



# Legal pluralism and women's rights

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# What is "legal pluralism"?

- Two types:
- "plural systems of law" - the legal sense
- "legal pluralism" in the sociological sense



# Plural systems of law

- The formal legal system recognises several systems of norms
- Examples:
  - Pakistan: Islamic law, British common law
  - Zimbabwe: Roman Dutch Law, customary law
  - Norway, UK: uniform legal systems (?)
- The lawyer's analysis: the state legal system as an umbrella



# “Legal pluralism” - sociological sense

- “The presence in a social field of more than one normative order”
- State law is not the sole regulatory force – groups have their internal rules
  - Ethnic, religious, otherwise...
  - Interaction between external and internal norms
- Is found in any nation-state



# Tensions between equality, culture and religion?

- Tools to help in the analysis:
  - explore tensions *within* normative systems
  - clarify the relationship *between* normative systems



# Tensions within formal (state) law

- Banda: different approaches of African constitutions
  - Primacy of custom: Zimbabwe
  - Silent: Tanzania
  - Primacy of equality: South Africa



# Zimbabwe's Constitution

- Customary law AND the prohibition of sex-discrimination
- ...but customary law prevails if conflict
- Section 23.3: “nothing contained in any law shall be seen as a contravention of the non-discrimination principle in art 23.1(a) to the extent that the law in question relates to:
  - (a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
  - (b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case



# Tensions within non-state law

- Shaheen: multiple interpretations of Islamic law
- Customary (traditional) law:
  - When was it defined?
  - How was it defined?
  - Does it change?

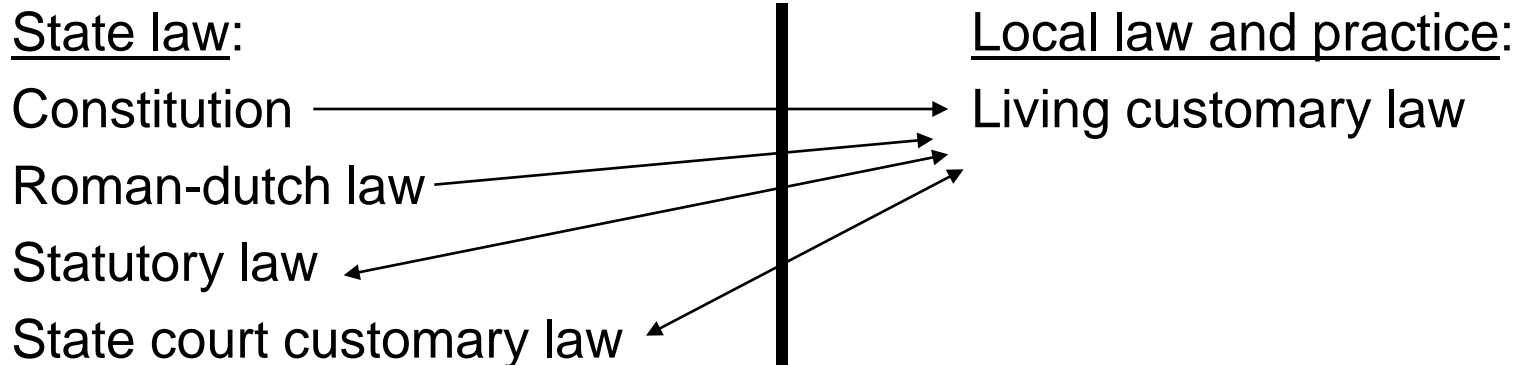




# Different perspectives on the tensions: Okin, Ali, Bano, Banda

- Can culture change? How? Role of law?
- Is culture less beneficial for women than state law?
- Relationship between culture and choice, culture and identity
- Balance of individuality vs. belonging
  - culture/religion as individual rights or group rights
  - people as individuals vs. people as members of groups, religions, families
  - equality as sameness or difference

# Dynamics and legal pluralism in Zimbabwe: Research and legislation



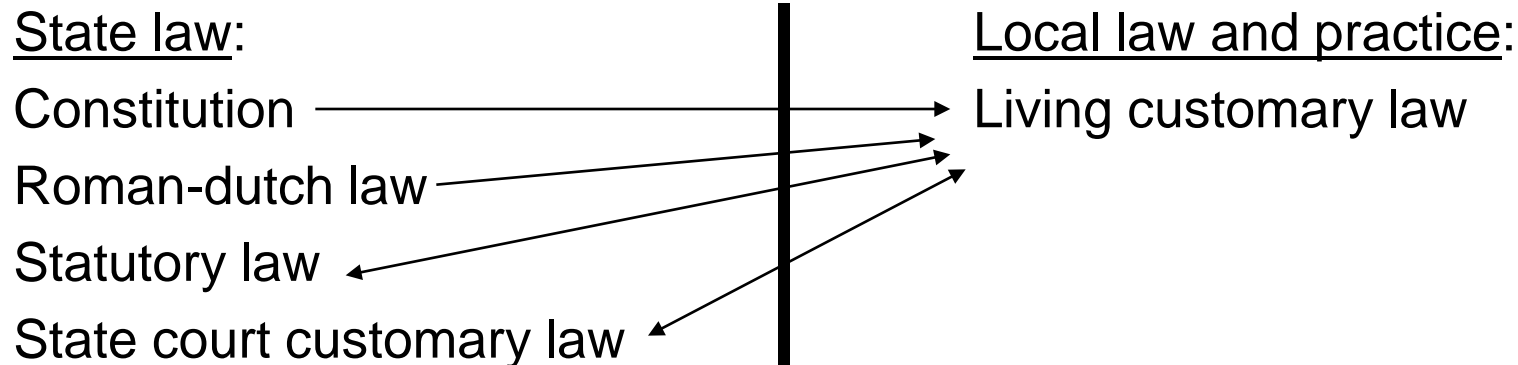
1991: Murisa vs Murisa case: according to custom, widows can not inherit

1994: research project on inheritance practices demonstrated that widows do inherit

1997: the Administration of Estates Act: widows can inherit under custom!

...A success story for women's rights?

# Dynamics and legal pluralism in Zimbabwe: The role of courts



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**1998: Magaya vs. Magaya case: Constitution trumped empirical evidence and human rights: widows cannot inherit under custom**



# Customary law, legal pluralism, and the role of courts

- South Africa: Bhe case (2004)
  - Constitution: equality over custom
- Tanzania: Pastory case (1990)
  - Constitution is silent on balancing
  - Arguments: Socialism (7), custom is abused (9), Constitution and human rights (10)
  - Strategies today: research on living customary law, litigation, and shadow reports to CEDAW and CCPR



# HR and discriminatory customary inheritance law: Treaty texts

- CEDAW Article 16.1: “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:  
(...) (c) The same rights and responsibilities during marriage and at its dissolution;  
(...) (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
- CCPR Article 23.4: “States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”



# HR and discriminatory customary inheritance law: State reporting

Tanzania: Law reform process is in motion (since 1980s). Culture.

CEDAW Committee (2008):

15. (...) The Committee is concerned at the lack of priority given to comprehensive legal reform to eliminate sex-discriminatory provisions and to close legislative gaps to bring the country's legal framework fully into compliance with the provisions of the Convention and to achieve women's de jure equality. The Committee is concerned, in particular, about the delay in the passage of the proposed amendments to (...) inheritance laws.

16. The Committee urges the State party to place high priority on completing the process of full domestication of the Convention. It calls on the State party to accelerate its law review process and to work effectively with Parliament in ensuring that all discriminatory legislation is amended or repealed to bring it into compliance with the Convention and the Committee's general recommendations. It urges the State party to raise the awareness of legislators about the need to give priority attention to such reforms in order to achieve de jure equality for women and compliance with the State party's international treaty obligations. It further encourages the State party to set a clear timeframe for such reforms, including the passage of the proposed amendments to (...) inheritance laws.



# Human rights and legal pluralism

- Theoretical debates
  - Universalism, culture relativism, or pluralist position? (Hellum 1998)
- Interpretation:
  - Autonomous, indivisibility
  - CEDAW Arts. 2.f, 5, 16, CCPR Art. 23
  - CCPR GC 28 and CESCR GC 16
- Implementation: "appropriate measures"



# Implementation, diversity, and ”appropriate measures”

- Dilemma: polygamy
- CEDAW Committee (1995): “The Convention allows for the interpretation and application in the most appropriate ways to the social and cultural structure of each state but with the premise that the States Parties will follow the principle of non-discrimination on the basis of sex”
  - See also CESCR Committee GC 3 (1990), para. 4