

SCRIPT-ed

Volume 2, Issue 2, June 2005

The Protection of Expressions of Folklore Through the Bill of Rights in South Africa

E.S Nwauche^{*}

Abstract

This paper uses the Bill of Rights in the Constitution of the Republic of South Africa 1996 and the jurisprudence that has developed in the course of its application to demonstrate that a human rights framework for the protection of expressions of folklore is a viable, or relatively better, framework than protection through existing intellectual property and sui generis regimes.

DOI: 10.2966/scrip.020205.223

© ES Nwauche 2005. This work is licensed through [SCRIPT-ed Open Licence \(SOL\)](#).

^{*} Associate Professor of Law, Rivers State University of Science and Technology, Nigeria, and

Visiting Professor of Law, North West University, South Africa. This paper is a revised version of a lecture delivered at the AHRC Research Center for IT and IP law University of Edinburgh on the 7th of December 2004.

1. Introduction

This paper uses the Bill of Rights in the Constitution of the Republic of South Africa 1996 and the jurisprudence that has developed in the course of its application to demonstrate that a human rights framework for the protection of expressions of folklore¹ is a viable, or relatively better, framework than protection through existing intellectual property and *sui generis* regimes. The principal basis of protection is the right to intellectual property which can be located in the right to language and culture found in s 30² and the right to linguistic religious and cultural communities provided for by s 31³ of the Constitution on the one hand and rules of customary law on the other hand. While article 15(1) of the International Covenant for Economic Social and Cultural Rights (ICESCR) provides for the right to intellectual property, its substantive content is undergoing elaboration. Since a general Comment of the Committee on Economic Social and Cultural Rights (CESCR) could be of great persuasive authority for South African courts, I examine the *Draft General Comment No 18*⁴ of Article 15(1)c and its implications, and offer an alternative interpretation that ensures protection and public access to expressions of folklore for creativity and development.

This paper is structured as follows, after the introduction in part I, part II examines the protection of expressions of folklore through existing intellectual property and *sui generis* regimes. This examination identifies the shortcomings of the framework and forms a basis for the discussion of the merits of a human rights protection in part III. Part III of the paper interprets the meaning of the right to intellectual property and compares this with the interpretation put forward by the *Draft General Comment No 18*. Part IV of the article examines the protection of folklore in South Africa.

¹ A fairly satisfactory definition of expressions of folklore is that offered by the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions 1982. Hereinafter the *Model Provisions*. The *Model Provisions* define expressions of folklore as follows: “ Expressions of folklore means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community, or by individuals reflecting the traditional artistic expectations of such a community, in particular

(a) verbal expressions, such as folk tales folk poetry, and riddles; (b) musical expressions such as folk songs and instrumental music; (c) expressions by action such as folk dances, plays and artistic forms of rituals whether or not reduced to a material form; (d) tangible expressions such as productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basket weaving, needlework, textiles, carpets, costumes, musical instruments and architectural forms.”

² Section 30 of the Constitution of the Republic of South Africa provides that “ Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision in the Bill of Rights.”

³ Section 31 of the Constitution of the Republic of South Africa provides “ (1) Persons belonging to a cultural, religious and linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

⁴ On file with author. The general comments on the ICESCR is issued by the Committee on Economic Social and Cultural Rights which is made up eighteen experts whose function is to assist the United Nations Economic and Social Council discharge its functions in implementing the Covenant.

Beginning by considering the existing protection through intellectual property rights and through the Bill of Rights. With respect to the latter it examines the effect of the exclusion of the right to intellectual property in the Bill of Rights of the South African Constitution and then considers direct protection by s 30 and 31 of the Constitution as well as indirect protection by customary law. Certain features of the constitutional enforcement of human rights conclude this section. Part V calls for an integrated framework of human rights protection against the background of the international and comparative significance of the South African system.

2. An Overview of the Protection of Expressions of Folklore

2.1 Protection Of Expressions Of Folklore Through Existing Intellectual Property Rights

Mrs. Kutty in her study for the World Intellectual Property Organisation captures the essence of folklore protection:

“Every nation claiming to be part of the civilized world is proud of its cultural heritage. Folklore is probably the most important and well-acclaimed component of the cultural heritage of a nation...Technological developments in the 1980’s especially in the fields of sound and audiovisual recording, broadcasting, cable television and cinematography, posed a global threat to the hitherto sacrosanct world of cultural heritage. Expressions and elements of folklore were subjected to wide-scale commercial exploitation without any economic benefit flowing to the community who were the creators and preservers of the folklore. Minimal respect or regard were shown to the custodians of the folklore in the commercialization process...commercial exploitation has been viewed as a threat to cultural heritage mainly in developing countries. The perception of some of the developed countries in this regard is one of pragmatism and based on the notion that expressions of folklore with origins dating back to the distant past, have fallen into public domain and are outside the purview of protection.”⁵

The most suitable form of intellectual property right to protect folklore is obviously copyright but certain requirements of copyright such as author, originality, fixation and the limited term of protection make it difficult for expressions of folklore to be a proper subject of copyright protection.⁶ The fact is that the collective timeless and oral

⁵ “ A Study on the Protection of Expressions of Folklore” WIPO/GRTKF/STUDY p.1 (WIPO Geneva 2002) Available at www.wipo.int/tk/en/studies/culturalexpressions/study/kutty.pdf Hereafter *Kutty*. See also R.K Paterson and D.S Karjala “ Looking beyond intellectual property in resolving protection of the intangible cultural heritage of indigenous peoples” 11 *Cardozo J. of Int’l and Comp. Law* 633, 636-638. Hereafter *Paterson & Karjala*. See also P. Kuruk “ Protecting Folklore under modern intellectual property regimes: A reappraisal of the tensions between individual and community rights in Africa and the United States” 48 *American University Law Review* 769 ((Hereafter *Kuruk I*) at p. 770-773.

⁶ See for example article 5 of the Copyright Law of Ghana which stipulates that (1) ‘works of Ghanaian folklore are hereby protected by copyright. (2) The rights of authors under this law in such folklore are hereby vested in the Republic of Ghana as if the Republic were the original creator of the works’ It is arguable that this amounts to a legislative *sui generis* protection of folklore. See A.O Ametgacher

nature of expressions of folklore, present problems for copyright protection. Yet some attempts have been made in using copyright law. In the Australian case of *Payunka and Others v Indofurn Pty Ltd.*⁷ indigenous artists sued a company for copyright infringement because they had imported carpets that had reproduced their works, which embodied their clan images. One of the issues that confronted the Court was whether a work that incorporated pre-existing traditional designs and images was original and subject to copyright protection. The court held that “ although the artworks follow Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality”⁸ The court was flexible in its interpretation of the term ‘original’ which is generally of a low threshold in many jurisdictions. However other requirements for copyright protection cannot be easily met and this includes moral rights protection.⁹

In addition to copyright, trade marks, and designs offer some form of protection to expressions of folklore. While communities may seek to register their names and symbols for use in their commercial activity, it is often difficult to stop the use by others of these names and symbols. The fact that trade mark registration is dependant on commercial activity is another major obstacle because of the limited engagement of communities in trade. This is also true of industrial designs.¹⁰

It can therefore be validly concluded that the possibility of protecting expressions of folklore within existing intellectual property regimes is indeed a difficult if not impossible process as it will entail a slow and doubtful incremental process largely dependant on judicial interpretation.¹¹ Legislative intervention short of *sui generis* solutions will also suffer the same fate.

While there is broad consensus that the existing IP system is unsuitable for expressions of folklore, the underlying reasons for this conclusion differ. The opinion of two different groups is instructive in the manner it mirrors the underlying tensions in this area, which gives meaning to, and justifies, the need for protection within a human rights framework. The first group, are the communities, including indigenous peoples, who find the existing IP system unsuitable because it does not fully protect their communal intellectual creations. The second group includes those who are largely dissatisfied with the existing IP system and point to the dangers of protecting expressions of folklore with a system that commodifies information through exclusive

“Protection of folklore by copyright- a contradiction in terms” XXXVI *e-Copyright Bulletin* 33. Hereafter *Ametgatcher*.

⁷ (1994) 130 ALR 659. (Also known as the *carpets case*).

⁸ Ibid at p. 665. See also *Yumbulul v Reserve Bank of Australia* (1991) 21 *IPR* 482, 490. See M. Hall “Case Note: *Bulun Bulun v R&T Textiles*” Vol.16 No.3 *Copyright Reporter* 124; S. McCausland “Protecting communal interests in indigenous artworks after the *Bulun Bulun case*” July 1999 *Indigenous Law Bulletin* 5; V.J Vann “Copyright by way of fiduciary obligation” 2000(3) *Media Arts and Law Review* 13.

⁹ See T. Janke *Minding Culture* Case Studies on Intellectual Property and Traditional Cultural Expressions. (World Intellectual Property Organisation, Geneva 2003) 22. Hereafter *Minding Culture*.

¹⁰ T. Janke in *Minding Culture* 81. See also K. Weatherall “ Culture, Autonomy and Djulinbinyamurr: individual and community in the construction of rights to traditional designs” 64 *MLR* 215.

¹¹ See for example *Paterson & Karjala*, note 5, 635.

proprietary interests thereby restricting the flow of information that is necessary for creativity and progress of mankind.¹²

2.1 Protection of Expressions of Folklore Through Sui Generis Regimes

The reaction of most of the developing world to the inadequacy of existing IPR protection of expressions of folklore found manifestation in sui generis regimes especially the *Model Provisions*. At least in Africa, the protection of expressions of folklore is legislatively based and draws considerable inspiration from the *Model Provisions*, which I use as my frame of analysis.¹³

The definition of expressions of folklore, of many of the national legislations of African countries, is based in different degrees on the definition offered by the *Model Provisions* especially the description of what expressions of folklore mean.¹⁴ For example the Copyright Act of Kenya¹⁵ defines folklore as

*“a literary, musical or artistic work presumed to have been created within Kenya by an unidentified author which has passed from one generation to another and constitutes a basic element of the traditional cultural heritage of Kenya and includes – (a) folktales, folk poetry and folk riddles; (b) folk songs and instrumental folk music; (c) folk dances and folk plays; and (d) the production of folk Art, in particular drawings, paintings, sculptures, pottery, woodwork, metal ware, jewelry, handicrafts, costumes and indigenous textiles”*¹⁶

There are other national legislations that do not describe what folklore is but define it in such a way that mirrors its cultural heritage. For example the Mozambique Copyright Act¹⁷ defines folklore as “works created on the national territory by anonymous authors or an unknown group, transmitted by successive generations and constituting one of the fundamental elements of the traditional cultural heritage.”¹⁸

Where the undertone of the national cultural patrimony is not very evident, such as in the Nigerian and Tanzanian legislations, any doubt of its influence is erased by the vesting of the folklore in the State or its institutions. Thus the Nigerian Act vests the

¹² See for example M. Brown “Can culture be copyrighted” 39 *Current Anthropology* 193, 196. See also Paterson & Karjala, *ibid* at p. 651-652 See also R.Coombe “Fear hope, and longing for the future of authorship and a revitalized public domain in global regimes of intellectual property” 52 *DePaul L. Review* 1171.

¹³ This section has also benefited from the responses of African countries to the Questionnaire on National Experiences with the Legal Protection of Folklore. Available at www.wipo.int/tk/en/questionnaires/ic-2-7/index.html. Hereafter *Questionnaire*.

¹⁴ See definition in note 1.

¹⁵ No 12 of 2001.

¹⁶ See also s 28 of the Nigerian Copyright Act Cap 68 Laws of the Federation of Nigeria 1990 (as amended) and s 24 of the Copyright and Neighbouring Rights Act No 6 of 1999 of Tanzania.

¹⁷ Law No 4/2001 of February 27 2001, Approving Copyright and Repealing the Code of Copyright Approved by Decree-Law No. 46 of April 27 1966.

¹⁸ The Copyright Act of Senegal 1996 also adopts this definition and provides that ““folklore” means all literary and artistic works created by authors presumed to be of Senegalese nationality, passed from generation to generation and constituting one of the basic elements of the Senegalese cultural heritage”

administration of folklore in the Nigerian Copyright Commission¹⁹, while in Tanzania it is the National Arts Council of Tanzania.²⁰ African countries that define folklore as the cultural patrimony of the nation also express this undertone in the vesting of the folklore resources on the State. Senegal for example authorizes the Copyright Agency known as BSDA to authorize utilization of folklore.

Expectedly none of the legislations of African countries completely bans the utilization of expressions of folklore, rather certain uses are possible on authorization²¹. Indeed some uses are free if they are regarded as exceptions and limitations. The Tanzanian legislation, for example, provides in s 25 that, any application, reproduction and distribution of copies of expressions of folklore; communication to the public - including recitation, performance, broadcasting or distribution by cable²²; when made with both²³ gainful intent and outside their traditional and customary context must obtain authorization.²⁴ However, neither the *Model Provisions* nor the legislations offer a definition of traditional or customary context. *Kutty's* definition of the two terms offers an excellent guide. She submits that:

*“ Traditional contexts refer to the way of using an expression of folklore in its proper artistic framework based on the continuous use of the community like the use in ritual dances or ways of worship forms. Whereas customary context refers to uses in the context of day-to-day life of the community like usual ways of selling tangible copies of tangible expressions of folklore ”*²⁵

These legislations offer a number of exceptions and a good example is provided for in s 28(2) of the Nigerian legislation. The exceptions therein include: the doing of the acts of utilization by way of fair dealing for private and domestic use, subject to the condition that if the use is public, it shall be accompanied by an acknowledgment²⁶

¹⁹ Section 29.

²⁰ Section 29 of the Copyright and Neighbouring Rights Act. The National Arts Council of Tanzania is established by section 3 of the National Arts Council of Tanzania Act 1984.

²¹ Article 3 of the *Model Provisions* lists the utilizations which are to be permitted to include: (i) publication, reproduction and any distribution of copies of the expressions of folklore, and (ii) any public recitation and performance, any transmission by wireless means or by wire, and any other form of communication. These utilizations must be authorized when they are for gainful intent and when it is outside the traditional or customary context.

²² These uses do not seem to contemplate the use by sale or offer for sale. It is possible that a generous interpretation of the enumerated uses could contemplate these uses.

²³ The conditions are not cumulative and the two must exist before authorization is sought. *Kutty* is correct to assert that: “ It is to be noted that even if there is gainful intent, if utilization is within the traditional or customary context, it is not subject to authorization. Again, even the members of the community are not entitled to utilization without authorization when it is outside the context and also with gainful intent. Note 5 p. 13.

²⁴ Article 8 of the Senegalese law restricts authorization only to public performance direct and indirect fixation of expressions of folklore when made for profit motives. The traditional and customary context is absent. S 28 of the Nigerian Act incorporates the twin requirements of gainful intent and the traditional and customary context.

²⁵ Note 5, p.13.

²⁶ See s 28(3) of the Nigerian legislation.

of the title of the work and its source; the utilization for the purposes of education, illustration in or creation of an original work of an author; and incidental utilization.²⁷ Civil remedies and criminal sanctions exist for breach of the provisions for utilisations of expressions of folklore. The criminal sanctions take the form of imprisonment, fines, and seizures of offending articles.²⁸

Available evidence indicates that the legislative provisions on folklore have not had much impact. The legislation has not been vigorously used either in the application for utilization²⁹ or in the imposition of sanctions in the event of breach. There may be many reasons for this state of affairs. It may well be that the legislative framework is couched in framework form only³⁰, requiring detailed legislative and/or judicial elaboration of content to make the system effective. Another reason is the difficulty of proving that a work is an expression of folklore, it is difficult in certain cases to prove that the alleged expression is indeed an expression of folklore.³¹ Some of the African

²⁷ See s 26 of the Tanzanian legislation which in addition provides examples of incidental utilization as utilization of expressions of folklore that can be seen or heard in the course of a current event for the purpose of reporting on the current event by means of photography broadcasting or sound or visual recording and utilization of objects containing the expressions of folklore which are permanently located in a place where they can be viewed by the public through including the image in a photograph, film or television broadcasting.

²⁸ See s 29 and 29A of the Nigerian Act; s 42(2)-(6) of the Tanzanian Act. Whilst the term of imprisonment in Nigeria is one year, it is three years in Tanzania. Article 45 of the Senegalese law only imposes a fine double the size of the royalties and a fine of 5000CFA.

²⁹ See for example *Ametgacher*, note 5, who recounts the now famous request to the Copyright Society of Ghana by Paul Simon in 1990 to allow him use a popular tune called 'Yaa Amponsah.' There does not seem to have been any other such application known to this author.

³⁰ This is the conclusion reached elsewhere with respect to the Nigerian Act. See E.S Nwauche "A critical evaluation of the provisions of the Nigerian copyright law on folklore" 33 *IIC* 599. See also the response of Kenya to the *Questionnaire* note 13.

³¹ Two practical examples illustrate this point. In the assessment of the application made by Paul Simon, note 29, the Copyright Society of Ghana had a difficult time in determining that the highlife tune was indeed a work of folklore and had to disregard its earlier publication that the copyright to the work belonged to Jacob Sam. It is obvious that if Paul Simon had not sought approval this may not have happened. See *Ametgacher*, note 5, p. 35. The second example concerns an alleged infringement of copyright in the Benin Republic case of *Akpovi Athananse v Kidjo Angelique* (Reported by H.G Adoukonou) in *XXXVI e Copyright Bulletin* 58. The reported facts of the case are that the defendant was found liable for having infringed the musical works of the plaintiff. Her defence was that the alleged works were folklore and fell within the public domain. The District Court of Cotonou held that even if the works were expressions of folklore the plaintiff had obtained the copyright in them and had even filed same with Beninese Copyright Office (BUBEDRA) and that even if the defendant had the intention of using the works she should not have reproduced in full the original or derivative work of the first author on the grounds that the defendant was inspired by folklore. Furthermore the Court held that the Benin Copyright Law of 1984 stipulates that any author wishing to use folklore must first make a declaration with BUBEDRA which would have verified that the work fell within the public domain. The conclusions of the court raise a number of issues: first suppose the words used by the plaintiff are the same words used by the expression of folklore, then it would not be wrong for the defendant to have used the same wordings. What rights does the plaintiff have if his work is an exact copy of the expression of folklore? Why should the plaintiff obtain copyright in the folklore and bar everybody else from using the work? The court refused the plea of the defendant because the onus of proving that the folklore existed before the work of the plaintiff was not discharged according to Beninese evidence law. Moreover the plaintiff did not register the folklore nor obtain authorization from BUBEDRA. This case exhibits the herculean task before any person who wishes to prove that an expression of folklore existed prior to and is a copyrighted work. It is submitted that customary law may be of assistance here. We shall return to this point later.

countries response to the *Questionnaire* indicates that documentation is regarded as an answer to the problem of proof and identification³². There is no doubt that the proper identification of expressions of folklore will occupy courts and arbitral tribunals in claims for the infringement of copyright and will greatly hamper protection.

A further plausible reason lies in the ownership of the expressions of folklore, and the right of enforcement, which are endowed on national governments and their agencies. Thus the institutional capacity of the State or agency becomes of issue. A weak, inexperienced, and/or under funded, government department or agency will be incapable of effective protection. It seems to be too much to saddle copyright offices- who invariably deal with expressions of folklore- with the responsibility for the protection of folklore in addition to other responsibilities of copyright protection and enforcement. It is very possible that the desire for enforcement is lost in bureaucracy and their zeal cannot be compared with that of the communities, who as creators are worried that their expressions of folklore have been misappropriated. Ultimately the State or its agency will need the cooperation of the affected community in any enforcement procedure, it might have been better to endow the right of ownership and protection on communities, allowing them to request national governments to provide logistical support as needed. The disconnection between governments and creator communities is further exacerbated by the fact that many of the legislative frameworks do not contemplate any economic benefit for communities beyond the mandatory acknowledgement of source.³³ It is instructive that the *Model Provisions*, contemplates communities being the repository of ownership rights, but national cultural patrimony may be the reason many of the African legislations prefer governments and their agencies. Furthermore, endowing the State with these rights may be explained on the grounds that these communities are not able to enforce their rights, and/or that the multiple sources of origin of certain expressions of folklore set the stage for conflict amongst communities that claim ownership of the folklore. Whatever the reason it seems that the present state ownership is of limited utility and should be reviewed.

While the exceptions and limitations, examined above, are commendable they in no way address the critical problem of which of the expressions of folklore are really in the public domain? The challenge here is the criteria for qualification. It could be the nature of the work and perhaps its spiritual and economic significance or even the extent of its usage. It certainly will be difficult to use citizenship as a criterion even though this is attractive to nationals of States. For example in many African countries expressions of folklore have become a critical source of content in local entertainment industries. Requiring nationals to obtain permission seems more imagined than real and may partly be the reason for the ineffective system.³⁴ It is possible to realize

³² See The *Questionnaire*, note 13. See response of Ghana, p. 5. See also the Namibian response at p. 6.

³³ The Nigerian Act makes no such accommodation for the economic interest of communities. The Tanzanian Act in s 28(b) authorizes the National Arts Board to collect tariffs on the grant of authorization for the use of expressions of folklore but states that the fees should be used for the purpose of promoting or safeguarding national culture. Article 9 of the Senegalese law seeks to compensate the person who assisted in the collection of the expressions of folklore and the BSDA which is mandated to spend the money for cultural and welfare purposes for the benefit of authors.

³⁴ See *Ametgatcher* note 5, who reproduces written comments of the Committee on Misgivings of Music Industry Practitioners (CMMIP) on the Ghanaian Copyright Bill: "It is unfair that Ghanaians are not exempted from paying for the use of Ghanaian folklore which is a heritage collectively bequeathed to all Ghanaians by their forebears. The Committee is therefore vehemently opposed to Ghanaians

adequate protection if the reason is the economic and contextual exploitation of the expressions of folklore as found in the *Model Provisions*. It is desirable that when a national of a State is engaged in either of these two activities, authorization should be sought. It cannot be right that only citizens can engage in the usage of the cultural patrimony of a country. When they seek to become economic agents or use the expressions of folklore outside a traditional or customary context they should obtain authorization.

The indefinite duration of the protection of folklore becomes a critical obstacle in determining when these works will truly be in the public domain. The necessity of the public domain as a source of creativity has already been pointed out and must be preserved if the *sui generis* systems are not to become stifling. One way of doing this is to construe the exceptions in a robust manner such that the public domain is of value. Also, in multiethnic societies, there are expressions of folklore that have entered into the national domain so that it is difficult for any one community to claim that it is its expression. The manner in which trademarks become generic names might be instructive here.

To conclude the discussions in this section, there is no doubt that the legislative regimes for the protection of folklore in many of the African countries have created some potential for the protection of these intellectual creations. Whether they are effective in the light of the defects discussed above is questionable. Enormous administrative and intellectual resources must be expended to make the system feasible.

3. The Protection of Expressions of Folklore in a Human Rights Framework

The protection of expressions of folklore within a human rights framework has always been a viable option³⁵ and arguably better than the existing intellectual property and *sui generis* regimes. There may be a number of reasons why resorting to a human rights framework has not been a preferred option. Firstly, this was largely due to the fact that the content of the rights, which could underpin this protection, was largely obscure in regional and international human rights conventions. Secondly, it was also a function of the belief that human rights could only be enforced against a State, giving the latter enormous power relative to the individual.³⁶ Fortunately, as we shall examine later, the jurisprudence of human rights contemplates what South Africa has termed 'horizontal application', which is the enforcement of human rights by

paying any fees or getting permission to use Ghanaian folklore... What the proposed Bill is saying in effect is that a Ghanaian weaver must seek permission and pay to weave kente or a writer to use Kweku Ananse stories in screen plays." At p. 36.

³⁵ See R. Coombe "Intellectual property human rights and sovereignty" 6 *Ind. J. Global leg. Studies* 59; R.L. Gana (Okediji) "Has creativity died in the third world? Some implications of the internalization of intellectual property" 24 *Denv. J. Int'l L. & Pol'y* 109 (1005); "The myth of development, the progress of rights: Human rights to development & ownership of intellectual property" 18 *L & POL'Y* 315 (1996).

³⁶ See for example, *Kuruk I* note 5 p. 836: "Nevertheless the human rights provisions remain of limited utility in the protection of folklore because they are directed mainly towards state governments and establish no clear basis for application to transnational corporations and individuals engaged in the unauthorized use of folklore"

individuals/groups against individuals and groups. Having crossed this threshold, the next point to consider is the type of rights that could become the means of enforcement. Without doubt the right to intellectual property is relatively more suited, especially as it is formulated in article 15(1) of the ICESCR and the interpretation that I advance of its content. That is why in the latter part of this section I also consider the interpretation put forward by *Draft Comment No. 18*. In this regard, two salient features of my interpretation are germane: the nature of the balance between the private reward and public benefit components found in article 15(1); and the manner of recognition of intellectual contributions.

The right to intellectual property is a specific expression of cultural rights since it seeks to protect one of its manifestations. A human rights framework privileges all communities and not just indigenous communities. It was largely through the fight for the recognition of indigenous rights³⁷ that the issue of the protection of traditional knowledge and expressions of folklore gained currency. Every community has expressions of folklore and should be able to protect it if it so desires.³⁸

3.1 The Right to Intellectual Property

This can be found in article 15(1) of the ICESCR which provides that:

“ 1.The States Parties recognize the right of everyone “(a) to take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”³⁹

In my opinion sub section 1(b) and subsection 1(c) constitute the right to intellectual property. Two issues form the core of my interpretation of article 15(1) as they relate to expressions of folklore. They are the balance inherent in article 15(1)b & 15(1)c and the manner of recognition of intellectual contributions as intellectual property rights. With respect to the first point there is in article 15(1)b & (c) the balance between the private reward for intellectual activity and the public benefit of access to the benefits of scientific progress. The nature of the appropriate balance is often the challenge of all intellectual property regimes. Article 15 (1) does not provide a clue as to how this balance is to be achieved. However the interpretation of a right to intellectual property must be undertaken within a human rights framework and in this framework it can be submitted that the appropriate balance is one that regards the right to private reward and public benefit as *equal*.⁴⁰ Thus in advocating the

³⁷ See the excellent discussion of this process in the following articles: L. Helfer “ Human rights and intellectual property: Conflict or co-existence” 5 MINN. INTELL. PROP. REV 47 (2003); D. Weissbrodt & K. School “ Human rights approach to intellectual property: The genesis and application of Sub-Commission Resolution 2000/7” 5 MINN. INTELL. PROP. REV 1 (2003).

³⁸ See for example the report that a group of historians and politicians have begun a campaign to rehabilitate Macbeth by claiming that William Shakespeare has unfairly maligned his reputation. See the Daily Telegraph (UK) 3rd February 2005.

³⁹ See also article 27 of the Universal Declaration of Human Rights.

⁴⁰ See Phillippe Cullet “ Human rights and intellectual property rights: Need for a new perspective” *IELRC Working Paper 2004-4*. At p. 6 he states that: “ Article 15(1) puts all the rights on the same level and can in fact probably be read as putting everyone’s right to benefit from the development of science

recognition of communal intellectual creations, the entitlement of the public to use an expressions of folklore should be acknowledged, and as argued above of *equal* tenor. It is doubtful if this equality can be met by exceptions and limitations as found, for example, in *Model Provisions* and African legislations.

The second aspect of my interpretation of article 15(1) lies in the manner in which it treats intellectual contributions. As stated earlier, a right to intellectual property recognizes *all* intellectual contributions as deserving of protection, whether a particular State or Convention accords that protection depends on a number of factors. Accordingly the intellectual contributions of communities such as expressions of folklore would be recognized as their right to intellectual property. The recognition of this right, as argued would vary. The countries that have recognized this right in the form of *sui generis* legislation, would be giving protection to this right. The strength of this submission is undergoing considerable scrutiny in the course of the adoption of the *Draft General Comment No. 18*. The CESCR in 2001 adopted a statement on intellectual property rights and human rights as a first step towards adopting a general comment.⁴¹ This statement indicated that it was designed to identify some of the key human rights principles deriving from the Covenant that are required to be taken into account in the development interpretation and implementation of contemporary intellectual property regimes. In paragraph 4, the statement encourages the development of intellectual property systems and the use of intellectual property rights in a balanced manner that meets the objectives of providing protection for the moral and material interests of authors, and at the same time promotes the enjoyment of these and other rights.

3.2 The Draft General Comment No 18 on Article 15(1)c of the ICESCR

The Draft General Comment concentrates on article 15(1) c of the ICESCR. It seeks to assess the recognition of the creation of intellectual products as human rights. There is no doubt that article 15 1 (c) can be interpreted in such a way that it excludes expressions of folklore being a community production of intellectual activity. This seems to be the thrust of the draft general comment. The said article uses the word 'author'. Paragraph 10 of the Draft Comment recognizes that

“Although it follows from the wording of article 15 1 paragraph (c) (“everyone”, “he”, “author”), that only the individual creator may claim protection of the moral and material interests resulting from any scientific literary or artistic production of which he or she is the author, this right can, under certain circumstances be enjoyed in community

as being more important than the interests and rights of authors/inventors.” Available at <http://www.ielrc.org/content/w0404.pdf> See also Okediji “The international relations of intellectual property: Narratives of developing country participation in the global intellectual property system” (2003) 7 *Singapore Journal of International and Comparative Law* 315, 345-346: Para 10. See also L.R. Helfer, note 39. A. Chapman “Approaching intellectual property as a human right: Obligations related to article 15 (1) (c)” XXXV *e-Copyright Bulletin* 4 (2001).

⁴¹ See Statement by the Committee on Economic, Social and Cultural Rights on Human Rights and Intellectual Property, November 2001, Annex XIII, Committee on Economic, Social and Cultural Rights Report of the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions, UN Doc. E/2002/22-E/C.12/2001/17. Hereinafter referred to as the 2001 Annex XIII Statement.

with other authors, for example in the case of authors belonging to ethnic, religious or linguistic minorities or indigenous communities”

It is evident that the expressions of folklore being a group creation is not contemplated by the comment and there is need to expand the meaning of “authorship” in this regard. Interpreting “any scientific, literary or artistic productions” paragraph 11 of the *Draft General Comment No 18* omits any reference to expressions of folklore. There are however sections of the *Draft General Comment No 18* that may assist in an interpretation that is purposive. For example paragraph 13-15 interprets the phrase “Benefit from the protection” and concludes that article 15 1 (c) constitutes a minimum standard of protection and States can adopt higher non-human rights protection standards in international treaties or in their domestic laws.

The *Draft General Comment No 18* has generated considerable controversy with regard to much of its content. For our purpose Dr Cullet advances an argument that is compelling:

“The inclusion of farmers and traditional knowledge holders in the scope of Article 15(1)c constitutes one of the few ways in which article 15(1)c can be made relevant to today’s challenges. As long as intellectual contributions are equated with existing intellectual property rights, article 15 (1)c can only serve to justify the existence of existing intellectual property rights and to limit debates concerning the impacts of intellectual property rights on the realization of human rights...there are inventors and innovators such as individuals and communities who constantly update and improve traditional knowledge that do not benefit from existing intellectual property regimes but deserve as much as other creators to benefit from the protection of the moral and material interests attached to their intellectual contributions.”⁴²

While the General Comment of the Committee is awaited, there is no doubt that if not drastically reworked to incorporate the intellectual contributions of communities it will deal a serious blow to the possibility of an integrated protection of expressions of folklore through a human rights approach.⁴³ States like South Africa who regard the General Comments of the CESCR as having great persuasive authority would lose a great source of inspiration and interpretation. A General Comment on article 15(1)c that recognizes communal intellectual protection would assist the beneficial interpretation of the right to intellectual property⁴⁴ as part of the s 30 and 31 rights.

⁴² Note p. 6.

⁴³ See Experts debate links between intellectual property and human rights” Vol. 8 no. 30 BRIDGES.

⁴⁴ See A. Chapman “ Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1) (c)” Discussion paper E/C.12/2000/12 (3rd October 2000) submitted to the Day of General Discussion organized in cooperation with the World Intellectual Property Organisation (WIPO) on 27 November 2000: “In contrast with the individualism of intellectual property law, a human rights approach also recognizes that an author, artist, inventor, or creator can be a group or a community as well as an individual ”

Even though a number of international treaties make provisions for cultural and intellectual property rights⁴⁵ South Africa is a signatory to the International Covenant on Civil and Political Rights⁴⁶, the International Covenant on Economic Social and Cultural Rights⁴⁷, and the African Charter on Human and Peoples' Rights.⁴⁸ The significance of South Africa's participation in the international human rights system lies in section 39(1)b of the Constitution provides which that: "When interpreting Bill of Rights a court, tribunal or forum ... (b) must consider international law." Therefore S 39(1)b obliges a court to consider international law as a tool for the interpretation of the Bill of Rights. In *S v Makwanyane* the Constitutional Court considered section 35(1) of the Interim Constitution⁴⁹ and said:

*"International agreements and customary international law provide a framework within which...[the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, Inter-American Commission on Human Rights and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions"*⁵⁰

The general comments on the ICESCR and the ICCPR can be said to fall under reports of specialized agencies. Indeed the Constitutional Court extensively reviewed general comments issued by the Committee on Economic Social and Cultural Rights on the interpretation and application of the ICESCR in the case of *Republic of South Africa v Grootboom*.⁵¹ Thus even though South Africa is not yet a State Party to the ICESCR and therefore has not incurred obligations including those under article 15 these obligations are of great persuasive force.⁵²

⁴⁵ See also the following (i) Article 29 of the Draft Principles for the Protection of Indigenous Peoples (ii) The UN Declaration on the Rights of Persons Belonging to National Ethnic, Religious and Linguistic Minorities; (iii) ILO Convention 169 Concerning Indigenous and Tribal Peoples in independent Countries

⁴⁶ South Africa signed this treaty on 3 October 1994 and ratified it on 10 December 1998.

⁴⁷ South Africa signed this treaty on 3 October 1994 but as yet has not been ratified.

⁴⁸ South Africa signed in 1995 and ratified it on 9 July 1996.

⁴⁹ Section 35(1) of the Interim Constitution is similar to s 39(1)b of the 1996 Constitution.

⁵⁰ 1995(3) SA 391(CC). (Para 9). See also J. Dugard 'The Role of International Law in Interpreting the Bill of Rights' (1994) 101 *SAJHR* 208.

⁵¹ 2001 (1) SA 46 (CC).

⁵² See s. 231 (2) of the 1996 Constitution. See also *Azaniaan Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 26; *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (CC).

4. Framework for the Protection of Expressions of Folklore in South Africa

4.1 Protection under existing intellectual property rights

4.1.1 Performers Protection Act 1967

The Performance Protection Act 1967 provides some protection for expressions of folklore. This is because a measure of protection is granted to performers in respect of their performances of literary, musical, dramatic, dramatico-musical artistic works and expressions of folklore. The term ‘expressions of folklore’ was introduced into the Performers’ Protection Act by the Performers’ Protection Amendment Act 2002. However, it does not define the term ‘expressions of folklore’. An obvious difficulty lies in how the expressions of folklore may be identified. Furthermore, the appropriation of folklore without permission is not protected, while certain acts with respect to the performance of the expressions of folklore are protected. This may be explained by the belief that by their performance the expressions of folklore become fixed in a material form. This is certainly plausible given the provisions of s 3 and 4 of the Performers’ Protection Act which requires that in order for protection to take place, the performance must take place, be it broadcast, live, or first recording. However, the fact remains that in reality it is not the performance that determines the expressions of folklore. Its existence will invariably predate the performance and the problem of identification remains. The uncertainty of what qualifies under this heading may have lead O.H Dean to conclude that:

“The fact that expressions of folklore are categorized as being a species of the genus ‘ literary and artistic works’ suggest that they too may be works ...many expressions of folklore have doubtless not been reduced to a material form and have been carried over from generation to generation by word of mouth and the like and it is open to question whether the legislature intended to exclude from the ambit of the Act these types of expressions of folklore. It is submitted that the ratio of the Act is that the performance giving rise to protection must be ‘scripted’ and that a performance of an expression of folklore which is true to the traditional expression must be regarded as being ‘scripted’ and therefore of being equated with a ‘work’ in the copyright sense.”⁵³

The protection given to performers⁵⁴ is commendable but raises fundamental problems in that it neglects the communal creators of the expressions of folklore. The fact that a performer will receive the protection of the law while the creator is denied

⁵³ *Handbook of South African Copyright Law* (Juta, Cape Town 1992) 1-112.

⁵⁴ See section 7 of the Performers Protection Act which grants performers a term of protection for fifty (50 years) calculated from the end of the calendar year in which the performance took place or, if the performance was included in a sound recording, in which it was so incorporated. Section 5 of the Act empowers the performer to control certain acts with respect to his performance. These acts include broadcasting or communicating his unfixed performance to the public; making a recording of his live performance; making a reproduction of a recording of his performance; by means of a fixation of a performance published for commercial purposes without payment of a royalty to the performer broadcast the performance and cause the performance to be transmitted by a diffusion service or cause any communication of the performance to the public.

protection tends to suggest that South Africa regards these forms of intellectual activity as lying in the public domain and an available corpus for creativity.

4.1.2 The National Environmental Management: Biodiversity Act 2004

The uncertainty created by the lack of a definition of expressions of folklore may in some sense enable protection of expressions of folklore under the National Environmental Management: Biodiversity Act 2004. This protection depends on whether the definition of expressions of folklore is contemplated by the Act.⁵⁵ Technical folk which are expressions of folklore, that support what are known as traditional knowledge, are important in this regard. Section 81 of the Act requires a person to obtain a permit before engaging in bioprospecting. Bioprospecting is defined by section 1 of the Act in relation to indigenous biological resources as: research on, or development, or application, of indigenous biological resources for commercial or industrial exploitation; it includes the systematic searching, collection, or gathering of resources, or making extractions from resources, for purposes of research, development or application; the utilization for purposes of research of any information regarding any traditional uses of indigenous biological resources by indigenous communities. The prospects for protecting folklore by the Act are however very limited in relation to technical folk, and therefore excludes a significant part of expressions of folklore.

4.2 The Protection of the Expressions of Folklore Through the Bill of Rights of the Constitution of South Africa 1996

4.2.1 The Omission of the Right to Intellectual Property in the Bill of Rights of the South African Constitution

A comparison of s 30 and 31 of the South Africa Constitution with article 15(1) of the ICESCR and article 27 of the ICCPR shows that article 15(1)a of the ICESCR and art 27 of the ICCPR are expressly incorporated in the Constitution. Can it therefore be said that the other subsections of article 15(1) of the ICESCR are of no significance in the Bill of Rights? It is submitted that to answer in the positive would be to negate the provisions of s 39(1)b of the constitution. It is also important to point out that the South African Constitution does not expressly recognize the right to intellectual property. The Constitutional Assembly, which wrote the South African Constitution⁵⁶ rejected the request to grant protection to intellectual property in the Bill of Rights.⁵⁷

⁵⁵ A leading South African professor of intellectual property law submits that: “ without entering the debate about the precise definition of the term ‘ traditional knowledge’ ... I use the term in its widest possible sense to include tradition based literary; artistic and scientific works; performance; inventions; scientific discoveries; designs; marks; names and symbols; undisclosed information; and all other innovations and creations resulting from intellectual activity in the industrial scientific literary or artistic fields” (Footnotes omitted). C. Visser “ Some thoughts on making intellectual property work for traditional knowledge” (2002) 14 *SA Merc LJ* 656.

⁵⁶ The Constitutional Assembly was set up in consonance of S 68(1) and (2) of the Interim Constitution. The section provides that “ (1) The National Assembly and the Senate, sitting jointly for the purposes of this chapter shall be the Constitutional Assembly. (2) The Constitutional Assembly shall draft and adopt a new constitutional text in accordance with this chapter.

⁵⁷ The clause which was sought to be included was framed thus: “ Everyone has the right to the protection of the moral and material interest resulting from any industrial scientific literary or artistic production of which they are creators, or brand equity of which they are proprietors” See O.H Dean “ The case for the recognition of intellectual property rights in the Bill of Rights” 1997 (60) *THRHR* 105.

In the proceedings brought by the Constitutional Assembly before the Constitutional Court to certify the Constitution⁵⁸, as being in compliance with the Constitutional Principles set forth in Schedule 4 to the Interim Constitution⁵⁹, this request was also made.⁶⁰

The Constitutional Court rejected the assertion and held that the right to hold intellectual property is not a universally accepted right.⁶¹ While this decision has been criticized⁶² on the fairly plausible ground that the right to hold intellectual property is universal⁶³, it is submitted that the Constitutional Court has some merit, albeit for other reasons, which may not have been obvious at the time of the judgment. It seems evident that what was intended as the right to hold intellectual property was for the benefit of the individual. According to O.H. Dean:

“The fundamental right concerning IP is the right of the individual to have the fruits of intellectual effort clothed in a form which can become the subject of property rights. Put differently, the fundamental right, which related to IP is the right to have the fruits of individual’s intellectual activity created into a thing (albeit an incorporeal thing) over which he can exert powers of ownership. The content of that ownership is entirely dependant upon the law which creates the intellectual thing and which specifies the powers which the creator or author can exercise in relation to it...”⁶⁴

It is clear that communal intellectual property was not under consideration. The fundamental problem with this contention was that the right to hold intellectual property was conceived to cover the *existing* intellectual property regime, which only recognizes individual intellectual creations. A better way to couch the right to hold intellectual property is to make it possible for any such activity to be recognized and protected by the law in defined circumstances.

The fact that the right to intellectual property was not recognized should not and is not fatal. A robust intellectual property protection exists in South Africa, even if as we shall see later no extensive protection exists for expressions of folklore. The inclusion of the right to hold intellectual property would have at least been a step in the right direction. *4.2.2 Direct Protection Under The Right to Language and Culture and The Right to Cultural Religious and Linguistic Communities*

As correctly observed by Dean, this clause is based on article 27(1) of the Universal Declaration of Human Rights.

⁵⁸ The certification process was mandated by section 71(2) of the Interim Constitution.

⁵⁹ See *In re: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253(CC)

⁶⁰ See O.H Dean, note 58, pp.105-106.

⁶¹ Note 60 (para 75).

⁶² See O.H Dean, note 50 and T. Roux ‘Property’ in MH Cheadle et al (eds) *South African Constitutional Law: The Bill of Rights*, (Butterworths 2002) 451.

⁶³ There are many countries, which protect the right to hold intellectual property. See for example article XIV(13) of the Philippine Constitution. A useful survey of the types of recognition of the right to hold intellectual property is conducted in O.H Dean, *ibid*, pp. 116-118

⁶⁴ *Ibid* at p.113.

To begin this part I shall determine the content of the s 30 and s 31 rights to see if that includes the expressions of that culture such as folklore? It is submitted that any definition of culture must necessarily include its expressions such as folklore. In the first place s 30 can be said to protect the individuals right to culture while s 31 protects the group⁶⁵ right to culture. What then is the relationship? The relationship seems to lie in the fact that as culture is the result of a group activity, an individual will be unable to enjoy it except it is preserved and protected. In our context we can argue that for a member of a group to enjoy the expressions of folklore, that expression of folklore must be in existence. Accordingly any activity that threatens its existence and its integrity must be of concern. It is further submitted that an inappropriate use of the expressions of folklore can be a source of considerable emotional and spiritual discomfort thus diminishing the enjoyment of the expressions of culture. Therefore a combined reading of the two sections leads clearly to the conclusion that expressions of folklore are part of the culture of a community and are therefore part of the content of the s 30 and 31 rights.

While they seem related, a closer look at the provisions seems to indicate that they may mean different things and that the right to culture is really found in s 31. S 30 stresses the choice of the individual, it may be argued that it approves the fact that an individual may adopt a language and culture that is not the consequence of his birth. Even if subject to other provisions of the Bill of Rights, it may be a constitutionally guaranteed process of *access*.⁶⁶ The critical point becomes the choice of the individual. Correspondingly it must be that the different cultural groups in South Africa are under a duty to accept whoever chooses to participate in their culture. Any attempt to restrict the enjoyment of a non-member of their cultural group must therefore be justified under s 36 of the Constitution.⁶⁷ A few questions are pertinent here. Supposing the person uses the expressions of folklore of a group he does not belong to in the production of a work of art for sale, will it be possible for that group to oppose that usage? The provisions of s 30 may be a transformative idea, and in the South African context may have its end as the promotion of a just and equal society given South Africa's racial and apartheid past.⁶⁸ What is the nature of the s 31 right? Is it positive in the sense that proactive measures must be taken or are is it negative in the sense that the State is obliged not to interfere with its enjoyment? The authors Waal, Currie and Erasmus wonder as well:

“Is s 31 more than simply a right to be left alone to practice culture, language and religion? Does the right require only that such practices are tolerated, but not that they are supported? The answers to these questions are a matter of interpretation. On the face of it, s 31 is phrased as if no more than a negative liberty. But constitutional interpretation requires one to look further than the phrasing...Arguably

⁶⁵ See the case of *Christian Education South Africa v Minister of Education* 2000(4) SA 757 (CC), for the definition of a community. The Constitutional Court held that a group would qualify as ‘community’ in the sense used in the Constitution if it associated on the basis of language, culture and religion.

⁶⁶ Emphasis supplied.

⁶⁷ See the following cases: *Lovelace v Canada* 68 ILR 17; *Kitok v Sweden* 96 ILR 637; *Gerhardy v Brown* (1985) 159 CLR 70.

⁶⁸ One of the foundational values of the Constitution is human dignity, the achievement of equality and the advancement of human rights and freedoms.

the inclusion of s 31 in the Constitution indicates a commitment to the maintenance of cultural pluralism even where this requires positive measures to be taken by the state to ensure the survival and development of minority cultures where they are threatened by disintegration."⁶⁹

In this light, it is also arguable that a court will protect the enjoyment of the right to culture by providing relief against those who use its expression such as folklore without permission or breach the moral rights of the cultural community.⁷⁰ It may be far fetched to argue that on one hand a Constitution allows an individual to enjoy the expressions of folklore of his group and then to argue on the other hand that same constitution may not come to the aid of the community if that folklore is for example appropriated or used in a wrong context. It is therefore appropriate to conclude that the right to intellectual property finds expression in s 31 even if it is not expressly recognized by the Bill of Rights. It is generally accepted⁷¹ that this indirectly protects and recognizes customary law because it will be meaningless for an enjoyment of culture without the system of law which regulates the manner of enjoyment.⁷²

The Constitutional Court of South Africa has stressed on numerous occasions that dignity is a foundational value and is at the center of the Bill of Rights.⁷³ While it is certainly true that dignity has in the main been considered in relation to individuals, it would be preposterous to deny the dignity of communities. Indeed, of what use is the dignity of the individual if that of his group is denied?

4.2.3 Indirect Protection of Expressions of Folklore through Customary Law

In this part we shall enquire into the possible protection of expressions of folklore as part of customary law. This protection is considered to be indirect because rules of customary law cannot be enforced if they in conflict with the Constitution generally and the Bill of Rights in particular. In this section, we examine the position where a customary law rule or practice protects an expression of folklore and determine whether that protection is recognized by the South Africa legal system, because if it is, then the courts would be bound to protect the folklore, not only because of its intrinsic nature but also because it is the law of the land. Any rule of customary law that recognizes communal intellectual creations can be taken as an expression of the right to intellectual property.

⁶⁹ J de Wahl, Currie I & Erasmus G eds. *The Bill of Rights Handbook* (Juta, Cape Town 4th Edn.) 476.

⁷⁰ "Section 31 now does the work of protecting communal interests in culture, religion and language." Ibid at p. 483.

⁷¹ See T.W Bennett *Human Rights and African Customary Law* (Juta Cape Town 1995) Chapter II where the author describes the processes by which customary law was negotiated during the constitutional conference

⁷² Bennett, *ibid* at p. 24 argues along this line in interpreting s 31 of the Interim Constitution('Every person shall have the right to use the language and to participate in the cultural life of his or her choice') which is similar to s 30 of the 1996 Constitution : " A right to application of customary law would be an entailment of the States' implicit duty to maintain African Culture. The state, as the direct duty bearer under s 31 has two obligations: not to interfere with the individual's right, and to permit the existence of institutions necessary to sustain the culture concerned."

⁷³ See the following cases: *S v Makwayane* note 50; *National Coalition for Gay Lesbian Equality And another v Minister of Justice and Others* 1999 (1) SA 6 (CC); *Dawood and Another v Minister of Home Affairs and Others* note 53; *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC).

Bennett describes customary law as deriving “from social practices that the community concerned accepts as obligatory”⁷⁴ It is the acceptance that infuses it with its normative character. Most of customary law is oral, though some of it is written. It is this oral nature that renders it questionable as law is understood in the western legal tradition. In Africa whatever possibility existed for the systematic study of customary law was destroyed by colonialism, which in its wake brought foreign law and relegated customary law into a matter of tolerance. This is perhaps why Bennett concludes that:

*“...the rules of an oral regime are porous and malleable. Because they have no clear definition, it is difficult to differentiate one rule from another, and, in consequence to classify rules according to type. If rules cannot be classified, they cannot be arranged into a system, and, without the discipline of a system, rules may overlap and contradict one another. In fact strictly speaking, the oral versions of customary law should not be called systems at all. They are probably better described as repertoires, from which the discerning judge may select whichever rule best suits the needs of the case.”*⁷⁵

The oral nature of customary law has been the fundamental characteristic that has shaped its development. It brought about a desire to reduce it into writing in order to understand and systematize it. In the process, foreigners using their own social standards and jurisprudence represented what they felt was customary law, leading as we shall see in South Africa, to three versions of customary law: the official, the academic and the living law. It seems to be the basis of the belief that customary law is fluid and flexible,⁷⁶ often regarded as derogatory, this may in fact be its uniqueness and utility, in the ability to respond to all situations. The oral nature brought about rules which sought to prove the existence of customary law before it could be applied by the courts and also fuelled notions of inferiority to western legal traditions. Hence the requirements that broadly enjoined courts to determine its suitability to “natural justice equity and good conscience” before its application.

In addition to ascertainment,⁷⁷ multi ethnic societies such as South Africa⁷⁸ face a problem of choice of law, especially in urban areas where different ethnicities interact against the background of contending foreign cultures.

⁷⁴ T.W Bennett *Customary Law in South Africa* (Juta Cape Town 2004) 1.

⁷⁵ Ibid p.2. See P. Kuruk “ African customary law and the protection of folklore” Vol, XXXVI *e Copyright Bulletin* 22 (2002):

⁷⁶ See *Bhe v Khayelitsha*, (Case CCT 69/03 judgment delivered on 15 October 2004.) Hereafter referred to as *Bhe*. Available at www.concourt.gov.za The majority of the Court elaborated on this virtue of customary law at para 45: “ The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements.”

⁷⁷ See *Alexkor Ltd v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC). (Hereafter *Alexkor*) Para 52: “ Indigenous law is not a fixed body of classified and easily ascertainable rules. By its very nature it evolves as people who live by its norms change their pattern of life”

⁷⁸ South Africa has eleven official languages, which largely reflects the ethnic divide of the country. See s. 6(1) of the Constitution.

The Position and Applicability of Customary Law in South Africa: Apart from the constitutional provisions, which we have examined above, there are other parts of the South African Constitution that deal with customary law. Section 211(3) of the Constitution 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”

The Constitutional Court in *Bhe*⁷⁹ clarified the position of customary law within the constitutional framework of South Africa:

*“...[t]he 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 and 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 recognized or conferred by customary law as long as they are consistent with the Bill of Rights. Finally, section 211 protects 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.”*⁸⁰

The important point to note is the constitutional foundation of customary law. This foundation has elevated customary law to the status of other systems of law such as the common law and legislation. In this regard the Constitutional Court in *Bhe* states that:

*“...an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of common law or legislation such as the Intestate Succession Act would be incorrect. At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution.”*⁸¹

⁷⁹ Note 77.

⁸⁰ Para 41. Bennett note 75 at p. 43 observes that “ customary law is a core element of the South African legal system, on a par with Roman-Dutch Law”.

⁸¹ Para 42. The approach of the Constitutional Court in essence restores the dignity of customary law as a system of law. In *Alexkor* note 78, the Court had stated that: “ While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common –law, but to the Constitution.” Para 51. See also *In Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2002 (2) SA 674 (CC). See also *Mabuza v Mbatha* 2003 (4) SA 218 (C) para. 32.

The clear words of the Constitutional Court in *Bhe* is such that it is tempting to conclude that the validity of customary law can not be tested with regard to legislation.

As we noted customary law is subject to the Constitution. Specifically customary law cannot apply if it is conflict with any provision of the Bill of Rights.⁸² In *Bhe* the primogeniture rule as applied to the customary law of succession was held irreconcilable with the rights to human dignity (section 10 of the Constitution) and right to equality (section 9) of the Constitution.⁸³ In reaching this decision the court conducted a justification inquiry in line with section 36 of the Constitution which provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.

The justification inquiry is critical in that it enables the court to undertake the exercise it set out in *S v Manemela and Another*:

“...[t]he Court must engage in a balancing exercise and arrive at a global judgment on proportionality ...As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.”⁸⁴

This justification inquiry is certainly important in assessing rules of customary law on expressions of folklore that may in some sense impinge on the exercise of rights in the Bill of Rights.⁸⁵ In this regard, the rights that readily come to mind include the right to freedom of expression recognized by section 16 of the Constitution.⁸⁶ For example in furtherance of the freedom of artistic creativity, protected by s 16 (1)c a film maker may argue that the restriction or total ban placed on the use of cultural motifs which is part of the folklore of a South African community by its customary law is in breach of this freedom. In determining the constitutional validity of the customary law rule, the court will have to balance the customary law rule with the freedom of artistic creativity. The existence of the balance in the right to intellectual property may not be found in all rules of customary law protecting expressions of folklore. Where it is

⁸² See Langa DCJ in *Bhe* at para 46: “ It bears repeating, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.” See also *Moseneke and Others v Master and Another* 2001 (2) SA 18 (CC).

⁸³ . This decision overturned the decision of Supreme Court of Appeal in *Mthembu v Letsela and Anor* 2000(3) SA 867(SCA).

⁸⁴ 2000(3) SA 1 (CC). See also *S v Makwayane*, note 50, para 104. See also *Prince v President Cape Law Society and others* 2002 (2) SA 794 (CC).

⁸⁵ See the case of *Christian Education South Africa v Minister of Education* 1999 (4) SA 1092 (SE).

⁸⁶ s. 16 of the Constitution provides that “ Everyone has the right to freedom of expression, which includes- (1) (a) freedom of the press and other media; (b) freedom to receive and impart ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. (2). The right in subsection 1 dos not extend to (a) propaganda for war; (b) incitement to imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

absent the justification inquiry and the balancing of rights serves to ensure that the balance can be infused onto the rule of customary law.

Even the text of section 30 of the Constitution, which protects the right to culture uses the word ‘of their choice’. Supposing the choice of the individual in using an expression of folklore is that of another community, which he does not belong to? It is only a balancing act in terms of a justification inquiry that may enable a court to arrive at a reasonable decision.

Ascertaining Customary Law: In this elevated status, it is doubtful whether ascertainment of customary law is no more than a practical exercise as a matter of evidence just as a court seeks to determine a rule of common law. Summarising the means of ascertainment of customary law Ngcobo J said in *Bhe*:

*“There are three ways in which indigenous law may be established. In the first place, a court may take judicial notice of it. This can only happen where it can be ascertained with sufficient certainty. Section 1(1) of the Law of Evidence Amendment Act 45 of 1988 says so. Where it cannot be readily ascertained, expert evidence may be adduced to establish it. Finally, a court may consult text books and case law.”*⁸⁷

It is clear from the provisions of section 1(1) of the Law of Evidence Amendment Act 1998⁸⁸ that the courts should seek ‘sufficient clarity’ a fact that might be a matter of evidence and disputations.⁸⁹ It also clearly envisages that the relevant court may engage in this inquiry and that the parties to the case may assist the court in this regard. However the argument that the only test that a customary law should pass through is the constitutional muster is supported by the fact that the Constitutional Court is of the opinion that “in view of the constitutionalisation of indigenous law, there are substantial doubts whether the first proviso still applies”⁹⁰ If this is correct and it is submitted that it is, it means as stated above that customary law does not need to pass any validity test as would have been necessary where it to comply with public policy and natural justice.

The use of textbooks, case law and codes are themselves a matter of procedure instituted by the courts.⁹¹ This approach is however fraught with difficulties and the

⁸⁷ Para 150 (footnotes omitted).

⁸⁸ S 1(1) of the Law of Evidence (Amendment) Act 1988 is apposite in this regard. The said section provides that:“(1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient clarity: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom or lobola or bogadi or any other similar custom is repugnant to such principles. (2)The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that section which is in issue at the proceedings concerned”

⁸⁹ See *S v Sihlani & Another* 1966(3) SA 148 (E); *Morake v Dubedue* 1928 TPD 625 at 631; Where the court is in doubt it should follow the rules laid down in *R v Dumezweni* 1961 (2) SA 751 (A) at 756-7. The court is permitted to decide on the customary law on the balance of probabilities. See *Gecelo* 1957 NAC 161 (S).

⁹⁰ See n.10 of the judgment of Ngcobo J in *Bhe*. See also *Mabuza v Mbatha* note 81. See also *Thibela v Minister van Wet en Orde* 1995(3) SA 147(T).

⁹¹ See *Mosii v Motseoakhumo* 1954(3) SA 919; *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388(A).

need for caution was sounded in *Alexkhor* and adopted in *Bhe*.⁹² The court in the former case said:

*“Although a number of textbooks exist and there is considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political administrative and judicial context in which it was applied...The result was that the term ‘customary law’ emerged with three quite different meanings: the official body of law employed in the courts and by the administration...; the law used by academics for teaching purposes; and the law actually lived by the people”*⁹³

The difficulty in ascertaining the customary law to apply is also exacerbated by the evolutionary nature of customary law.⁹⁴ However this difficulty cannot be equated to impossibility, as is clear with the numerous rules of customary law which South African courts continue to apply. For our purposes, there is no reported evidence of customary law for the protection of expressions of folklore. This does not mean that it will be difficult to discover.

Customary law by definition and essence is communally based. In the South African context, it is clear that there might be eleven customary laws on the protection of expressions of folklore. While choice of law problems may exist with regard to the application of customary law in other areas, it seems clear that with respect to folklore it is the folklore of the group in question that will apply.

The Development of Customary Law: One of the commendable principles in the human rights jurisprudence in South Africa, and one which could positively affect the development of customary law rules of the protection of expressions of folklore, is the injunction mandated by s 39(2) of the Constitution on Courts to develop customary law to bring it into line with the spirit, purport and objects of the Bill of Rights.⁹⁵ With the different versions of customary law in South Africa, this provision is potentially capable of evolving rules of customary law to reflect the living law which is a reflection of the current socially accepted practices indicating changes that have taken place. It may thus be described as recognition of the inherent flexibility of the customary law system. What the development would then mean is a judicial endorsement of current practices. For example in *Mabena v Letsoala*⁹⁶ the court recognized and applied widespread practice of a community allowing a person to negotiate *lobolo* with his prospective mother in law even when evidence was led to show that the textbook version of the customary law required negotiations with the parents of the bridegroom.

⁹² Para 151. In para 152 Ngcobo states that “ It is now generally accepted that there are three forms of indigenous law: (a) that practised in the community: (b) that found in statutes, case law or textbooks on indigenous law (official); and (c) academic law that is used for teaching purposes”

⁹³ Note 77, para 54.

⁹⁴ See Ngcobo J in *Bhe* para 155. See Langa DCJ at para 87.

⁹⁵ Note however that s. 8(3)b of the Constitution omits the mention of ‘customary law’ leading to speculation that customary law is not to be developed. The decision of the Constitutional Court in *Bhe* has put paid to these speculations.

⁹⁶ 1998 (2) SA 1068(T).

The route through which the court approached the manner of development of customary law in *Bhe* is instructive as to the role of the courts in this regard. The options open to the court was on the one hand to adapt the law or on the other hand to introduce new rules in place of impugned provisions of customary law based on the constitution. The interim order made by the majority of the Court in *Bhe* was adaptive in that using section 1 of the Intestate Succession Act as the foundation, the Court added rules to protect parties that would have been discriminated against if the Act is left the way it was promulgated.⁹⁷

The justification for using an interim order for the development of customary law pending appropriate legislative development is clear from the opinion of the Court in *Bhe* on the ground that judicial development is ad hoc slow and uncertain. “*The problem with the development by courts on a case by case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there may well be different solutions to similar problems.*”⁹⁸

The minority in *Bhe* however pursued a different line of reasoning. Ngcobo J who wrote the minority judgment relied on the *Carmichele v Minister of Safety and Security*⁹⁹ and endorsed judicial development to adjust customary law to changed circumstances or to develop customary law to bring it in line with the rights in the Bill of Rights.¹⁰⁰ The two instances mentioned in the minority judgment implicate two different approaches to the development of customary law. The first instance is that of adaptation of a customary law rule for example by recognizing the ‘living law’, which is reflective of the social relations of a group of people. The example of this type of adaptation is found in the case of *Mabena v Letsoala*. The majority rejected this approach essentially on the ground of the difficulty in proving the ‘living law’¹⁰¹ preferring the legislature as the proper organ. However in reaching the interim order, the Intestate Succession Act was adapted in the sense that it was used to modify the customary law rule. In the end the effect of the decision is that the courts have now recognized the need to develop customary law. The second means of development of customary law is one that uses constitutional principles to test the customary law rule. A declaration of invalidity of a customary law rule is linked to this approach. The question is what replaces the impugned provisions? It is our submission that very little practical difference exists as to the approach of the different opinions of the Court. Both achieved the result of allowing surviving female children to inherit. In both instances, a new rule was introduced into the customary law of succession albeit from different perspectives.

The real difference lies in the fact that while the majority favoured the legislative development of customary law¹⁰² the minority was for adaptation- which may really

⁹⁷ Para 125

⁹⁸ Para 112.

⁹⁹ 2001 (4) SA 938(CC).

¹⁰⁰ Para 216-218.

¹⁰¹ Ibid para 110: “The difficulty lies not so much in the acceptance of the notion of ‘living’ customary law as distinct from official customary law, but in determining its content and testing it...”

¹⁰² The principle supporting the legislative development of customary law finds support in the belief that the legislature are in the best position to develop the common law. See for example the majority in

mean re interpretation¹⁰³ and judicial law making to conform to the Bill of Rights. On one hand legislative development may be questionable as to its compliance with s 8(3) of the Constitution. If courts are to wait for the development of customary law by the legislature then the import of s 8(3) may be of no use. On the other hand legislative intervention is to be expected in the course of affairs and is often deliberative but inevitable. The preference of legislative activity as the appropriate means of developing customary law by the Constitutional Court may be borne more out of the nature of customary law than the desire to refrain from the usurpation of legislative activity. As stated earlier, since there may be a problem of proof when the desire is for example to reflect the existing law, legislative activity enables consultations and representations that allow conclusions to be reached as to the existence and content of rules.¹⁰⁴ Yet, as use of an interim order by the majority in *Bhe* indicates, there are immediate problems which have to be solved since people depend on customary law.¹⁰⁵ Moreover legislative activity may be meaningful only after incremental judicial development of customary law. It is therefore preferable to adopt the two approaches of immediate incremental judicial adaptation or law making and legislative development to develop customary law. In this way, the content of customary law will evolve in an organized and systematic way.

Another very important question is the manner of development in terms of the corpus of the law to guide the development. Should it be guided by constitutional principles, the common law, or even customary law, especially if what is to be developed is characterized as ‘official customary law’ as distinct from ‘living customary law’? The importance of this question lies in the fact that the use of constitutional principles could lead to wholesale change to customary law. In this regard, Professor Kerr raises important issues:

“The crucial question that arises now that the Constitution has been brought into force (as it arose when the interim Constitution was in force) is the following. Does the body making the change have to substitute rules deducible from the Bill of Rights in succession and other branches of customary law whenever present rules are inconsistent with the Bill of Rights? If so, at an estimate this would mean a change in 85 percent of customary law. What system of law would the new rules make up? It would not be customary law because its rules would be quite

the case of *Fourie v Minister of Home Affairs* Case No 233/2003 decided on 30 November 2004 by the Supreme Court of Appeal.

¹⁰³ See Himonga and Borsh who argue that what the Constitution really mandates is the ‘living’ customary law. See “ The Application of customary law under the Constitution of South Africa: Problems solved or just beginning (2000) 117 *SALJ* 306.

¹⁰⁴ Professor Kerr has been a consistent advocate of legislative development and seems to have influenced the majority in *Bhe*. See Fn 131(para 109) and 138 (para. 115) of *Bhe*. See A.J Kerr “The Bill of Rights in the new constitution and customary law” 1997 114 *SALJ* 346; See also the case of *Mthembu v Letsela*, note 83.

¹⁰⁵ See Para 115: “What should be borne in mind is that the task of preventing ongoing violations of human rights is urgent. The rights involved are very important, implicating foundational values of our Constitution.”

different. It would be appropriate to give that system of rules a title descriptive of its origin and call it the Bill of Rights rules."¹⁰⁶

While the eminent professor's viewpoint is appreciated a few comments are in order. It seems that he conceives customary law as a closed system. As a closed system, it would be able to reform itself from within. However reform is also possible from the outside and the question should be as to its desirability. Customary law is not and should not be a closed system of law in a constitutional democracy such as South Africa. Just like the common law, customary law must be affected by constitutional principles. It is also implicit in his view that constitutional values are alien to the customary law system or that those governed by this law do not believe in them. In the context of South Africa and its history, the idea of transformation and new legal order embodied in the Constitution and its values can rightly be assumed to reflect the wishes of its peoples including those governed by customary law. Indeed they have more reason to welcome this state of affairs since they were the victims of the past unjust order. If they now embrace equality and non-discrimination, is it to mean that this would not affect the way their personal relations are ordered? If customary law reflects the wishes of the people, then their assent to the new constitution could be said to have effected significant changes to their customary law because of the new values that have been brought into place.¹⁰⁷ Does it mean then that customary law will disappear in the contestable dimensions, which the learned professor has alluded to? It may not be so and in any case this can only be arrived at after a thorough assessment. In an environment where succession and other like matters are considered to be the bulk of customary law it might disappear; but there are other areas of customary law such as the protection of expressions of folklore, which will not disappear by reason of the Bill of Rights. Even if I agree to some extent with Professor Kerr's solution to this 'destructive confrontation'¹⁰⁸ between the constitution and customary law as the use of legislation¹⁰⁹ it should be pointed out that the aim should be to respond to the needs of justice in an integrated system. As the Constitutional Court stated in *Daniels v Campbell NO*¹¹⁰:

"[o]ur Constitution contemplates that there will be a coherent system of law built on the foundations of the Bill of Rights, in which common law and indigenous law should be developed and legislation should be interpreted to be consistent with the Bill of Rights and with our obligations under international law. In this sense the Constitution demands a change in the legal norms and values of our society"

¹⁰⁶ "Inheritance in customary law under the interim constitution and under the present constitution" 118 SALJ 262 (2001)

¹⁰⁷ See Kerr, *ibid* at p. 269 "This is not to say that the values in the Bill of Rights are to be disregarded. If those affected by customary law are persuaded to adopt new values, such of those values as the legislature(s) adopt and enact are incorporated into customary Law"

¹⁰⁸ See the *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744(CC).

¹⁰⁹ See note 107, p. 269: "Change is needed; but, especially in a democracy, those affected by customary law need to have an opportunity to state their views with the assurance that 85% of their system of law will not need to come from other sources."

¹¹⁰ 2004 (7) BCLR 735 (CC) at para 56.

In an integrated system, customary law rules can and should in fact influence the development of constitutional principles.¹¹¹ Furthermore, in this context, it would be possible for the principles of customary law for the protection of expressions of folklore to influence the development of the content of the s 30 and 31 rights. The reverse is of course assumed.

The development of customary law through the Bill of Rights represents a powerful weapon in the development of customary rules for the protection of expressions of folklore. Rights like the right to equality (s.8); human dignity (s.10); privacy (s. 14); Freedom of religion, belief and opinion (s.11); Freedom of expression (s.16) are the rights that seem very implicated in such a system. If and when the development of customary law is understood as a two-way affair, the strength of this concept becomes evident. The Bill of Rights can infuse customary law with constitutional principles that it lacks and arguably make it a better system. For example in the case of *Hlophe v Mahlalela*¹¹² the Court used s 30(3) of the Interim Constitution to decide the matter because evidence of the alleged customary law could not be found. This case illustrates what can be called progressive development even if it was by default of evidence. It certainly seems plausible that when customary law rules are lacking, constitutional principles can be used to come to its aid. A very credible example is the right to privacy, which seems capable of empowering communities to be able to prevent information they regard as important from being brought to the attention of third parties or published to the world. Often the appropriation of expressions of folklore lies in the fact that it is obtained as information.

In the development of the rules of customary law, certain key issues must be borne in mind as they are constitutive of an effective regime for the protection of folklore. These issues are (i) the principle of protection; (ii) the protected expressions of folklore; (iii) the utilizations subject to permission; (iv) the exceptions and limitations to utilization; (v) the expressions in the public domain; (vi) acknowledgment of source; (vii) remedies; and (ix) standing to sue.

Ultimately our analysis of the potential for the protection of folklore by customary law shows that the unique features of the South African constitution presents real possibilities for forging progressive norms. The possibility for the development of customary law presents a critical variable in this regard and will be meaningful if these norms are developed along the lines of the interpretation of the right to intellectual property

4.2.4 Broad Principles of Constitutional Enforcement of Human Rights in South Africa

Certain features and principles underlying the South African Constitution render it exceedingly feasible for the protection of the expressions of folklore. Many of these features such as the supremacy of the Constitution, the foundational values of the Constitution, the wide standing disposition of the court as an adjunct of enforcement and the horizontal application of the Bill of Rights are pillars on which a regime for the enforcement of expressions of folklore can be built. While these principles have been discussed in the course of this paper, we shall dwell on some of them, which are at the core of such a regime of enforcement. Accordingly in this section we shall

¹¹¹ See for example the adoption of the concept of “Ubuntu” in the case of *S v Makwayane*, note 50 para 224.

¹¹² 1998 (1) SA 449(T).

consider in some detail, the ‘horizontal application’ of the Bill of Rights; the standing principle and remedies in the enforcement of the Bill of Rights. Horizontal Application of Human Rights: The horizontal application of human rights is fundamental to the potential protection of expressions of folklore based on s 30 and 31 of the Constitution because it is an individual or corporate entity that are likely to be proceeded against in the enforcement of the s 30 and 31 rights.

S. 8(2) and (3) of the South African Constitution provides that:

“(2) A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) a court-

in order to give effect to a right in the Bill, must apply, or if necessary develop the common law to the extent that legislation does not give effect to that right; and

may develop rules of the common law to limit the right, provided that the limitation is in accordance with s.36(1).”¹¹³

As stated earlier it is the application of the Bill of Rights to individuals and juristic persons that has been characterized as the ‘horizontal application’ of human rights. It is clear that not all fundamental rights can be of horizontal application. As Professor Lubbe observes:

“The implications of the Bill of Rights for private law therefore center in the first instance on the identification of those rights that are applicable horizontally. Thereafter, the question is how such rights may be given effect by means of the application and development of the technical substance of private law doctrine”¹¹⁴

What therefore are the prospects for the protection of expressions of folklore by the s 30 and 31 rights? It is our submission that by virtue of s 8(2) of the Constitution this is certainly possible against individuals and juristic persons such as corporate bodies. The nature of the right and the duty imposed on natural persons are such that this is possible. In the context of this paper it is submitted that it is entirely appropriate to seek for example to prevent dealings with expressions of folklore without permission; to require due acknowledgement of its source and a performance of the expressions of folklore within its traditional or customary context. These norms arguably serve to protect the culture, which is the focus of s 30 and 31.

¹¹³ See the provisions of s. 7 of the Interim Constitution. See also *Du Plessis v De Klerk* 1996 (3) SA 850(CC). See the following representative literature on this rather unique principle of South African Constitutional Law: H. Botha “Freedom and constraint in constitutional adjudication” 2004 20 *SAJHR* 249; S. Woolman & D. Davis “The Last Laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of fundamental rights under the Interim and Final Constitutions” 12 *SAJHR* 361 (1996); H. Chaedle & D. Davis “Application of the 1996 Constitution in the private sphere” 13 *SAJHR* 44 (1997).

¹¹⁴ G. Lubbe “Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law” 121 *SALJ* 395.

What remains is a consideration of the jurisprudence of this concept in South Africa as a means of determining its utility and whether any of the developments can aid an understanding of how this principle can apply to s 30 and 31 rights. In the area of the liability of public officers, the cases of *Carmichele v Minister of Safety and Security*¹¹⁵ *Minister of Safety and Security v Van Duivenboden*¹¹⁶ and *Van Eden v Minister of Safety and Security*¹¹⁷ establish as Professor McQueen rightly points out:

*“It seems clear that the SCA has, in this area at least, fully accepted the role of the Bill of Rights in the development of the law of delict at least so far as concerns the liability of public authorities...”*¹¹⁸

In *Khumalo v Holomisa*¹¹⁹ the Constitutional Court held that the freedom of expression has direct horizontal application between private parties. It seems that the application of fundamental human rights to private law seems most prospective in the area of delict.¹²⁰

Though there has been the horizontal application of human rights in the area of contract¹²¹, the prospects do not seem very encouraging and will remain controversial for a while. Even at that the concept of good faith or *boni mores* could very well play a significant part in the assessment of contracts of exploitation of expression of folklore. This is because the concept contemplates the inequality of bargaining powers of parties to a contract. Accordingly it may well be that by its tenor courts would be able to assess the terms of the contract to determine whether they are conscionable with the interests and aspirations of the owners of the expressions of folklore. For example the commercial success of an expression of folklore could play a part in the determination of royalties payable to the community.

The application of the concept of good faith in South Africa is however of a muted pedigree. It is recognized but seemingly controversial in its application. The principle of good faith was used as a principle to challenge an exemption clause in *Afrox Healthcare v Strydom*¹²² The argument of the respondent was that the exemption clause infringed the spirit purport and objects of the right to access to healthcare enshrined by s 27(1)a of the Constitution and was therefore contrary to public policy by virtue of s 39(2) of the Constitution which requires courts to promote the ‘spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law or customary law’ Good faith is a component of public policy which in South African law is well recognized as capable of striking down

¹¹⁵ Note 100.

¹¹⁶ 2002(6) SA 431 (CC).

¹¹⁷ 2003 (1) SA 389 (SCA).

¹¹⁸ “Delict, Contract and the Bill of Rights: A Perspective from the United Kingdom” 121 *SALJ* 359, 369.

¹¹⁹ 2002 (5) SA 401(CC). See O’Regan J at para 33.

¹²⁰ A. van Aswegen “The implications of the Bill of Rights for the law of contract and delict” 1995 (11) *SAJHR* 50 at 60 cited in MacQueen, note 119, p. 367.

¹²¹ See *Farr v Mutual & Federal Insurance Co Ltd* 23000 (3) SA 684 (C); *Janse van Rensburg v Grieve Trust* 200(1) SA 315(C); *Hoffman v South African Airways* 2001 (1) SA 1 (CC).

¹²² 2002 (6) SA 21 (SCA). Hereafter *Afrox*. See also *Brisley v Drotsky* 2002 (4) SA 1 (SCA). Hereafter *Brisley*.

unconscionable bargains.¹²³ The court in *Afrox* and *Brisley* accepted that by virtue of s 39(2) the determination of whether a contractual provision is contrary to public policy is to be directed by the values of the Constitution.¹²⁴ Even if in the application of this principle of law the courts dismissed the contention that the contracts were contrary to public policy, the important point lies in the fact that the principle is recognized. As stated above, the principle will remain controversial for some time to come because of seeming reluctance to apply it. An example of this attitude is found in the dictum of Cameron JA in *Brisley*:

“The jurisprudence of this court has already established that in addition to the fraud exception, there may be circumstances in which an agreement unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy...in its modern guise public policy is now rooted in our constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism. It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy...I share the misgivings about our over-hasty or unreflective importation into the field of contract law of the concept of ‘boni mores’. The legal convictions of the community’- a concept open to misinterpretation and misapplication- is better replaced, as the Constitutional Court itself has suggested, by the ‘appropriate norms of the value system embodied in the Constitution. What is evident is that neither the Constitution nor the value system it embodies gives the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their unenforceability on the basis of imprecise notions of good faith. On the contrary the Constitution’s values of dignity and equality and freedom require that the Court’s approach their task of striking down contracts or declining to enforce them with perceptive restraint.”¹²⁵

It is not difficult to imagine contracts of folklore being struck down for being unconscionable due to public policy, which could rest on the concept of good faith if evident in the terms of contract. Whether the courts will be willing to this is still debatable; if they do not it will not be for lack of doctrinal foundations; but it will certainly require a radical approach by the Supreme Court of Appeal and the Constitutional Court.¹²⁶

¹²³ See *Magna Alloys & Research (SA) Pty Ltd v Ellis* 1984(4) SA 874(A); *Sasfin (Pty) Ltd v Beukes* 1989(1) SA 1 (A)

¹²⁴ See *Brisley*, note 123 para 33-6; and *Afrox*, note 123 para 18.

¹²⁵ Note 122 para 2-7.

¹²⁶ See G. Lubbe, note 115; D.D Tladi “Breathing Constitutional values into the law of contract and the Constitution” (2002) 35 *De Jure* 306; “one step forward, two steps back for constitutionalising the common law: *Afrox Healthcare v Strydom*” (2002) 17 *SA Public Law* 472.

With respect to our discussion, it may be possible that some of the inappropriate dealings with expressions of folklore could be framed as delict occasioning breach of the s 30 or 31 right.

Limitation of rights: The exercise of the s 30 and 31 rights is also subject to a general limitation clause, which is found in s 36 of the Constitution. The said section provides that:

“(1) The rights in the Bill of Rights may be limited only in terms of 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-

the nature of the right;

the importance of the purpose of the limitation;

the nature and extent of the limitation;

the relation between the limitation and its purpose; and

the less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”¹²⁷

Even though we have discussed the limitation or justification inquiry in the preceding sections, of this part, attention is drawn to the need to achieve a balancing of rights. For example there may be a need to balance the rights in s 30 and 31 with the right to freedom of expression in s 16 of the Constitution.

Standing in the enforcement of rights in the Bill of Rights: S 38 of the Constitution of the Republic of South Africa provides:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The person who may approach a court are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.”

Interpreting this section Chaskalson P in *Ferreira v Levin NO*¹²⁸ stated that the court should adopt a broad standing rule. Apart from the communities and their representatives whose standing is unimpeachable, the public interest standing option

¹²⁷ In *Christian Education South Africa v Minister of Education* note 85 the Court held that a law prohibiting corporeal punishment trumped the right to religion and culture. See also *Prince v President Law Society of Good Hope* note 84.

¹²⁸ 1996(1) SA 984(CC). Hereafter *Ferreira*.

can be used effectively to develop the jurisprudence for the protection of expressions of folklore by many groups notable of which should be the Commission for the Promotion and Protection of the Rights of Cultural Religious and Linguistic Communities whose function is set out by s 185(1) of the Constitution to include ‘to promote respect for the rights of cultural, religious and linguistic minorities.’¹²⁹

Remedies in Enforcement of the Bill of Rights: South African courts have wide latitude to fashion appropriate remedies for constitutional infractions.¹³⁰ In *Fose v Minister of Safety and Security*¹³¹ the Constitutional Court said:

“[I]t is left to the courts to decide what would be appropriate relief in any particular case...Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the Courts may even fashion new remedies to secure the protection and enforcement of these all important rights.”¹³²

In *Sanderson v Attorney General Eastern Cape*¹³³, the Court said:

“ ‘appropriateness’ requires ‘suitability’ which is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of the right”¹³⁴

It is thus possible given our analysis above to state that the courts should recognize remedies for breach of the protection of folklore to include (i) damages; (ii) injunctive relief; (iii) account for profits; (iv) destruction or removal of offending materials; (v) acknowledgment of source and (vi) criminal remedies such as imprisonment, fines, community service etc.

5. Concluding Remarks: Towards an Integrated Framework of Protection

For many developing countries battling to ensure an effective system for the protection of expressions of folklore, the human rights framework presents a credible and even better system than the existing *sui generis* regimes and protection through intellectual property rights. Well intentioned as the *sui generis* regimes are, it seems that the manner of their expression and implementation through State institutions have greatly hampered their effectiveness. The result is that even with what is arguably a reasonable framework of protection, there is nothing much being protected. While this

¹²⁹ Emphasis supplied.

¹³⁰ S 172(1)b provides that when deciding a constitutional matter within its power, a court may make an order that is just and equitable.

¹³¹ 1997 (3) SA 786 (CC)

¹³² Para 87

¹³³ 1998 (2) SA 38 (CC)

¹³⁴ Ibid para 38

may well be attributable to other reasons, the fact remains that they are not working and there is no indication that they will work in the near future.

The content of a human rights framework is of considerable importance as it will determine its effectiveness or otherwise. An interpretation of the right to intellectual property that I put forward as opposed to interpretations such as that found in *Draft General Comment No 18* is well illustrated in the protection of expressions of folklore and serves to address different concerns of protection and access. The fact that the right to intellectual property is not found in the Bill of Rights of many countries should not be fatal since the right to communal intellectual property is part of the right to culture that is likely to be recognized in these constitutions. Accordingly any country in this position will find a human rights framework of considerable significance. This is more so if appropriate status and recognition is accorded rules of customary law. It is however recommended that an integrated system of protection that combines the right to culture and the rules of customary law in a mutually reinforcing manner would be beneficial to the protection of expressions of folklore. For example the concept of the development of customary law is significant. Whether constitutionally mandated as in South Africa or incidental to discover the living customary law the important point is that developing customary law in the context of a Bill of Rights with attendant balancing of rights could be undertaken along the lines of the content of the right to intellectual property that I have urged in this paper. In this way, the concerns of communities mirrored in their customary law would be the starting point of any inquiry as to protection. Other rights and values in the constitution, which also mirror the wishes of the larger community, would then be brought to bear on rules of customary law. Even though much may be said as to whether customary law will survive an integration, the reality is that this concern can be met by the fact that the principles that will emerge will be constitutional, supreme valid, and reflective of conscious choices of the people.

A human rights framework in general ensures that since human rights are of primacy¹³⁵ the protection offered thereby may be of a higher status than that offered by protection through *sui generis* regimes. As the jurisprudence of the South African Bill of Rights shows, certain concepts, such as the horizontal application of human rights is fundamental to a human rights framework. A liberal standing approach is also important just as a flexible remedial regime ensures that the particular concerns of a community can be met.

Ultimately the integrated framework depends on the courage and dexterity of the judiciary. In the South African context, they have risen to the challenges of transformative adjudication in the past and it is hoped that the dark clouds of undue restraint in the horizontal application of human rights that loom in the background do not threaten the incipient reach of human rights in private law in its egalitarian march. Indeed it can be argued that respect of community rights will assist in no small measure in the building of a new South Africa ravaged by apartheid. What is good for South Africa may be a model for any multi racial and multi ethnic country.

¹³⁵ See art 103 of the United Nations Charter; art 30 of the Universal Declaration of Human Rights and the Vienna Declaration on Human Rights 1993.