenship Act 26 of 1970.³³ The Natal Code had no corresponding provision. Hence, there was no indication whether citizens of KwaZulu were exempt from its provisions.

While the courts (understandably) stepped very lightly across this minefield of rules, application of the Codes is fraught with contradictions.³⁴ The re-creation of a unified South Africa might have brought an end to this unhappy state of affairs, but, for the sake of a smooth transition, the interim Constitution provided that all laws in areas forming part of the new national territory would continue in force.³⁵ Thus, although Natal and KwaZulu were amalgamated into one province in 1994,³⁶ nothing was done to end the anomaly of two different Codes applying in one political unit.

IV DISCRIMINATION UNDER THE CODES

With the introduction of a justiciable Bill of Rights, doubt was cast over the validity of many sections of the Codes, and some, at least, have been repealed. Those encoding the traditional idea of patriarchal authority, for instance, were removed by the Recognition of Customary Marriages Act 120 of 1998,³⁷ and more amendments will follow if effect is given to the Law Commission's recommendations for reform of the customary law of intestate succession.³⁸

Despite these reforms, many of the remaining provisions are at odds with the Bill of Rights.³⁹ The aim of this article, however, is not to

32 For example, under s 14, the Age of Majority Act 57 of 1972 is applicable to KwaZulu citizens. See also s 39(1) (a civil marriage between blacks is deemed to be out of community), s 42(3) (the consent of a guardian is not essential for a customary marriage by a citizen who has attained majority), s 73 (the first wife is the chief wife and her house is the *indlunkulu*) and s 83(3) (estates of citizens married by civil rites devolve according to the common law of intestate succession).

33 This Act was repealed in its entirety by Schedule 7 of the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993).

34 Thereby infringing the individual's right to certainty in the administration of justice. See JD Van der Vyver 'Human Rights Aspects of the Dual System Applying to Blacks in South Africa' (1982) 15 *CILSA* 312-14.

35 Although, under s 229 of Act 200 of 1993, 'subject to any repeal or amendment'.

36 Part 1 of Schedule 1 to the interim Constitution.

37 Section 12 of that Act. Sections 22 and 27(3) of the KwaZulu Code and s 27(3) of the Natal Code provided that wives fell under the marital power of their husbands.

38 See clause 5(a) of the bill attached to the South African Law Commission Discussion Paper *Customary Law: Succession* (2000) Project 90, Paper 93. Sections 80 and 81 of both Codes provide that the system of male primogeniture applies in cases of intestate succession.

39 To choose from many possible examples: s 24 of both the Codes provides that a family head may 'arrest any person defying his authority or disturbing the peace or committing or reasonably suspected of committing . . . any offence against person or property'. While the arrested person must be handed over to a police officer 'as soon as possible', summary arrest by a private citizen for an ill-defined offence may well violate s 35 of the Constitution, which

identify constitutionally offensive sections of the Codes and then to suggest suitable amendments. Instead, because we are dealing with laws that violate values central to South Africa's new constitutional order, the laws must be repealed in their entirety.⁴⁰ In the first place, the Codes owe their existence to a system that was designed to deprive black South Africans of fundamental rights. In the second place, race, ethnicity or citizenship remain the terms for applying rules that are distinct from – and usually more onerous than – rules applicable to other members of the South African population. In consequence, the Codes constitute an invasion of the right to human dignity – which is the most basic principle of the Constitution.⁴¹

An obvious feature of the Codes is their differentiation between people on the basis of race, tribe (or ethnic origin) and citizenship. The first two of these, in particular, constitute a potential violation of the constitutional guarantee of equal treatment or non-discrimination.⁴² In the case of the Natal Code, differentiation is based squarely on race: the enactment repeatedly states that its provisions apply to 'blacks'.⁴³ What is more, the Black Administration Act provides that the Natal Code is in force 'as law for Blacks in Natal'.⁴⁴

It can therefore be argued that, in relation to non-blacks, blacks are subject to different, and nearly always disadvantageous, forms of treatment. Although the reference to blacks is found mainly, as might be expected, in the public law provisions,⁴⁵ it also occurs in certain provisions regulating private law.⁴⁶ This reference cannot be considered

protects the rights of arrested, detained and accused persons. Moreover, although s 42 of the Criminal Procedure Act 51 of 1977 allows private persons to effect summary arrests, it carefully defines the circumstances under which this is permitted.

40 M Pieterse 'Its a "Black Thing": Upholding Culture and Customary Law in a Society Founded on Non-racialism' (2001) 17 *SAJHR* 364, 394.

41 Which is protected in s 10 of the Constitution. The term 'dignity' has not been precisely defined, partly because it is seen as having the function of protecting all the other rights in the Bill of Rights and partly because it is used in a number of different contexts. See D Leibowitz & D Spitz 'Human Dignity' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (RS 5 1999) 17-6A. However, equal respect for human beings and recognition of the ability to make individual choices are held to be part of the content of this right. J De Waal et al *The Bill of Rights Handbook* (2001) 231-32.

42 Which is protected in s 9 of the Constitution.

43 See, for example, ss 3, 4, 11, 14 and 15. Not surprisingly, this term was removed from the KwaZulu Code in favour of 'citizen'. Section 1 of the Natal Code defines 'Black' as 'a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa'. This definition was taken from s 35 of the Black Administration Act 28 of 1927.

44 Section 24 of Act 38 of 1927.

45 See ss 3 and 4 of ch 2 (Tribal Boundaries), s 9 of ch 3 (Chiefs), ss 83-90 of ch 11 (Medicine Men, Herbalists and Midwives), s 91 (which applies to the entire chapter) of ch 12 (Actionable Wrongs); ss 106 and 117 of ch 13 (Civil Procedure and Miscellaneous Provisions).

46 Section 12 (Family-heads and Inmates), s 13 (Property Rights), s 14 (Age of Majority), s 16 (Children Born out of Wedlock) of ch 4 (Personal Status), ss 107, 110, 112 and 113 of ch 13 (Civil Procedure and Miscellaneous Provisions).

inadvertent, for it dates back to the time when customary law had far less to do with cultural orientation than with race.⁴⁷

When a provision of the Natal Code dealing with private law is not racially marked, the courts are free to decide whether to apply customary or the common law to a cause of action. Section 105(1) provides that nothing in the Code impairs the operation of the Law of Evidence Amendment Act 45 of 1988, s 1 of which governs the choice of law process in South Africa at large.⁴⁸ Through this section, a black person may escape the operation of at least some provisions of the Code. For example, s 98(1) provides that 'the seduction of an unmarried female shall give rise to an action against the seducer in damages for the *ngquthu* beast'. If a case were to arise where parties had a 'Western' cultural orientation, the court could apply the common law instead of s 98(1), which might well result in the defendant escaping liability.⁴⁹

Certain private law provisions, however, specifically exclude the possibility of applying common law. Section 113 of the Code, for example, provides that '[n]o Black may avail himself of . . . any insolvency law . . . to the prejudice of claims against him by any other Black unless he is a trader as defined under the Insolvency Act [24 of 1936]'.⁵⁰ In these provisions, if a black person is involved, the ordinary choice of law rules are superseded by the overriding consideration of race, and so common law may not be applied in place of customary law.

In the final analysis, however, the constitutionality of both the Natal and KwaZulu Codes does not depend on the text making explicit references to race. A law that is, on the face of it, racially neutral can be discriminatory if it is applied *in a manner* that discriminates on the basis of race. In the case of the Codes, although many provisions make no reference to race, they have consistently been applied only to blacks.

Section 9(3) of the Constitution prohibits both direct and indirect discrimination. The former denotes a situation where an individual or group is 'disadvantaged simply on the ground of her or his race, sex,

47 Section 11(1) of the Black Administration Act 38 of 1927, for example, used to provide that commissioner's courts could apply customary law 'in all suits or proceedings between Blacks involving questions of customs followed by Blacks'. The reference to Blacks was omitted only with promulgation of the Law of Evidence Amendment Act 45 of 1988, which currently regulates application of customary law.

48 Under this section, courts have a discretion whether to apply customary or common law, although, in this regard, they are guided by precedents set in the former Black Appeal Court. See TW Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 118ff.

49 See, for example, *Magwentshu v Molete* 1930 NAC (C&O) 40; *Monaheng v Konupi* 1930 NAC (N&T) 41; *Magadla v Hams* 1936 NAC (C&O) 56 and *Lebona v Ramokone* 1946 NAC (C&O) 14. For further discussion, see TW Bennett *Application of Customary Law in Southern Africa* (1985) 74-5.

50 In its attempt to eliminate racist terms, the KwaZulu Code provides, in s 113, that 'no person' may avail himself of any insolvency law to the prejudice of claims against him by any other 'person', a formulation that extends the prohibition far too broadly.

ethnicity, religion or whatever the distinguishing feature(s) may be'.⁵¹ The practice of applying the Codes only to blacks is an instance of directly discriminatory *conduct*. Indirect discrimination emphasises the result rather than the form of the law. In other words, laws that appear non-discriminatory, may nonetheless produce a disparate, discriminatory effect⁵² on a particular race group. In such cases, the discrimination is indirect.⁵³ Even where the term 'black' is not used in provisions of the Codes, it may be argued that, by virtue of the fact that they attempt to codify Zulu customary law,⁵⁴ the Codes affect a disproportionately larger number of black people than those of another race group. In the case of the two Codes, a discriminatory effect is produced by the fact that they impose duties on the black inhabitants of Natal and KwaZulu that are more onerous than duties borne by other citizens of South Africa under the national law.⁵⁵

The second form of discrimination is the Natal and KwaZulu Codes is based on tribe. Certain provisions in the Codes are aimed at securing the jurisdiction of chiefs,⁵⁶ which in turn depends on subjects being affiliated to particular 'tribes'. Although the Codes do not make provision for the acquisition or loss of tribal membership, s 3(1) of the Natal Code contains a deeming provision: 'a Black shall be deemed to be a member of a tribe of the chief within whose area of jurisdiction he resides'. Residence, in this case, is not entirely voluntary, because s 3(2) continues to provide that 'any Black who disregards any tribal boundary duly defined . . . and without authority . . . moves from the area of any tribe to that of another shall be guilty of an offence'.⁵⁷

Citizenship is the third ground of discrimination. The KwaZulu Code has many provisions indicating that it applies only to citizens of the former self-governing territory.⁵⁸ Under the National States Citizenship

51 J Kentridge 'Equality' in Chaskalson et al (note 41 above) 14-24B.

52 *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 31. See also Kentridge (note 51 above) 14-24B; 14-25.

53 Kentridge (note 51 above) 14-25. De Waal et al (note 41 above) 221 note that direct discrimination is evident on the face of a law. If an applicant wishes to show that indirect discrimination exists, however, he or she has to provide evidence of a discriminatory effect or impact.

54 Of course, people of other race groups may be considered and may consider themselves to be Zulu but this does not detract from the fact that such people are few and that the Codes therefore affect a disproportionately larger number of black people. See *Walker* (note 52 above) para 32.

55 What is more, those to whom the Codes apply have no opportunity of escaping these provisions (an issue dealt with below).

56 And thereby the power to enforce certain 'customary' duties owed by subjects to traditional rulers. See, for example, s 7 of the Natal Code and s 7 of the KwaZulu Act.

57 This section violates s 21(1) of the Constitution, which allows freedom of movement.

58 See, however, W van der Meide 'Culture v Equality: Debunking the Perceived Conflicts Preventing the Reform of the Marital Property Regime of the "Official Version" of Customary Law' (1999) 116 *SALJ* 102. Van der Meide argues that, in fact, the KwaZulu Code applies purely on the basis of racial distinctions and territorial boundaries, without reference to tribal affiliation or cultural practice.

Act 26 of 1970 such citizenship was imposed on

every Black person in the Republic who was born in KwaZulu from parents of whom one or both were citizens of KwaZulu, or who speaks the Zulu language or any dialect thereof . . . or who is related to any member of the Black population of KwaZulu or has identified himself with any part of the population or is associated with any part of the population by virtue of his cultural or social background, and is not a citizen of any other territorial area.⁵⁹

As a result, individuals could find themselves bound by the Code even though they did not live in the former KwaZulu and have never considered themselves to be 'Zulu'. Although differentiation on the basis of citizenship is not specifically prohibited in s 9(3) of the Constitution, along with race and ethnic origin, it is also tantamount to unfair discrimination, as will become apparent below.

V ESTABLISHING AND JUSTIFYING UNFAIR DISCRIMINATION

Section 9 of the Constitution prohibits only *unfair* discrimination.⁶⁰

Relevant subsections read as follows:

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race . . . ethnic or social origin
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

From these provisions, it follows that a discriminatory law must be considered constitutionally valid if it can be shown to be 'fair'. When the basis for discrimination is a ground listed in s 9(3), however, s 9(5) presumes the law to be unfair. Once unfairness has been shown to exist, the respondent still has an opportunity to justify the unfair discrimination under s 36, the general limitation clause.⁶¹

(a) Discrimination

In light of s 9, the following courses of action are available to applicants intending to contest the constitutionality of a law. Where they can show that the law differentiates on the basis of a ground listed in s 9(3), the court may presume that discrimination exists *and* that such discrimina-

⁵⁹ Rabie CJ in *Government of the RSA v Government of Kwazulu* 1983 (1) SA 164 (A) 204H-205A.

⁶⁰ The peculiarly South African distinction between fair and unfair discrimination was intended to ensure that certain kinds of discrimination, notably affirmative action programmes, would be permissible, because they would be aimed at achieving equality for all. Thus, the inclusion of 'unfair' in s 9 allows account to be taken of the social and historical context within which the Bill of Rights operates. See Kentridge (note 51 above) 14-18; 14-19. See also T Loenen 'The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective' (1997) 13 SAJHR 401, 407.

⁶¹ The relationship between ss 9 and 36 is considered below.

tion is unfair (it is, of course, still open to the respondent to attempt to rebut the presumptions). As ethnic origin and race are grounds listed in s 9(3), it can be presumed that the Natal Code discriminates unfairly.

In the case of citizenship, there is no presumption to assist applicants who wish to establish unfair discrimination. Instead, they would first need to establish that the differentiation amounts to discrimination. In this regard, however, the Constitutional Court has been willing to accept that discrimination exists if differentiation is based on an attribute or characteristic that has 'the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner'.⁶² In the case of citizenship, this is not a difficult burden to discharge. Indeed, the Constitutional Court, in *Larbi-Odam v MEC for Education (North-West Province)*,⁶³ found the ground of citizenship to be such an attribute or characteristic. The basis for the court's finding was that citizenship is a personal attribute that is difficult to change⁶⁴ and that foreigners are always a minority with little political influence. Hence, continuing to differentiate between people on the basis of homeland citizenship amounts to discrimination.

(b) Unfairness

Having established the discriminatory nature of both the Natal and KwaZulu Codes, the next step is to decide whether the discrimination is unfair.⁶⁵ According to the Constitutional Court, the inquiry centres on the effect of discrimination on a person in the applicant's position. This analysis requires reference to the following factors:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage . . . (b) the nature of the provision or power and the purpose sought to be achieved by it . . . (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.⁶⁶

62 *Harksen v Lane* 1998 (1) SA 300 (CC) para 46. Note that it has also been suggested that an inquiry into discrimination on a non-listed ground is not based strictly on the above formulation. The Constitutional Court 'regards differentiation as discrimination whenever it is based on a ground that the complainant cannot change or cannot reasonably be expected to change'. See I Currie & J De Waal *The New Constitutional and Administrative Law Volume One: Constitutional Law* (2001) 355.

63 1998 (1) SA 745 (CC).

64 *Ibid* para 19.

65 With the listed categories of race and ethnic origin, the onus is on the respondent to show that discrimination is fair. In the case of citizenship, however, the applicant bears the onus of showing that the discrimination is *unfair*. See *Harksen v Lane* (note 62 above) paras 46-7.

66 *Harksen v Lane* (note 62 above) para 51, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) paras 41; 47, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 19.

(i) *The position of the complainants in society*

While s 9 protects 'everyone's' right to equality, discrimination against previously disadvantaged persons, or those who are socially vulnerable, is more likely to be unfair, because it exacerbates existing disadvantage and indignity.⁶⁷ At the time the Natal Code was drafted, its clear purpose was to establish a separate system of governance for a subordinate section of the population. Indeed, much of the writing on the history of segregation shows how the Code functioned to maintain the inferior position of the African population.⁶⁸

The KwaZulu Code operates somewhat differently, because it applies not to blacks but to citizens. Again, however, the Code maintains the inferior position of blacks as notional 'foreigners' in South Africa. In *Bangindawo v Head of the Nyanda Regional Authority*,⁶⁹ it was argued that the concept of such citizenship infringed both s 1 of the Constitution, which constitutes a single sovereign state, and s 5(1), which provides for only one South African citizenship. Similarly, in *Rehman v Minister of Home Affairs*,⁷⁰ the idea of separate citizenships in South Africa was rejected, because it offended the principle of a unified state under the Constitution and because the administrative means for enforcing homeland citizenship laws no longer existed.⁷¹ The Court in *Larbi-Odam v MEC for Education (North-West Province)*⁷² provides the final, and most telling comment about the old homeland citizenship system.

[The] general lack of control over one's citizenship has particular resonance in the South African context, where individuals were deprived of rights or benefits, ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race. Many became statutory foreigners in their own country under the Bantustan policy, and the legislature even managed to create remarkable beings called 'foreign natives'.⁷³

(ii) *The nature and purpose of the discriminatory law*

Here the main concern is to establish whether the law is aimed at achieving 'a worthy and important societal goal'.⁷⁴ Because the nature and purpose of a discriminatory law arises in the context of unfairness under s 9 and then, again, in the context of justifiability under s 36, the

67 O'Regan J in *Hugo* (note 66 above) para 112. See also Kentridge (note 51 above) 14-18 14-19.

68 See, for example, U Mesthrie 'White Dominance and Control in Natal 1893-1903' (1984) 7 *J of Natal and Zulu History* 41, 44ff.

69 1998 (3) SA 262 (Tk) 267.

70 1996 (2) BCLR 281 (Tk).

71 Under ss 1; 3 and Schedule 6 (Transitional Arrangements) of the Constitution, it is clear that South Africa is now one state with a common citizenship. On the policy of 'separate development' and denationalisation, see Currie & De Waal (note 62 above) 55-6.

72 1998 (1) SA 745 (CC).

73 *Ibid* para 19.

74 See *Harksen v Lane* (note 62 above) paras 51-2. Note that an intention to discriminate does not have to be proved.

applicant must be prepared to argue about the nature and purpose of a law twice.⁷⁵ Although there is no obvious distinction between these two inquiries, and although the procedure has been criticised for needless duplication,⁷⁶ some writers have suggested that unfairness under s 9 is a test of 'internal' justification. As a result, if the purpose of a law is to be considered at this stage of an inquiry, it must relate to the promotion of equality itself.⁷⁷ Other justifications, such as administrative convenience and legal certainty, are more appropriately considered as part of the inquiry under s 36.

Of all possible purposes for having the Codes, the most socially important is likely to be the protection of a right to culture. In fact, protecting culture has the effect of promoting equality, because the community concerned can then secure its position vis-à-vis other, usually more powerful, communities.⁷⁸ Today, it would probably be argued that the primary purpose of the Codes is to safeguard Zulu culture, since the term 'Zulu' or 'Zulu law' is mentioned frequently in the text.⁷⁹ These terms presuppose the existence of a Zulu people practising this legal system.⁸⁰

There are several flaws, however, in an argument for retaining the Codes in order to protect a Zulu cultural tradition. In the first place, many, if not most, of the provisions are not peculiarly 'Zulu'. They are administrative measures that have nothing to do with culture.⁸¹ In the

75 See, for example, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 66 above) paras 53; 59.

76 De Waal et al (note 41 above) 204-05. There has been some attempt to draw a distinction between the kinds of purposes to be taken into account in the s 9 inquiry, as opposed to an inquiry under s 36. For purposes of the former, the only relevant justifications are those that relate to the values underlying the constitutional concept of equality. Under s 36, other legitimate social purposes such as administrative convenience may be taken into account. Kentridge (note 51 above) 14-43. See also Kriegler J in *President of the Republic of South Africa v Hugo* (note 66 above) paras 77-80. This distinction is not clear in the cases, however. See the majority judgment in *Hugo* (ibid) and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

77 See C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248, 269-70; Kentridge (note 51 above) 14-31.

78 In *Ryland v Edros* 1997 (2) SA 690 (C), for instance, the Court held that continued refusal to recognise a Muslim marriage would violate the principle of equality between groups. A similar view was expressed in *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) paras 21-3.

79 It will be apparent from what has been said above, however, that the original purpose of the Code had little to do with rights to culture. *S v Jordan* 2002 (6) SA 642 (CC) paras 113; 115 acknowledges that the purpose of legislation may change over time, and that the courts may take into account this change when assessing constitutional validity. Even so, the current purpose must be consistent with the Bill of Rights.

80 Sections 7; 81; 106; 108; 113 and 114 of the KwaZulu Code, for instance, refer to 'Zulu Law' and s 10 of the Natal Code refers to the 'laws of the Zulus'. Moreover, ss 106 of the Natal and KwaZulu Codes, respectively, refer to 'Zulu good manners'.

81 Under ss 83 of the Natal and KwaZulu Codes, for instance, medicine men, herbalists and midwives must be licensed with the authority of the Minister of Health and Welfare.

second place, although the term Zulu is usually taken to apply to those whose first language is Zulu,⁸² the existence of a homogeneous Zulu culture – let alone a homogeneous system of Zulu customary law – is highly questionable.⁸³

In fact, rather than protecting a pre-existing Zulu culture, the Codes themselves seem to have contributed towards the creation of a somewhat artificial conception of that culture. As we have already seen, prior to the introduction of the Natal Code, the courts recognised a diversity of laws (and by implication cultures) in the colony. Even after the Code was promulgated, the courts continued to recognise this diversity. Gradually, however, constant reference to the Code resulted in the withdrawal of official recognition from local customs and the emergence of one body of rules, which was deemed ‘Zulu’ customary law.⁸⁴ If continued application of the Code has this effect, then the freedom to practise a culture of choice is defeated and, with it, the main reason for protecting cultural diversity.⁸⁵

In the third place, and related to the point above, culture is not a fixed and immutable set of rules, and any attempt to make it so may lead to violation of the right to culture. For this reason, it is argued that the right to culture demands application of what is called a ‘living’, not an ‘official’, version of customary law.⁸⁶ The two Codes are a perfect example of official law.⁸⁷ Indeed, the very process of codification creates such law.⁸⁸ With regard to the carrying of traditional weapons, for instance, it has been held that:

the era since 1891 has been dominated by the Code and marked by its impact on every practice which clashed with it, on every practice by which dangerous weapons were carried when it forbade them to be. A century of proscription makes it hard to regard any such practice nowadays as a traditional one. For the enactment and endurance of the Code must have tended to suppress the tradition, if it existed previously, and to prevent it from ever taking root, if it did not.⁸⁹

82 *Tsenoli v State President of the Republic of South Africa* 1992 (3) SA 37 (D) 48. The evidence presented by Mary De Haas, a lecturer in social anthropology at the University of Natal, was uncontested in this case.

83 *Tsenoli* (note 82 above) 48E: ‘Zulus have never comprised a single entity in either a political or societal sense. . . [w]ithin their broad ranks . . . traditions have varied greatly from one region to another and, in the same parts, from one period to another’.

84 See TV McClendon ‘From Aboriginal to Zulu: Ethnicities, “Customary Law” and the Natal Code in the Segregation Era’ paper delivered at a conference on Ethnicity, Society and Conflict in Natal University of Natal (PMB) 14-16 September 1992.

85 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) paras 22-3.

86 C Himonga & C Bosch ‘The Application of African Customary law under the Constitution of South Africa: Problems Solved or Just Beginning?’ (2000) 117 *SALJ* 306, 340. See also Pieterse (note 40 above) 377.

87 Himonga & Bosch (note 86 above) 329.

88 See TW Bennett & T Vermeulen ‘Codification of Customary Law’ (1980) 24 *J of African L* 206.

89 Didcott J in *Tsenoli v State President of the RSA* (note 82 above) 48F-G.

Fourthly, a group may not insist on its right to culture, if to do so entails subjecting an individual to that culture against his or her will.⁹⁰ A right to culture implies that people living according to a particular cultural tradition may require the state to enforce and protect institutions peculiar to that tradition. Thus, the right is opposable, in the first instance, against the state, rather than individuals, who must be free to explore other cultural traditions of their own choice.⁹¹ It follows that the individual's right to equal treatment – which could be defeated by application of a culturally defined system of personal law – generally supersedes the right to culture. Sections 30 and 31 of the Constitution make this clear by the inclusion of an 'internal limitation' clause, namely, a clause providing that the right to culture must be read subject to the Bill of Rights.

On the other hand, when an individual is associated with a particular cultural community, he or she may reasonably expect to be bound by the laws that constitute the community. Such is the basis for recognition and application of customary law in South Africa.⁹² Nevertheless, in specific cases, the courts have required some indication of an individual's voluntary submission to the laws of that community, whether expressly or by implication from prior transactions, behaviour and general cultural orientation.⁹³ In other words, individuals may not be involuntarily bound to a system of personal law indefinitely.

The Natal and KwaZulu Codes, however, pay little regard to individual volition. All blacks in Natal and all citizens of KwaZulu must comply with the public law provisions of their respective Codes. As for the private law provisions, an individual may escape the Codes only if he or she has agreed with the other party to application of a different system of customary law.⁹⁴ Even so, blacks are, in practice, presumed to be bound by the Codes.⁹⁵

90 F Kaganas & C Murray 'The Contest Between Culture and Gender Equality under South Africa's Interim Constitution' (1994) 21 *J of Law & Society* 409, 415-17; 424-25, on the other hand, look to the general tenor of the Constitution, and conclude that it is in favour of an individual right to non-discrimination rather than a group right to culture.

91 Under s 8(2) of the Constitution, individuals may bear duties as well as rights, but only where this is 'applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. The duty to protect and promote culture will fall largely to the state because the state has the capacity to fulfil these functions. Private persons could be obliged to respect a group's right to culture, but it should be noted that the right to culture, as laid down in ss 30 and 31, whether applied against the state or a private person, is itself subject to the Bill of Rights, notably, of course, the right to freedom from discrimination on the ground of culture under s 9(3).

92 South African Law Commission *Report on Conflicts of Law* (1999) Project 90 paras 1.88ff.

93 South African Law Commission *ibid* paras 1.83-5 and 1.87.

94 See note 30 above.

95 In the past, Africans, especially women, were forced to abide by customary law, on the ground that, if one party were given the benefit of a change in personal law, the other would be put at a disadvantage. See *Ngwane v Nzimande* 1936 NAC (N&T) 70; *Yako v Beyi* 1944 NAC (C&O) 72, 76 (subsequently overturned on appeal in *Ex parte Minister of Native Affairs: in re Yako v Beyi* 1948 (1) SA 388 (A)) and *Mashego v Ntombela* 1945 NAC (N&T) 117, 121. Another explicit reason for this approach was the courts' attempt to enforce segregation Bennett (note 49 above) 66-7.

Formerly, individuals could be specifically exempted from the Natal Code. This possibility was introduced in 1864⁹⁶ to cater for Christianised Africans and to ward off criticisms that the Colony was doing nothing to promote higher standards among the African population.⁹⁷ A similar procedure, which applied nationwide, was introduced in 1927 by the Black Administration Act.⁹⁸ Although the option was eventually omitted from the Codes, it is still available in terms of national law. Not surprisingly, however, the exemption procedure has proved decidedly unpopular⁹⁹ and the Law Commission has recommended its repeal.¹⁰⁰

Retention of the Codes advances no worthy social interest. Whilst protection of culture is an important societal goal, it is debatable whether the Codes actually do embody an authentic Zulu culture. Furthermore, protection of culture has always to be weighed against other rights and the enforcement of the Codes constitutes a serious infringement of the individual's freedom of choice.

(iii) *Extent to which individual rights are affected and whether fundamental human dignity is impaired*

This inquiry must be pursued with reference to the substance of the Codes, rather than the terms of their application. The applicant arguing for repeal should have no difficulty in showing that the Codes materially prejudice the interests of blacks living in KwaZulu-Natal. Examples abound of activities that are considered delictual or criminal by the Codes but not by national or provincial law.

Section 94 of both the Codes, for instance, provides that '[a]ny unmarried girl whose chastity has been publicly denied, scoffed at, or

⁹⁶ Law 11 of 1864.

⁹⁷ The mission stations, in particular, encouraged converts to abandon what was considered a primitive and heathen system of law. See Mesthrie (note 68 above) 46. Among the stringent conditions for exemption were monogamy and literacy: M Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2000) 343. Later, although the Natal Code dropped the general exemption procedure, an equivalent option was made available to unmarried, widowed or divorced women. If such women were, by reason of 'good character, education, thrifty habits or any other good and sufficient reason' deemed fit to be emancipated, a commissioner's court could order that they be emancipated from their guardian's control. This procedure was omitted from the KwaZulu Code and from the 1987 version of the Natal Code.

⁹⁸ Section 31 of Act 38 of 1927. The discretion to grant exemption was vested in the Governor-General (later, of course, the State President): GN 1233 of 1936.

⁹⁹ In Natal, for instance, the first letter of exemption was granted only 11 years after the procedure had been introduced, and, by 1900, only 1 252 letters had been granted. See Mesthrie (note 68 above) 47. Moreover, the effect of exemption was never entirely clear. Africans believed that it entitled them to the same legal status as whites, but here they were disappointed. Although the courts were prepared to apply common law to exempted persons for purposes of domestic relations, they refused to grant immunity from racist legislation. Thus Africans remained subject to the curfew laws in Durban and to the jurisdiction of commissioners' courts: *Mahludi v Rex* (1905) 26 NLR 298, 315; *Mdhlalose v Mabaso* 1931 NAC (N&T) 24.

¹⁰⁰ *Report on Conflicts of Law* (note 92 above) para 1.105.

impeached by any person, is entitled to damages'. Not only does this section appear to infringe freedom of expression (which is protected under s 16 of the Constitution) but it also perpetuates a gender stereotype that is arguably discriminatory. In addition, the Codes create a number of offences that have the effect of requiring an unusually onerous standard of behaviour for blacks in Natal and for citizens in KwaZulu. Section 115(1)(a) of the Codes, for example, provides that any person who 'spreads any false report of a nature calculated to cause disquiet and anxiety, or affecting the Government [of KwaZulu] and its acts . . . shall be guilty of an offence';¹⁰¹ similarly, s 115(1)(e) establishes seduction of an unmarried woman as an offence.¹⁰²

In conclusion, the discrimination and impairment of dignity that flows from enforcement of the Codes cannot be justified by any valuable societal objective. Once this conclusion is reached, it is clear that the law in question discriminates unfairly on the basis of race, ethnicity or citizenship (or a combination of these grounds), and the respondent may proceed to a second stage of justification.

(c) Limitation

This inquiry entails argument under s 36 of the Constitution, the general limitation clause. A right protected in the Bill of Rights may be limited only by a 'law of general application'.¹⁰³ The Codes would certainly qualify as 'law', for the term has been interpreted widely to include both original and delegated legislation, as well as the common and customary law.¹⁰⁴ More pertinent, for our purposes, is whether the Codes should be considered to be 'publicly accessible', in the sense that those who are bound must know what is expected of them.¹⁰⁵ Although particular provisions in the Codes may be challenged for being too broad, they are

101 This provision may be constitutionally challenged not only as a violation of the right to freedom of expression but also because it is vague and does not allow for those bound by the Code to modify their behaviour so as not to fall within the ambit of the offence. Many such provisions in national and provincial laws have already been amended or repealed to ensure consistency with the Constitution. See De Waal et al (note 41 above) 332. See also Gubbay CJ in *Chavunduka v Minister of Home Affairs, Zimbabwe* 2001 (4) SA 1 (ZSC).

102 On conviction, s 118 imposes a mandatory fine or, on default thereof, imprisonment. See M Lupton 'The Natal Code of Bantu Law - A Legal Dinosaur' (1978) 95 *SALJ* 152 commenting on *S v Dhudla* 1977 (2) PH H143 (N), a case dealing with adultery as a crime.

103 Section 36 of the Constitution provides that: 'The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance and purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose'.

104 De Waal et al (note 41 above) 148.

105 Mokgoro J in *Hugo* (note 66 above) para 104. See also S Woolman 'Limitation' in Chaskalson et al (note 41 above) 12-28.

still reasonably certain.¹⁰⁶ In addition, the law must not arbitrarily target specific or easily ascertainable individuals or groups of individuals.¹⁰⁷ This requirement does not mean that the law has to be uniformly applied across South Africa.¹⁰⁸ The Codes are likely to pass this first, and not very demanding, leg of the limitation analysis, because the targeting of a specific group in this case cannot be said to be arbitrary: it is based on race, ethnicity and citizenship.

The second leg of the limitation analysis balances the purpose sought by the law against the extent to which the Bill of Rights is infringed.¹⁰⁹ As indicated above, an argument based on the right to culture is unlikely to succeed, because the existence of the Codes is connected in only the most tortuous way to the protection of culture.

It is submitted, then, that there is no rational connection between the Codes and the purpose they are supposed to serve. Even if there were, less restrictive means for achieving that purpose are available – which is evident in the fact that most systems of customary law are applied in South Africa without the need for their codification. In other words, recognition of ‘living’ customary law adequately serves the purpose of protecting a cultural identity and constitutes a less invasive violation of the right to equality. On a balance, then, the right to culture is outweighed in favour of the right to equality.

Other possible justifications will, it is argued, suffer a similar fate. Historically, the Natal Code was intended to bring certainty to the administration of justice and no doubt the parts of both the Natal and KwaZulu Codes that codify customary law still serve the same purpose.¹¹⁰ At the outset, however, it must be appreciated that legal certainty benefits two distinct groups: officials engaged in the administration of justice and the legal subjects themselves. Originally, the intention of producing the Natal Code was to benefit the former group, because it was aimed at easing a magistrate’s burden in applying customary law.¹¹¹ Arguably, this group is still the principal beneficiary.

Legal certainty has always been difficult to attain in systems of customary law. These laws derive from the practices of particular communities, and not only may the practices vary considerably from place to place but they are also changing constantly over time. From the perspective of a Western legal tradition, application of such rules is a daunting prospect, because lawyers need a stable and certain code that

106 See Mokgoro J in *Hugo* (note 66 above) para 104 on the desirability of avoiding too technical an approach to the ‘law of general application’ requirement.

107 Woolman (note 105 above) 12-29. See also De Waal et al (note 41 above) 149.

108 *S v Makwanyane* 1995 (3) SA 391 (CC) para 32.

109 *S v Bhulwana* 1996(1) SA 388 (CC) para 18. See also *Makwanyane*’s case (note 108 above).

110 See *S v Jordan* (note 79 above) paras 113; 115 on the changing purpose of legislation.

111 See GMB Whitfield *South African Native Law* (1929) commenting on the variations in the practice of magistrates at the time, and, of course, the variety in local custom itself.

can be consistently applied to the facts of a variety of different cases.¹¹² Moreover, because judges and magistrates are socially, and often geographically, distant from the communities they serve, they have no direct access to customary law. Seen in these terms, the variability of oral custom is antithetical to the administration of justice.¹¹³

The Constitutional Court has found administrative and legal convenience to be a reasonable basis for limiting rights,¹¹⁴ although it is still questionable whether this factor can function as a justification on its own. In *Moseneke v The Master*,¹¹⁵ however, the Constitutional Court held that, even if an administrative system held practical advantages for the people bound by it, where that system was rooted in racial discrimination, the dignity of those concerned was severely assailed and the attempt to establish a fair and equitable public administration was undermined.¹¹⁶ As a result, it seems that considerations of legal certainty and convenience cannot be used as the sole basis on which to justify the Codes when the same enactments are responsible for serious intrusions on fundamental rights and freedoms.

A better ground of justification is that the Codes give the people of KwaZulu-Natal a sense of security by allowing them immediate access to the law. The right to know the law is an old precept, one that is basic to the rule of law. Indeed, it seems that, in the 19th century, Africans were often confused and indignant at their subjection to a patchwork of different laws. At a meeting called in 1863, a speaker summed up the general opinion of the gathering by saying that 'he did not know how many laws there were in Natal. English, [Customary], and Roman Dutch he had heard of. There was also a mixture of all; by all of which the native got the worst of it'. In the circumstances, it was not surprising that the speaker called for the law to be written down.¹¹⁷

In so far as the Codes facilitate the individual's right to know the law, therefore, they are unobjectionable. But legal certainty has been won at the cost of distorting social reality. Any code reflects the law only more or

112 See generally AN Allott & E Cotran in Ife University (ed) *Integration of Customary Law and Modern Legal Systems in Africa* (Conference held at Ibadan 1964) 21; 37 and G Woodman in AN Allott & G Woodman (eds) *People's Law and State Law* (1985) (The Bellagio Papers) 145ff.

113 See AN Allott (ed) *Conference [on the] Future of Customary Law in Africa 1959-1960* (1960) 14ff. For this, and other reasons associated with the privileged status of written texts in literate societies, oral law is generally regarded as suspect.

114 In *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) paras 133-34; 138, for example, a majority of the judges found that there were no less restrictive means for achieving the purpose of preventing drug abuse. Partly because of the immense administrative difficulties for the state, they rejected a suggestion that Rastafari be identified by permits, and then, as permit-holders, be allowed to use cannabis.

115 2001 (2) SA 18 (CC) para 20ff.

116 *Ibid* para 22.

117 Cited by N Etherington in A Duminy & B Guest (eds) *Natal and Zululand: From Earliest Times to 1910* (1989) 173.

less accurately at a particular date. In fact, courts in South Africa have openly recognised that the Codes do not and cannot possibly include all customary law.¹¹⁸

The divergence between what is stated in the text and actual custom, however, must be considered in light of s 211(3) of the Constitution. This section provides that: 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. It has been forcefully argued that the customary law referred to here is the 'living law', namely, law currently being observed by South African communities. The so-called 'official' law, which is law captured in codes, precedents, legislation and textbooks, does not enjoy the same degree of constitutional protection.¹¹⁹

In South Africa, outside KwaZulu-Natal, litigants are entitled to depart from the official version of customary law in order to plead a more authentic, 'living' version.¹²⁰ Within the province, however, this option is not permitted, because, wherever the Codes contain a provision on customary law, that provision is binding to the exclusion of any other version of the rule.¹²¹ Again, people in KwaZulu-Natal suffer disadvantage in comparison with the rest of the South African population.

In summary, magistrates and administrators are most likely to benefit from the sense of legal certainty provided by the Codes. Historically, the drive for codification came from this group, which favoured a rule of law accountable to the administration.¹²² Thus, the net effect of codification 'was to shift control of African law away from Africans and place it in the hands of white administrators and magistrates'.¹²³ Indeed, the African population of Natal had no formal say in the content of the Natal Code.¹²⁴

VI CONCLUSION: THE PROCEDURE FOR CONTESTING THE CODES

The emphasis on dignity (although criticised) remains at the centre of any argument seeking to justify discriminatory laws.¹²⁵ Because the Codes apply on grounds offensive to the Constitution and because the subjects

118 See, for example, *Xolo v Nyongwana* 1912 AD 696; *Mcunu* 1918 AD 323.

119 See Himonga & Bosch (note 86 above) 306ff.

120 Under s 1(1) and (2) of the Law of Evidence Amendment Act 45 of 1988. If a litigant cannot meet the standards of proof required, however, the official version prevails for want of better evidence, as happened in *Ruzane v Paradzai* 1991 (1) Zimbabwe LR 273 (SC) 278.

121 *Mcunu* (note 118 above).

122 See Brookes (note 18 above) 219.

123 Chanock (note 97 above) 249.

124 Welsh (note 5 above) 172.

125 The test has been criticised because its emphasis on dignity rather than material disadvantage is inappropriate in the current South African context. See Albertyn & Goldblatt (note 77 above) 256-60 and the response of Sachs J to the argument put in *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 76 above) paras 120-24.

of these enactments are not free to escape their application, fundamental human dignity is impaired.¹²⁶ The Black Administration Act, which has a history and content comparable with the Codes, has been described as ‘an egregious apartheid law which anachronistically has survived our transition to a non-racial democracy’.¹²⁷ Subordinate legislation passed under the Act generated what has been described as a demeaning and racist system that did not befit a society based on human dignity, equality and freedom.¹²⁸ As has been argued above, it is unlikely that this impairment to dignity will be found to be justifiable under s 36. What is more, the Codes are steeped in colonialism and apartheid politics.

When action is to be taken to repeal the Codes, however, it should preferably proceed from the state, not the courts. Although *Du Plessis v De Klerk*¹²⁹ held that an individual could challenge any rule of statutory law, the Court drew back from licensing the judiciary to undertake a general law reform. It said that, if particular rules were struck down, gaps would result, and the courts were in no position to fill the gaps.¹³⁰ The Constitutional Court noted that the same problem would arise if a statutory rule were declared invalid, because, in order to avoid creating a gap, the courts would have to reinstate the pre-statutory common or customary law, which itself would very probably be in conflict with the fundamental rights.¹³¹ Partly for this reason, legislation was the function of elected members of Parliament, not an unelected judiciary.¹³²

Reform of the Codes falls within the competence of both national and provincial governments, because it involves ‘indigenous law and customary law’.¹³³ However, the matter can be regulated *intraprovincially*, as opposed to *interprovincially*, and so it seems as if provincial government has exclusive competence.¹³⁴ In these circumstances, the

126 *Mhlekwia v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Authority* 2001 (1) SA 574 (Tk) 629-30 held that it is ‘implicit in the right to culture that a person should have the freedom to choose to be part of a culture’.

127 *Moseneke v The Master* (note 115 above) paras 20ff. See also *DVB Behuising v North West Provincial Government* 2001 (1) SA 500 (CC) para 1.

128 *DVB Behuising* (note 127 above) paras 2; 93.

129 1996 (3) SA 850 (CC) paras 180-81.

130 *Ibid* para 178.

131 *Ibid* paras 51-3. See however *Prior v Battle* 1998 (8) BCLR 1013 (Tk) 1020.

132 *Du Plessis v De Klerk* (note 129 above) paras 180-81.

133 Under ss 44(1)(ii) and 104(1)(b)(i), as read with Schedule 4 of the Constitution. Under s 104(1)(b)(ii), as read with Schedule 5, however, provinces have exclusive competence over, *inter alia*, ‘provincial cultural matters’.

134 *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) paras 52-3; 72-5. Under s 146(2) of the Constitution, national legislation prevails if this is the only way that the subject matter can be effectively regulated or such legislation is necessary to promote or protect certain national interests. These include security, the economy, promotion of equal opportunity or equal access to government services and protection of the environment. Section 146(3), which protects certain interests from unreasonable or prejudicial action by the provinces, has similar focal points, namely, the economic, health or security interests of another province or of the country as a whole, and the maintenance of national economic policy. Moreover, under s 146(5), in the case of a

national legislature may intervene only if the criteria set in s 44(2) of the Constitution are met,¹³⁵ namely, that a national law is the only way for effectively regulation or such a law is necessary to promote or protect certain national interests (which include security, the economy, promotion of equal opportunity or equal access to government services and protection of the environment).

In view of the fact that the government of KwaZulu-Natal has given no indication of bringing the Codes into line with the Constitution, it may be necessary to proceed by way of public-interest litigation. The applicant would therefore be advised to seek a suspended order of invalidity, which would allow the KwaZulu-Natal legislature time to take appropriate action.¹³⁶

conflict between national and provincial laws within areas of concurrent legislative competence, provincial legislation prevails unless the conditions prescribed in s 146(2) and (3) are met: a national law has *either* to apply uniformly across the nation and meet certain additional criteria (s 146(2)) *or* be aimed at preventing material prejudice caused by provincial action (s 146(3)).

135 Section 44(2)(e) allows national legislation to supersede 'unreasonable' action by a province which prejudices 'the interests' of another province or the country as a whole.

136 Section 172(1)(b)(ii) of the Constitution. Suspended orders of invalidity have been granted in a number of cases. For example, see *S v Ntuli* 1996 (1) SA 1207 (CC) and *S v Steyn* 2001 (1) SA 1146 (CC).