CUSTOMARY LAW IN POST-APARTHEID SOUTH AFRICA: THE VEXED QUESTION OF CULTURAL DIVERSITY, WOMEN'S RIGHTS, "LIVING LAW", AND APPROPRIATE LAW REFORM.

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1. Introduction

Tracking the progress of customary law in South Africa from 1994 to 2014 is relatively easy to do, in one sense. One can go back to the interim constitution of 1993 and, in particular, to the multiparty political negotiations that preceded it and then follow the story through the final constitution and the first rash of litigation that reached the courts in those early days. In addition to the steady trickle of court cases one can also review the law reform processes that were taking place in parallel. And finally, one might then bring the story up to date with an assessment of recent developments in the field and perhaps reach some conclusion about causes and effects, and some forecasts about the future.

What is not nearly so easy to do is to get into the "mind" of the South African legal system, so to speak, and fathom what this legal system "thinks" about customary law and its place within it. Questions that arise in this respect include the over-arching issue of whether there is commitment within the system to a proper mainstreaming of customary law as part of the South African legal system, rather than a junior partner in it. This paper seeks to contribute to these debates by reflecting on selected judicial decisions and law reform initiatives in an attempt to answer the question: "Is securing the place of customary law in the south African legal system a legitimate objective and, if so, are we going about it the right way?" The backdrop to this question will be the quest for the protection of the rights of women, on the one hand, and the constitutions attempt to entrench cultural diversity, on the other.

But first, and as background to the main debate, the historical review described above will be undertaken.

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2. The progress of customary law since 1994

2.1. The early phase

A lot has been written about the birth of the South African constitution and the debates on cultural diversity and customary law which preceded it. Commentators tell of the goings on at the Congress for a Democratic South Africa (CODESA I and II) and the Multi-Party Negotiating Forum and the contestation that ensued between the National Women's Coalition and the organisations representing traditional leaders, especially the Congress of Traditional Leaders of South Africa (CONTRALESA). These accounts invariably record that both sides could claim some measure of victory in these skirmishes – the women's coalition in having the recognition of customary law subjected to the provisions of the Constitution especially the strong equality clause, and the traditional leaders in securing the protection of culture, language and religion as enshrined in various Constitutional Principles.

The equality and wide-ranging non-discrimination provisions are found in section 8 in the chapter on fundamental rights:

- 8(1) Every person shall have the right to equality before the law and to equal protection of the law.
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

Satisfying the traditionalists on the other hand were the significant concessions of Constitutional Principles XI and XIII. Principle XI provided for cultural and linguistic diversity while Principle XIII guaranteed that:

The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognized and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

¹See Nhlapo RT "Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons from the South African Constitutional Debate" in International Journal of Law and the Familty 9(1995) 208-225; Corder H "Towards a South African Constitution" in Modern Law Review (1994) Vol. 57 491 and the materials cited therein.

² See for instance Nhlapo "African Family Law Under an Undecided Constitution: The Challenge for Law Reform in South Africa" in Eekelaar and Nhlapo (ed) The Changing Family: Family Forms and Family Law (Hart Publishing) Oxford – 1998

Sections 181 – 184 provided support for the customary law underpinnings of chiefly authority by preserving the usual powers and functions of traditional leaders; securing them a role in local government, and creating Provincial Houses of Traditional Leaders and a national Council of Traditional Leaders.

The interim constitution of 1993 thus "hosted" customary law amidst growing anxieties as to what this would mean in practice, and also growing expectations on all sides. It was into this expectant atmosphere that Justice Farlam dropped the first hint of things to come with his judgement in the case of **Ryland vs Edros**,³ where he squarely confronted the issue of the non-recognition of Islamic marriages because of their potentially polygamous nature and upheld a contract based on such marriage, in the face of arguments that such a contract was offensive to public policy. The court emphatically rejected previous justifications for the refusal to recognise Islamic marriages. In a now celebrated statement, Judge Farlam said:

"I agree with Mr Trengove's submission that it is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to the public policy if it is offensive to the values which are shared by the community at large, by all right-thinking people in the community and not only a section of it."

Suddenly, anxieties turned into hope and a cautious optimism began to emerge that subjecting non-Western cultures to the Constitution may not after all spell the death of these cultures: that something more than offending the sensibilities of Europeans and educated Africans was needed before a cultural or religious practice was ousted.

These cautions hopes were further strengthened by the decision in the case of **Mthembu v Letsela** which, in the opinion of this writer, was a hugely significant milestone in the progress of customary law under the constitution. Decided, like **Ryland v Edros**, on the basis of the interim constitution, **Mthembu**, in its three iterations through the SA court hierarchy, was to touch most 'bases' in the debate as it was then and as it was to unfold later. For this reason, I spend some time on analysing its implications.

³ 1997(2) SA 690 (c)

⁴ At 708

Mthembu v. Letsela (I)

In November 1996, in the Transvaal Provincial Division of the High Court of South Africa, Le Roux J heard an application in a case that was later to be reported and celebrated as **Mthembu v Letsela and Another 1997 (2) SA 936 (T).** The applicant, Mildred Hleziphi Mthembu, a Zulu woman, approached the court for relief in a matter of succession to the estate of one Tebalo Watson Letsela, to whom she claimed to have been married by customary law. Before his death Letsela was employed as a mine clerk in Boksburg and owned a house at 822 Ditopi Street, Vosloorus, in which he had lived with the applicant since 1990, together with their daughter, Tembi, who was born on 7 April 1988. In the same house also lived Letsela's parents, his sister and her daughter.

The deceased died, intestate, on 13 August 1993 and the applicant was appointed by the second respondent (the Magistrate, Boksburg) to administer and wind up the estate. The first respondent is Henry K Letsela, father of the deceased, who claims that the house in Ditopi Street devolves upon him according to the rules of customary law. The rules are recognized by s 23 of the Black Administration Act 38 of 1927 and the regulations made under the authority of the Act, especially reg 2 of 6 February 1987 promulgated in *Government Gazette* 10601 as Government Notice (5) R200. This regulation provides for customary law to apply to the devolution of the estate of a black person who dies intestate. The most important customary law rule (hereinafter "the customary law rule" or the "offending rule") is the one of male primogeniture in the customary law of succession in terms of which only first-born or precedent males may inherit in cases of intestacy, to the exclusion of females and junior males.

According to the papers before the court, the matter came to a head because of strained relationships in the house which had culminated in the first respondent ordering the applicant and her daughter to leave the house. First respondent claimed that he has no responsibilities toward applicant, either to house her or to maintain her and her daughter. He denied the existence of a customary marriage between the applicant and his son and rejected any suggestion that Mthembu and her daughter were part of his family. In reply, the applicant produced witnesses and documents to prove the existence of a valid customary marriage between herself and the deceased, including the information that lobolo was formally fixed at R2,000 and that by the time of his death, Watson Letsela had paid R900 towards this sum.

The applicant sought the following relief:

1. An order declaring

- 1.1. that the rule of African customary law which generally excludes African women from intestate succession ("the customary law rule") is inconsistent with the Constitution and consequently invalid;
- 1.2. that s 23 of the Black Administration Act 38 of 1927 ("the Act") and s 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks made under s 23(10) of the Act by Government Notice R200 of February 1987 ("the regulations") are invalid insofar as they demand the application of the customary law rule;
- 1.3. that the administration and distribution of the estate of the late Tebalo Watson

 Letsela ("the deceased") is governed by the common law of intestate succession; and
- 1.4. that Tembi Mtembu is the deceased's only intestate heir.

The first respondent relied mainly on the argument that there was no valid customary marriage between his son and the applicant and that consequently she neither has any rights as a wife in this matter nor does he owe her and her daughter any obligations.

The court finds that the customary law rule excluding women from inheritance is *prima facie* discriminatory on grounds of sex or gender but not unfairly so because of the concomitant duty of support. Le Roux J appears to have been aware that the constitutional issue might assume a different complexion if the facts revealed that there had been no customary marriage between Mthembu and Watson Letsela. For one thing, the concomitant duty of support would cease to be a consideration and the investigation into the constitutionality of the rule would have to take different factors into account. The court accordingly referred the matter for the hearing of oral evidence on: (a) whether there was a valid customary marriage between the applicant and the deceased; or (b) whether a putative marriage under customary law existed between them.

3.2 Mthembu v. Letsela (II)

The hearing of oral evidence took place in August 1997 in a case that was to be reported later as **Mthembu v Letsela and Another 1998 (2) SA675 (T)**, a judgment by Mynhardt 1. Neither the applicant nor the first respondent adduced any evidence and the application was accordingly determined on the basis that no customary marriage existed between Mthembu and the deceased and that Tembi was therefore illegitimate.

On the question of the court 'developing' customary law in line with the spirit, purport and objects of the Bill of Right, applicant's counsel made a strong case for customary law to be coaxed towards equality, which is a value fundamental to the constitution.

Arguing that the issue of discrimination on the grounds of sex or gender is 'academic' in this case because the real reason for Tembi's disqualification from inheritance is her illegitimacy, the Court refuses to 'develop' customary law in the direction suggested, adding:

"In the present case I therefore decline the invitation to develop the customary law of succession which excludes women from participating in intestacy and which also excludes children who are not the oldest male child. In any event, because the development of that rule, as proposed by Mr Trengrove, would affect not only the customary law of succession but also the customary family law rules, think that such development should rather be undertaken by Parliament⁵

Worthy of note is statement of the Court in relation to the work of the South African Law Commission where the Court refers to the Commission's Discussion Paper on Customary Marriages, which invited comments from individuals and organizations who wished to contribute to the reform of this branch of the law. The Judge declares: "I believe that route should also be followed to reform the customary law rules of succession".

⁵ at 880 E

⁶ at 887 E

The Court dismisses the application with costs, and grants leave to appeal.

3.3 Mthembu v. Letsela (III)

The appeal was heard on 4 May 2000 in the Supreme Court of Appeal before Justices of Appeal Smalberger, Marais, Zulman and Mpati, and Acting Justice of Appeal Mthiyane. Counsel for the appellant raised the same four grounds of attack against the customary law rule of male primogeniture which had been dismissed by Mynhardt J in the court *a quo*. They stated, however, that they would not advance oral argument in respect of the first two grounds and would instead concentrate on the last two grounds which were based on the proposition that Tembi would have succeeded by intestate succession at customary law to her deceased father's estate but for the fact that she is female, and that the customary law rule of primogeniture is offensive to public policy or natural justice (within the meaning of s 1(1) of the Law Evidence Amendment Act, 1988).

The Court dismissed both arguments and went on to consider the invitation to develop customary law according to the 'spirit, purport and objects' of the Bill of Rights. On this point, counsel for the appellant had argued that the customary law rule was based on 'inequity, arbitrariness, intolerance and inequality,' all of which are repugnant to the new constitutional order. The Court was urged to develop the rule so that it sheds its discriminatory elements and allows male and females, legitimate and illegitimate, descendants to inherit. The court was not convinced, arguing that Tembi was excluded by illegitimacy not gender and that it was undesirable to pronounce on such an important constitutional question in a case in which the issue was academic.

The appeal was dismissed on all four grounds.

Evaluation of Mthembu v Letsela

The place of this case in history is assured for the simple reason that it fielded the first salvo in what was to become a sustained battle against the primogeniture rule which was to culminate in the case of **Bhe**. Several points about the Mthembu cases are worth noting.

- i. Some of the earliest criticisms of the outcome in Mthembu were based on concerns that the court did not give enough weight to the distinction between official customary law, on the one hand, and day-to-day community practice, on the other. At the time, under attack was the conclusion of Le Roux J that the concomitant duty of support attaching to the heir's right to take all the property to the exclusion of girls and women had the effect of 'saving' the customary law rule from constitutional attack. This was because the duty of support rendered the discrimination fair. In the view of this writer the criticism is justified but the point usually overlooked is the impact of the approach of the court. In deciding to assess an African customary practice on its own merits without assuming its inferiority to some other "mainstream" notions of propriety, the court sent a strong signal about the future of customary law in a constitutional dispensation.
- ii. The failure to recognise the existence of a marriage between Hleziphi Mthembu and the deceased was another lost opportunity this time to force the issue of the existence of a marriage so as to ensure the centrality of the real constitutional issue, sex and gender, as opposed to illegitimacy. I submit, with respect, that the point could have been canvassed more forcefully, with a fair chance of success.

One must always be mindful of that important truism in customary law: 'African customary marriage is a process, not an event'. According to many systems of customary law a relationship between a man and a woman 'ripens' towards marriage on the occurrence of a number of events, formal and informal, intended or inadvertent, and the reaction of the couple's families to those events. Chief among the events and occurrences are: discussions about lobolo, cohabitation, pregnancy or the birth of a child.

As it happens, all these fundamentals exist in the case of Hleziphi and Watson. The crisp legal question then becomes: "what is the applicable legal system and, according to that legal system, do these fundamentals constitute a valid customary marriage?" The judgement in the first Mthembu hearing reveals that the applicant is Zulu and the deceased was of South Sotho stock. It would have been worth exploring the rules in these two systems to see whether a valid customary marriage comes into existence, in either system, in the circumstances set out above, despite the protestations of the first respondent. As things have turned out, a feeling persists that a potentially fruitful avenue in inquiry has been blocked by

(or surrendered to) the first respondent, who had the clearest material motive for denying the existence of the marriage.

This is underlined to devastating effect in Dial Ndima's trenchant critique of the Mthembu judgements. Ndima questions why the court did not put the father-in-law to his defence for claiming a right based on customary law while he refused to grant recognition based on the same law to his daughter-in-law and granddaughter. Chiding the three courts involved in the Mthembu matter for failing to locate the claims of Hleziphi and Tembi "within a communal indigenous frame of reference that would reflect [African values] as distinct and original", he refers to the respondent's admission that he had stayed together in the same house with the deceased, his widow and their child, and concludes:

This admission alone was enough for the court to hold the deceased's father to his customary commitments as he had based his claim on African law which did not allow the head of the family to condone cohabitation in the family house. The deceased's father should have been estopped from claiming that a woman who had stayed at the house of which he was the head, as his daughter-in-law, was in fact not so, whilst he relied of African culture's primogeniture rule as the basis of his title.⁷

One can only endorse these views as a clear statement of the source of misgivings around the treatment of customary law in the early post-apartheid cases.⁸

iii. In a somewhat similar way, the refusal to 'develop' customary law in the ways suggested by counsel began the debate (elaborated upon later in this paper) around section 39(2) of the Constitution, which laid the groundwork for the reasoning that was to be adopted much later in the case of **Bhe**.

In the field of family law, two more judgements are worthy of mention in respect of the role they played in confirming the trend supporting a growing belief that customary law was going to be treated sensitively. The first of these was **Makholiso and others v. Makholiso and others 1997(4) SA 509 (TK)**. In this case the court was faced with a tug-of-war over inheritance between two sets of children of the deceased: one set claiming rights as heirs on the basis of their mother's marriage by <u>civil rites</u> to the deceased, the other set claiming the same rights by virtue of the marriage of their mother to the deceased according to customary law. These marriages had taken place during apartheid in the era of "discarded wives", where a customary

⁷ Re-imagining and Re-interpreting African Jurisprudence Under the South African Constitution, a thesis submitted in fulfilment of the requirements for the degree of Doctor of Laws at the University of South Africa, November 2013:164

⁸ Maithufi "The Effect of the 1986 Constitution on the Customary Law of Succession: some observations" (1998) 31 *De Jure* 285. See, on the Swazi, Nhlapo, *Marriage and Divorce in Swazi Law and Custom*, Websters, (Mbabane) 1992, Ch 7.

marriage contracted during the subsistence of a civil marriage was null and void and the children, accordingly, illegitimate.

In a burst of creativity in the new dispensation the court, while acknowledging the stark reality of this legal situation nevertheless opted to deem the 'adulterous' customary marriage a putative marriage, enabling the classification of the children as legitimate, with the result that all of the deceased's offspring were declared to be his heirs in intestacy.

The second case is **Mabena v. Letsoalo 1998(2) SA 1068 (T)**. The issue here was whether an adult man could negotiate *ilobolo* for his intended bride and do so, not with her father or other male relatives, but with her mother. The court, consciously basing its decision on section 39(2) of the constitution as a "development" of customary law according to the "spirit, purport and objectives" of the Bill of Rights, ruled in the affirmative on both courts. This confirmed the man's right to negotiate personally and to do so with the mother, whose right to negotiate *ilobolo* and give consent to the marriage was also confirmed.

The early era probably reached its climax in the set of cases cited as **Bangindawo and others v Head of the Nyanda Regional Authority and another; Hlantalala v Head of the Western Tembuland Regional Authority and others 1998(3) SA 262 (TK)**. The applicants in these cases challenged the constitutionality of sections of the Transkei Regional Authority Courts Act 13 of 1982. The courts set up in terms of this Act were impugned on a number of grounds, the main one being that they did not allow accused persons to be represented by a lawyer. But there were other criticisms, such as that the courts in question unlike the Magistrate Courts follow a "truncated procedure"; that they do not respect the concept of separation of powers; and that their presiding officers have no training in law.

In what many commentators considered to be a blast of fresh air in the debate, Madlanga J gave short shrift to these arguments, maintaining that customary courts cannot be judged by the standards of magistrates courts. Essentially, the court ruled that it was wrong to benchmark customary courts against the culture and procedures of western courts when their whole purpose and function were based on a different value system⁹. Implicit in this judgement was an

⁹ But see Pieterse M (2001) "It's a 'black thing': upholding culture and customary law in a society founded on nn-racialism" 17 *South African Journal on Human Rights* 364 for a contrary view.

acknowledgement that constitutional protection of cultural diversity presupposed the acceptance of a parallel system of courts.

Analysing these trends at the time many customary law watchers began to relax, increasingly comfortable in the knowledge that the subjection of customary law to the constitution was not necessarily a plot to kill it. Later developments were to show whether such relaxation and comfort were justified.

2.2. The later phase

What distinguishes the later phase from the earlier one is probably the passage through the courts during this period of a cluster of 'hard cases' which deeply exercised the minds of South African judiciary and, in the process, produced significant milestone decisions in customary law.

Easily the most celebrated of these was the case of **Bhe and others v. Magistrate Khayelitsha** and others 2005 (1) SA 580 (CC). [Reported together with Shibi v Sithole and others; and South African Human Rights Commission and another v. President of the Republic of South Africa and another]. The case captured public attention not only because of the importance of the subject matter but also because it provided vindication for those commentators who had forecast during the development of the Recognition of Customary Marriages Act that the issue of succession would reach the Constitutional Court way before the question of polygamy.

In the cases of **Bhe** and **Shibi** the Constitutional Court was considering applications for confirmation in terms of section 172(2) of the Constitution of the orders granted by the respective High Courts (Cape, in the instance of Bhe and Pretoria in the instance of Shibi). These courts had, respectively, struck down as unconstitutional section 23(10)(a, c) and (e) of the Black Administration Act 38 of 1927 read with Regulation 2(e) of the Regulations and section 1(4)(b) of the Intestate Succession Act 81 of 1987, and also the customary law principle of male primogeniture. In both cases the applicants sought relief against the provisions in question which denied the applicants the right to inherit the estates of their deceased fathers. Nonkululeko Bhe had brought her application in the Cape Provincial Division, which granted

the relief sought, declaring that "until the afore-going defects are corrected by a competent legislature, the distribution of intestate black estates is governed by section 1 of the Intestate Succession Act 81 of 1987".

The Constitutional Court confirmed the orders of the two High Courts, holding the impugned statutory provisions to be unconstitutional and invalid. The consequence of holding these provisions invalid, the court continued, was to re-activate customary law as the law governing succession in the case of Africans, which then led to a consideration of the rule of male primogeniture in customary law by the court. Langa DCJ reviewed the historical purpose and function of the rule, its transformation into "official" customary law and the changed economic and social context in which it was expected to function. He came to the conclusion (at para 97) that "the official system of customary law of succession is incompatible with the Bill of Rights. It cannot in its present form, survive constitutional scrutiny." The rule was accordingly struck down as unconstitutional. The court then turned its attention to measures that should be put in place pending legislative rectification, deciding in the end to adopt section 1 of the Intestate Succession Act.

The next thunderbolt came in the form of **Shilubana and others v. Nwamitwa 2009 (2) SA 66 (CC)**. The case concerned succession to the chieftainship of the Valoyi traditional community in the province of Limpopo. Briefly stated, the issues arose from the actions of the Valoyi royal family which had unanimously resolved to confer the chieftainship on Ms Shilubana, the daughter of Fofoza, a *hosi* (chief) who had died without male issue in 1968 and therefore had been succeeded by his younger brother – ie. Shilubana's uncle. In trying to bring their governance arrangements in line with the Constitution, the royal family with the active participation of the younger brother Richard, who was now the *hosi*, sought to install as chief the daughter who had been passed over on the death of her father allegedly "because she was a woman".

The actions of the royal family were opposed by the respondent who claimed to be the rightful heir to the chieftainship as *Hosi* Richard's eldest son. To this end, he had instituted proceedings in the High Court to be declared the heir who was entitled to succeed *Hosi* Richard upon his death. His application had succeeded in the High Court and, on appeal, in the Supreme Court of Appeal (SCA). Ms Shibulana sought leave to appeal to the Constitutional Court against the

decision of the SCA, claiming that the royal family were within their rights in amending the customary law to declare her the rightful *hosi* and restore the chieftainship "to the house from which it was removed by gender discrimination." In response, the respondent argued that the royal family's actions had been "grossly irregular" because they lacked the power to redirect the succession by selecting someone other than the heir as indicated by the customary law of the Valoyi. The Constitutional Court found for the appellant holding, essentially, that a community had a right to develop its own laws in a manner consistent with the constitution; that in ascertaining a rule of customary law past practice was relevant but not decisive; that the royal family's resolution legitimately constituted a change in the customary law of the Valoyi. The decision caused ripples in legal and social circles both as an endorsement of 'enacted' living customary law and as a harbinger of unprecedented uncertainty in the area of customary law succession to chieftainship.

A mere six months after the Constitutional Court disposed of these heavy matters of civic status, it had to return to family law in the form of another confirmation hearing. This time the court had been approached for confirmation of a declaration of constitutional invalidity by the High Court in respect of certain national and provincial legislation dealing with the proprietary consequences of customary marriages. The case was reported as **Gumede v. President of the Republic of South Africa and others 2009 (3) SA 152 (CC)**

The impugned provisions were Sections 7(1) and 7(2) of the Recognition of Customary Marriages Act¹⁰; Section 20 of the KwaZulu Act on the Code of Zulu law¹¹; Sections 20 and 22 of the Natal Code of Zulu law¹². The effect of these provisions was that, in excluding customary marriages contracted before the its commencement from the operation of clauses declaring post-recognition marriages to be in community of property, the RCMA relegated pre-recognition marriages to customary law which, in the case of KwaZulu-Natal, was governed by the codes. The High Court had found these provisions to be unfairly discriminatory against wives in pre-recognition marriages and accordingly declared them to be unconstitutional and invalid. The Constitutional Court agreed and confirmed the High Court decision as follows:

10 120 of 1998

¹¹ 16 of 1985

¹² Proc R151 of 1987

The court accordingly: (a) declared s 7(1) of the Recognition Act to be invalid to the extent that it related to monogamous customary marriages; (b) severed the words 'entered into after the commencement of this Act' from s 7(2) of that Act; and (c) declared s 20 of the KwaZulu Act, s20 of the Natal Code, and s 22 of the Natal code to be invalid.

Mayelane v. Ngwenyama¹³ which again turned in part on the interpretation of sections of the RCMA. In this instance the issue was the interpretation of section 7(6) of the RCMA: whether, in requiring a husband who wants to marry another wife to make certain proprietary arrangements it introduces (by the back door, as it were) another requirement for the validity of a customary marriage. Ms Mayelane and Ms Ngwenyama both claimed to be married by Xitsonga customary law to one Mr Moyana, now deceased. After his death Ms Mayelane, the first wife, challenged the validity of Ms Ngwenyama's marriage on the ground that the RCMA required a husband to obtain the consent of his first wife to contact a valid further customary marriage, and that Mr Moyana had not obtained such consent. The issues before the court resolved themselves into:

- i. whether Section 7(6) of the RCMA did indeed introduce a new requirement of validity by requiring the husband to seek his first wife's consent;
- ii. if not, whether such consent was required in Xitsonga customary law; and
- iii. whether, if such consent had not been furnished, the court ought to develop the customary law to insert this requirement.

In the event, the Constitutional Court, by a majority, held that the Act did not contain such a requirement and that Xitsonga customary law did not have a uniform rule. The court decided in these circumstances to develop Xitsonga customary law to include the rule, with the consequence that non-compliance with the rule would result in the attempted subsequent marriage being invalid.

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¹³ 2013(4) SA 415 (CC)

The decision, striking as it did at the heart of the institution of polygamy, caused ripples in customary law circles. It has become a rich source of debates – about the ascertainment by courts of living customary law, about its application to other traditional communities in South Africa and about the intentions of the legislature in enacting the RCMA¹⁴

1.3 Parallel developments outside the courts

From the review of the judicial decisions above it is fair to conclude that there has been no shortage of activity in the courts with respect to customary law. It is also quite clear that matters of marriage law and family law in general and of traditional leadership have assumed centre stage. This is not surprising, since issues of kinship relations cover the bulk of customary law and spill over into every aspect of life, especially matters of entitlement to land, which is where the intersection with traditional leadership is most evident¹⁵.

But the government and the legislature have been no less active. Legislation enacted since 1994 dealing expressly with or significantly affecting customary law includes: the Recognition of Customary Marriages Act¹⁶; the Children's Act¹⁷; the Communal Land Rights Act¹⁸; National House of Traditional Leaders Act¹⁹; Reform of Customary Law of Succession and Regulation of Related Matters Act²⁰; Traditional Leadership and Governance Framework Act²¹. There have also been legislative proposals which have not yet made their way through Parliament: for our purposes the most important of these are the Traditional Courts Bill²² and the Draft Recognition of Customary Marriages Amendment Bill²³.

Space does not permit of a full analysis of the legislation and this paper intends to limit itself to the RCMA and the TCB, with passing references to other statutes or statutory proposals as and when necessary.

¹⁴ See the reasoning of the majority in paragraphs [69] – [84] and the dissenting judgements of Zondo J [90] – [131] and Jafta J (Mogoeng CJ and Nkabinde J concurring) in [132] – [157]

¹⁵ See the essays in Claassens and Smythe (ed) *Marriage Land and Custom: Essays on Law and Social Change in South Africa*, Juta & Co (Cape Town) 2013.

^{16 120} of 1998

¹⁷38 of 2005

^{18 11} of 2004

^{19 22} of 2009

²⁰ 11 of 2009

²¹ 41 of 2003

²² [B1-2012]

²³ [B110-98]

2. The courts and the development of living law

Thankfully, there is no longer any doubt in South African legal circles that the customary law recognised by the Constitution is living customary law as opposed to official customary law. What was hinted at in the pronouncements of the court in the Certification case²⁴ has been amplified and clarified in a series of decisions, notably **Alexkor**²⁵, **Bhe**²⁶, **Shilubana**²⁷ **Gumede**²⁸ and **Mayelane**²⁹. Indeed some of these pronoucements have attained biblical status in declaring the direction of customary law away from official understandings of it towards living norms that govern the day-to-day lives of communities. Some of these iconic declarations include the holding in **Alexkor**³⁰ where the court held:

that while in the past indigenous law was seen through the common-law lens, it now had to be seen as an integral part of our law and like all law it depended for its ultimate force and validity on the Constitution;

that the courts were obliged by s 211(3) of the Constitution apply customary law when it was applicable, subject to the Constitution and any legislation that dealt with customary law. In doing so the courts had to have regard to the spirit, purport and objects of the Bill of Rights;

that it was clear that the Constitution acknowledged the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, made it clear that such law was subject to the Constitution and had to be interpreted in the light of its values. Furthermore, like the common law, indigenous law was subject to any legislation, consistent with the Constitution, that specifically dealt with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law;

that indigenous law could be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However caution had to be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that were foreign to it. In the course of establishing indigenous law, courts may also be confronted with conflicting views on what indigenous law on a subject provides.

The difficulties inherent in following the living-law path have not been lost on the courts. Thus, in **Bhe**, Langa DCJ observes:

²⁴ Certification of the Constitution of the Republic of South Africa 1996(4) SA 744 (CC) para 197

²⁵ Alexkor v Richtersveld Community 2004 (5) 460 (CC)

²⁶ Bhe v Khayelitsha Magistrate 2005 (1) SA 580 (CC)

²⁷ Shilubana v Nwamitwa 2001 (2) SA 66 (CC)

²⁸ Gumede v President of the Republic of South Africa 2009 (3) SA152 (CC)

²⁹ Mayelane Ngwenyema 2013 (4) SA 415 (CC)

³⁰ op cit n 25

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The question whether the Court was in a position to develop that rule in a manner which would 'promote the spirit, purport and objects of the Bill of Rights' evoked considerable discussion during argument. In order to do so, the Court would first have to determine the true content of customary law as it is today and to give effect to it in its order. There is however insufficient evidence and material to enable the Court to do this. 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, as the Court should, against the provisions of the Bill of Rights. ³¹

There has also been no shortage of attempts at setting out some guidelines for the courts when faced with the need to ascertain a rule of living law. Van der Westhuizen J in **Shilubana** set out a useful framework:

Customary law must be permitted to develop, and the enquiry must be rooted in the contemporary practice of the community in question. Section 211(2) of the Constitution requires this. The legal status of customary-law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to the Constitution and cannot be accepted.³²

The case of **Mayelane** is rich in this respect. The reasoning of the majority is brought into sharp focus by the dissenting judgements both on the issue of how a court should ascertain living customary law and the circumstances under which it may develop that law³³.

If the battle between living customary law and official customary law has been won, the remaining issues in my opinion resolve themselves essentially into:

- how a court should go about satisfying itself of the alleged existence of a rule of customary law; and
- when it is appropriate for a court to develop the customary law in line with Section 39(2) of the Constitution.

With regard to the former, there is a useful discussion of changing trends in ascertainment to be found in a recent text book on customary law in post-apartheid South Africa³⁴. The authors discuss

³² para 55

³¹ para 109

³³ Both dissents address these issues in depth. See note 38 below.

³⁴ Himonga and Nhlapo (ed) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives*, Oxford University Press (Cape Town) 2014: 63-68.

old-school ascertainment approaches as exemplified by the decisions in the **Mthembu** cases³⁵ and the rejection of these approaches in later jurisprudence. In **Bhe** the issue of ascertainment was sidestepped in both the majority and dissenting judgements, the former pleading the dearth of evidence establishing the appropriate rule and the latter arguing for development of the impugned rule in which case the question of ascertaining the living law rule would not arise³⁶. Both judgements endorse the requirement that evidence should be adduced to establish a rule of living law. **Shilubana** so far provides the clearest guidelines for the ascertainment of living law. As the authors put it:

According to this statement, Shilubana has settled the ascertainment debate between the living and the official versions of customary law in favour of the former. Van der Westhuizen J emphasised that customary law is the practise of the community, past and present. If past practise is proved, it must be accepted as the community's customary law. There are only two ways of deviating from the community's past practice, namely:

- proof that a new community practice has superseded the past practice, in which case the new practice is the applicable customary law
- when past practice is developed to align customary law with constitutional values.³⁷

Mayelane endorses the Shilubana guidelines and indeed the court called for further evidence to clarify the issue of whether a rule existed in Tsonga customary law requiring the consent of the first wife before a husband could marry another spouse. What the case raises sharply is the question of what ought to happen if the evidence is inconclusive. The majority prefers the approach of fashioning some common understandings from the apparent disagreements, referring to the latter as "not [a case] of contradiction, but of nuance and accommodation" The dissenting judgements, on the other hand, criticise this approach as having no legal basis and leading to the improper preference of one version over another 19 In view of the Mayelane decision, the issue of the proper approach to the ascertainment of living law cannot be considered to be closed.

The issue of the development of customary law in line with section 39(20 of the Constitution is linked to ascertainment but is in a sense more uncertain. In the first place, there does not seem to be consensus as to when a court should consider itself bound to develop the law and when it is free to decline. Going back to the earlier cases, one finds that there is no uniform approach.

³⁶ op cit n 31

³⁵ ibid

³⁷ op cit n 34 at 66

³⁸ para 61

³⁹ Zondo J at para 126 and Mogoeng CJ at para 139

Another look at **Mthembu v Letsela** and **Mabena v Letsoalo** is warranted. The relative positions of the disputants in the two cases are strikingly similar. In each case a father is seeking to deny the status of daughter-in-law to the woman left behind by his deceased son. In each case a successful challenge to the alleged marriage has immediate material rewards: the father inherits the contested property. Why then the different results? In **Mabena**, the Court was able to accept the challenge to develop customary law in line with the "spirit, purport and objects" of the Bill of Rights as enjoined by section 39(2) of the interim constitution: in **Mthembu** the court refused to do so.

Before this is taken as an obvious example of the difference between a 'liberal' court and a 'conservative' court we need to study the two decisions carefully. The Court in **Mthembu** declined the invitation because it felt it was being asked to take a momentous step without the benefit of the total picture, a task the Court felt was better undertaken by the legislature. In **Mabena** the Court was facing nothing of the sort. In that case, the Court found some evidence to support the view that a new customary practice had evolved; that this new practice was more 'liberal' or 'progressive' then the 'official' rule; and that applying this new practice would achieve a constitutionally correct result.

In Mabena, therefore, the Court was able to apply an emerging rule of 'living' customary law to achieve a result that would have constitutional approval. In other words, the Court was in the happy position of using politically correct reasoning to achieve a politically correct result. And all because customary law had itself over the years adapted and developed in a progressive direction. This has huge implications on the way we seek to understand how cultures operate; perhaps they can adjust internally faster and more effectively than we have hitherto been prepared to accept.

The later cases are no more illuminating. In **Bhe** the majority declined to develop the rule of male primogeniture because it could not readily determine the "true content of customary law as it is today" and moreover feared that such an exercise would delay unduly the relief due to women in similar circumstances. In the minority judgement, by contrast, Ngcobo J concluded that the rule offended against the equality provision of the Bill of Rights and was therefore deficient. "It must be developed so as to remove the deficiency" he declared.

But it is the way that Justice Ngcobo arrived at this conclusion which is instructive. According to the judge, following the court's decision in the case of **Carmichele v. Minister of Safety and Security**

⁴⁰ at para 109

⁴¹ at para 220

and Another⁴², there are at least two instances where the need may arise to "develop" customary law: (a) to adapt it to changed circumstances, or (b) to make it conform to the Bill of Rights. In the first instance it will be necessary to ascertain the living law rule; in the second, the law according to which people actually live is irrelevant.

Following this approach, Ngcobo is critical of the reasoning supplied by the majority for involving the issue of living law and the delays that might be caused by attempting to ascertain it. In his view, the issue does not arise because ascertainment of the living law has nothing to do with developing customary law for the purpose of bringing it into line with the Bill of Rights. This can be done quite independently of the actual practice "on the ground" simply by subjecting the impugned rule to the appropriate constitutional yardstick. On this basis the judge found the rule of male primogeniture in customary law to be inconsistent with the quality provision in the Bill of Rights and, for that reason, was "ripe" for developing in line with section 39(2).

As powerfully pointed out by Dial Ndima⁴³, this reasoning leads Justice Ngcobo into dangerous waters. While acknowledging that the rule may once have served a socially useful purpose, the judge observes that its contemporary application is in the context of vastly changed circumstances:

"The rule of male primogeniture may have been consistent with the structure and functions of the traditional family. The rule prevented the partitioning of the family property and kept it intact for the support of the widow, unmarried daughters and younger sons."

Ngcobo, noting that "the circumstances in which the rule applies today are very different" goes on to describe the ways in which modern woman is no longer shackled to the dictates of the traditional economy, observing that "many women are de facto heads of their families", that "they support themselves and their children by their own efforts", many contributing meaningfully in the acquisition of family assets. But instead of pursuing this line of thought to raise the question whether these changes have influenced any developments in customary law or, alternatively, whether they are themselves the results of developments in customary law, Judge Ngcobo moves on to the conclusion: "The defect in the rule of male primogeniture is that it excludes women from being considered for succession to the deceased family head". ⁴⁶ In other words, he reverts to the official rule and finding it wanting proceeds to develop it by removing the gender bias. As Ndima⁴⁷ points out, this was a lost

⁴² 2004 2 BCLR 133 (CC)

⁴³ op cit n 7

⁴⁴ para 221

⁴⁵ ibid

⁴⁶ para 222

⁴⁷ op cit n 7 at 184

opportunity to consider whether the changes in the circumstances of women that he so rightly identified had been matched by any organic adjustments in the rules of the game at grassroots level.⁴⁸

A possibly problematic consequence of this approach is identified by Ndima, who observes:

"The danger in Ngcobo J's approach is that it may lead to an anomalous situation where two rules apply simultaneously – the one growing from the popular habits of the community; and the other developed by the courts. Which one of the two rules would prevail as the law?" ⁴⁹

Clearly, there remain some unresolved issues around the question of when it is proper to develop a rule of customary law, and when it is improper.⁵⁰ Further potholes in the road towards developing a judicial guideline for developing customary law in terms of section 39(2) are found in the case of **Mayelane**.⁵¹ The case is notorious for introducing, in the words of Dial Ndima, "an additional requirement for the validity of the customary marriage"⁵² in the form of the first wife's consent, in the absence of which the subsequent marriage is invalid. But for our purposes here **Mayelane** is important for the debate between the justices over the issue of "developing" customary law.

The majority readily concede that the validity requirements for a customary marriage are found in section 3(1)(b) of the RCMA and that section 7(6) does not introduce any additional requirements. But then the court says "... we must therefore turn to living Xitsonga customary law to determine whether Ms M's claim can be sustained"⁵³ thus prompting Ndima to observe that the court has turned section 211(3) of the Constitution (which provides for the application of customary law subject to legislation) on its head by applying legislation subject to customary law!⁵⁴

The court then directed the parties, including the *amici* to present affidavits on the question of whether the consent of the first wife is a rule of Xitsonga customary law. In the result, the affidavits were inconclusive in that, taken together, they were contradictory. The court chooses to place a positive interpretation on this:

⁴⁸ There is some evidence from other African countries showing progressive developments in customary laws of succession in response to changed socio-economic circumstances. For instance, the <u>Women and the Law in Southern Africa Project</u> found that lower customary courts in Zimbabwe were routinely upholding family decisions to appoint women as heirs, see Stewart et al "The Legal Situation of Women in Zimbabwe" in *The Legal Situation of Women in Southern Africa* (University of Zimbabwe Publications) Harare 1990

⁴⁹ Ndima op cit 185

⁵⁰ One may also question the logic of striking down a rule as unconstitutional and then "developing" it to bring it into line with the constitution.

⁵¹ op cit n 13

⁵² op cit at 234. He continues: "There was no support for this finding either in the Act or in African Law,"

⁵³ para 42

⁵⁴ op cit n 7 at 235

"We do not think this picture of Xitsonga customary law that the further evidence has given us should be viewed as presenting a difficulty in deciding the case before us ... the further evidence has shown that there are nuances and perspectives that are often missed or ignored when viewed from a common law perspective." ⁵⁵

On the back of this interpretation the court finds that the existence of the consent requirement in Xitsonga customary law has been established and, relying on the constitutional imperatives of human dignity and equality, accordingly "develops" Xitsonga customary law:

"In accordance with this court's jurisprudence requiring the determination of living customary law that is consistent with the Constitution, we thus conclude that Xitsonga customary law must be developed, to the extent that it does not yet do so, to include a requirement that the consent of the first wife is necessary for the validity of a subsequent customary marriage. This conclusion is in accordance with the demands of human dignity and equality." ⁵⁶

In his dissenting judgement, Zondo J criticises the court's decision to call for further evidence, arguing that it was unnecessary. According to Judge Zondo, the matter could (and should) have been decided on the same record that was before the High Court. In the first place, the answer was clear from the record: the respondent had not discharged the onus of proving the existence of a customary marriage between herself and the deceased. There was evidence before the court of the consent requirement in Xitsonga customary law and it was not challenged. In the second place, in the view of Judge Zondo, calling for further evidence had merely confused the issue because the new evidence was inconclusive. He disagrees with the majority that the lack of consensus in the evidentiary inputs poses no difficulty:

"I am unable to agree with the main judgment that there are no contradictions or disputes of fact in the additional affidavits. When I read those affidavits, the single most material dispute of fact, namely, whether, among the Vatsonga, a man needs to obtain his first wife's consent before he can enter into a second or further customary marriage with another woman, seems to be quite prominent. The main judgment's conclusion that there are no disputes of fact on the issue under consideration runs contrary to the contents of the affidavits." ⁵⁷

He then undertakes a breakdown of the evidence collected through the affidavits, diving them into those that supported the existence of a consent requirement and those that did not, and those that fell somewhere between the two positions. He concludes that the main judgement is essentially an indication of a preference for the evidence of two deponents, one Mr Maluleke and one Dr Shilubane. Judge Zondo declares: "I am unable to see the legal basis upon which one can prefer one version over another on this dispute of fact in a motion matter."⁵⁸

⁵⁵ para 60

⁵⁶ para 75

⁵⁷ para 126

⁵⁸ ibid

Jafta J (with Mogoeng CJ and Nkabinde J concurring) writes the second dissenting judgement, in which the justices question the need to develop Xitsonga customary law in relation to the rule in question. They raise the fact that neither party for this development – because, according to the judges, they all accepted the existence of the consent requirement. More to the point, the dissent points to the abundance of evidence proving the existence of the consent requirement. "The evidence supporting the applicant in her ascertain of the customary-law rule on consent is overwhelming." ⁵⁹ Justice Jafta continues:

In the light of this evidence, it has been established that the custom observed by the community to which the applicant and her late husband belonged requires consent of the first wife for a subsequent marriage to be valid. This meets the concern that the court had on the adequacy of evidence establishing the customary-law rule relied on by the applicant. Accordingly, there is no need for developing Xitsonga customary law insofar as the present case is concerned.⁶⁰

Usefully, the judgement takes the time to visit the issue of uniformity in customary law rules, pointing out that there may be different observances even within the same group or sub-group, attributable to a range of circumstances.⁶¹

It is not unheard of that within the same broader group of African people we find customary-law rules with differ. This may occur as a result of development that takes place in various communities within a group.

The majority's decision to develop Xitsonga customary law is attacked even more pointedly by Jafta J:

In fact the development falls outside the scope of the current case. As mentioned earlier, none of the parties have asked for it. But even if one of them did, it would have been inappropriate to raise the development of customary law for the first time in this court. It was not raised in the high court. Nor was it raised in the Supreme Court of Appeal. Therefore, this court deals with the development of Xitsonga customary law as a court of first and last instance. This is undesirable and where it is not necessary for a determination of a dispute, in my view, it should not be done. ⁶²

The dissent makes the point that the advantage of making the claim for development in the High Court is that it allows parties to prepare and to respond to the claim in an informed way.

⁶⁰ para 139

⁵⁹ para 138

⁶¹ para 140. The judgement gives the example of Shilubana where the different observance was a result of a royal family resolution. Other reasons for variations in practices may range from conversion to Christianity to clan preferences.
⁶² para 142

A properly pleaded claim allows the other parties to meet it head-on and place before a court evidence necessary for assessing the propriety of the development. In this case we do not know why the other Vatsonga communities follow the custom of simply informing the first wife instead of requiring her consent. On the face of it, the rule appears to be inconsistent with the rights to dignity and equality, entrenched in the Bill of Rights. But we know that under appropriate circumstances these rights can be limited. Because the case was not about the validity of the developed rule, we do not know if there is justification for it. In the circumstances of this case it would be dangerous to assume that there is no justification.⁶³

The judgement continues:

Moreover, Xitsonga customary law was developed in the main judgment appears not to be in line with Constitution. To require the consent of the first wife only is not consistent with the equality clause. And if the rule is to be developed to require consent of all existing wives, there may be difficulties arising out of its application. Take, for example, the case of a man with 13 wives who wishes to marry another wife. If he marries with consent of 12 wives only because one of them did not consent, can it be said that the marriage is invalid? Would the lack of consent by one wife vitiate a marriage concluded with the consent of 12 other wives? These issues were not canvassed because of the manner in which the case was prosecuted in other courts and in this court.⁶⁴

There were other objections raised to the majority judgement, such as the technical issue of whether it was appropriate for an amicus to raise an issue which the parties themselves are debarred from raising. In considering the totality of the points raised in the two dissenting judgements against the majority's decision to develop Xitsonga customary law, it would be fair to conclude that we are no closer to a uniform guideline as to when and how development of customary law should be approached by the courts. On current form, the invitation to develop customary law has been accepted where:

- a rule of living law was proved (or alleged) which was attractive because it was in line with the Bill of Rights (eg. **Mabena v Letsoalo**);
- there was no living law rule alleged or proven, but the court saw an opportunity to "do the right thing" for instance, overturning an apartheid distortion and took it (eg Makholiso v Makholiso)
- there was no compelling evidence one way or the other, but the court wished to honour a constitutional right (eg. **Mayelane v Ngwenya**)
- granting the constitutional right claimed would support conscious and progressive intragroup reforms (eg. **Shilubana v Nwamitwa**)

⁶⁴ para 144

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⁶³ Para 143. This argument is applicable also to the criticism of Ngcobo J's refusal to pursue the possibility of the existence of a more constitutionally complaint living law rule in practice, in respect of primogeniture.

• development was the least intrusive intervention in customary law (eg **Bhe** dissent)⁶⁵

On the other side of the coin, the courts have declined the invitation where:

- they believe they were not qualified; that the courts were better-placed to introduce change (Mthembu v Letsela II and III; the majority in Bhe v Magistrate, Khayelitsha);
- they believed the process required knowledge of living law and no evidence had been presented (eg Bhe majority)
- they believed the decision could more easily and properly be founded on different grounds (eg. the dissenting opinions in **Mayelane**)

A final note on living law must surely take into account an issue we have not yet addressed. It may still be a "work in progress" whether courts could await the existence of a proveable living law practice before they develop the customary law in that area, or whether they merely need to be persuaded that the rule (official or otherwise) has outlived its time. Nevertheless, in either case the job is rendered easier when the rule in question is in alignment with the Bill of Rights. What are courts to do when faced with a living-law practice that violates the Constitution?

Another way of posing this question is: flexibility and adaptability to changed circumstances may be some of the more attractive attributes of customary law yet there is no guarantee that all "home grown" solutions will be constitutionally compliant – what should a court do with bad living laws?⁶⁶ Perhaps even more interesting is the case, not so much of bad living law, but of living laws based on the 'unintended consequences' of law reform efforts.⁶⁷

⁶⁵ The tone and content of Justice Ngcobo's dissenting opinion suggests a laudable desire to limit interference with customary law to a minimum while aligning it to the constitution.

⁶⁶ The issue of *ukuthwala* comes to mind where there is a clear and definite practice increasingly prevalent in certain communities which is, just as clearly, a wholesale violation of the constitutional rights of young girls and an affront to many values that indigenous communities hold dear.

⁶⁷ The cases of **Radebe v Road Accident fund (2012/10855) 2013 ZAGPJHC 135** (9 May 2013) and **PSC V LPM [2013] JOL 29847 (GNP)** come to mind of s 3(1)(6) of the RCMA. The section requires a marriage to be "celebrated" according to customary law. In the latter case in particular, there is a strong indication that the verb has been construed as a requirement for a party as opposed to 'solemnisation' as intended by the legislature.

3. A note on law reform

As mentioned earlier, developments in customary law were not occurring only in the judicial arena. There were several state interventions during the same period which directly addressed customary law, mainly in the form of legislative proposals which were either successfully passed through parliament or fell by the wayside or faltered in their progress for a variety of reasons.

A full review of these measures is beyond the scope of this paper, which will thus concern itself only with two projects, one which culminated in legislation and one which did not. The first of the project in question was the investigation into customary marriages by the South African Law Reform Commission⁶⁸ which produced a Report and a Bill that was enacted into law as the Recognition of Customary Marriages Act 200 of 1998. The second was the attempt to legislate the powers and functions of customary courts through the introduction in 2008 of the Traditional Courts Bill which was so strongly opposed by the legal fraternity and civil society on the grounds of both content an of process, that it was withdrawn. It was controversially re-introduced unchanged in 2012 and continued to draw the same criticisms and unfavourable comparisons with the 2001 Bill in respect of both content and process. Opposition to the Bill was so fierce that in 2013 the government quietly withdrew it from parliament's legislative programme.

The work to extend formal legal recognition to marriages entered into in accordance with customary law was one of the earliest projects of the "new" Commission. ⁶⁹ For many good reasons, not the least of which was the need to end the insult of decades of non-recognition by apartheid laws, the recognition of customary marriages in the new South Africa was always about "when", never "whether". ⁷⁰ But it was also clear to the Law Commission that any recognition of these marriages would have to involve measures removing the disabilities and inequalities associated with this institution especially in respect of women and children. It could not be "business as usual".

Several provisions attempted to give voice to this thinking, notably section 6 on equality between the spouses; section 7 which tried to address the issue of property in a polygamous marriage; and section

⁶⁸ At the time still referred to as the South African Law Commission (SALC).

⁶⁹ The SALC was created by the South African Law Commission Act of 1968 and its operations had been suspended during the democratic transition. It was revived in 1996 with new membership.

⁷⁰ [See SALC Report on Customary Marriages 1998 for background to the project]

8 which imported the provisions of the Divorce Act⁷¹ in an effort to strengthen the protections available for women and children when the marriage ends while applauded by human rights activists. These measures were not to everyone's liking and the Act received a fair amount of negative comment.⁷²

For our purposes, the point sought to be made in this paper can be established simply by examining section 7 which in subsections (6) - (9) introduced procedures to be followed by a husband who wished to marry another wife.

- 6) A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contact which will regulate the future matrimonial property system of his marriages.
- 7) When considering the application in terms of subsection 6
 - a) the court must
 - i. in the case of a marriage which is in community of property or which is subject to the accrual system
 - (aa) terminate the matrimonial property system which is applicable to the marriage; and (bb) effect a division of the matrimonial property;
 - ii. ensure an equitable distribution of the property; and
 - iii. take into account all the relevant circumstances of the family groups which would be affected if the application is granted;
 - b) the court may
 - i. allow further amendments to the terms of the contract;
 - ii. grant the order subject to any condition it may deem just; or
 - iii. refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.
- 8) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).
- 9) If a court grants an application contemplated in subsection (4) or (6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of such contact and must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated.

The original idea in enacting section 7 had been to accommodate community of property in a polygamous marriage, a notion adopted by the SALC after women's groups made clear their opposition the out-of-community regime during the consultations on the Bill.

⁷¹ 70 of 1979

⁷² Mainly in respect of aspects considered to be an attempt to 'westernise' the customary marriage. See for instance Mqeke RB (1999) "The 'Rainbow Jurisprudence' and the Institution of Marriage with emphasis on the Recognition of Customary Marriages Act 120 of 1998 **Obiter** 20(1): 52-68; also Maithufi and Bekker (2002) The Recognition of Customary Marriages Act of 1998 and its impact on Family Law in South Africa **CILSA** 35 (2): 182-197

Given the profile that has been given to the problems associated with this provision by the case of Gumede, there is little need to go over the same ground. Suffice it to say that the introduction of procedures requiring court orders and lawyers in a customary law setting never really had a chance of succeeding in implementation. The truth of the matter is that recent research is beginning to reveal that these new mechanisms are being ignored wholesale in traditional communities.⁷³

The attempt by the government to enact the Traditional Courts Bill⁷⁴ into law raises a different set of issues. It is important to put it on record that the Bill was radically different from the original draft bill on Traditional Courts that was attached to the Report of the Law Commission in 2002. That bill was the outcome of intense country-wide consultations with traditional leaders, women's organisations, religious leaders, and a range of other stakeholders. The parliamentary process of public consultation is by its nature unable to compete with the Law Commission process for depth of debate or width of geographical coverage. To put this another way, the Traditional Courts Bill might have appeared to be the outcome of the Law Commission process, but in reality it was not, because its provisions departed significantly from those that were negotiated during that process.

In the view of many citizens (rural women's groups, human rights advocates, academics and parliamentarians) the Traditional Courts Bill was seriously flawed at many levels. These included its adoption of apartheid Bantustan boundaries as the areas of geographical jurisdiction for the courts of traditional leaders⁷⁵; the composition of the courts and their procedures⁷⁶; a truncated appeals hierarchy⁷⁷; and its flouting of living customary law.⁷⁸ An examination of only one of these issues will suffice to make the point: the question of composition.

Composition of traditional courts

Two problems are easily identifiable under this heading:

⁷³ The same can probably be said of Section 8, which ousts familiar family-based processes in favour of court proceedings.

⁷⁴ The Traditional Courts Bill [B1-2012], originally introduced in the National Assembly as [B15-2008] and withdrawn on 2 June 2012 and then re-introduced.

⁷⁵ Section 4(1) and (2)

⁷⁶ Section 4(4)

⁷⁷ Section 27

⁷⁸ See on this topic Mnisi Weeks S "Beyond the Traditional Courts Bill (2011), "SA Crime Quarterly 31-40; Mnisi Weeks S "Regulating Vernacular Dispute Resolution Forums" Oxford University Commonwealth Law Journal 133-155; Ntlama N and Ndima DD (2009) "The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems" 4 International Journal of African Renaissance studies 6.

i. Designating a king or queen, or senior traditional leader as the sole presiding officer of the court⁷⁹.

• This is problematic in that it ignores the layered nature of traditional conflict resolution

and the traditional justice system. There is now more than enough empirical evidence to

suggest that in day-to-day traditional life there may be as many as five or six levels of

dispute resolution entities and arrangements: family council; neighbourhood councils;

ward or headman councils; chiefs' councils; kings' courts; and any number of specialised

forums⁸⁰. Often, too, there are lines of appeal between all or some of these levels. The

mischief here is obvious. The Bill distorts customary law by pretending that only the

court of a king or queen, or a senior traditional leader, is known to customary law. This

has the immediate effect of concentrating a great deal of power in the hands of these

members of the traditional hierarchy, to the exclusion of other points of power and

accountability within the system.

• By contrast, the original Law Commission Bill was particularly alive to this issue. Not

only was its definition of a customary court markedly different from the definition of a

traditional court in the current Bill, but the Law Commission Bill also contained a

specific provision on the different levels of courts. A "traditional court" in the current

Bill is a court which

"is presided over by a king, queen, senior traditional leader, headman, headwoman or a member of a royal family who has been designated as a presiding officer of a traditional court by the Minister in terms of Section 4...."81

In the Law Commission Bill, a "customary court" is defined broadly to recognise various types and levels, and Section 3, entitled "levels of customary courts", specifically recognises the existence of a layered system:

• Customary courts shall be of such different levels as are recognised in customary law and may exercise jurisdiction only within the limits prescribed for such level.

• The authorisation for a customary court must specify the level to which the court belongs, together with the limits within which it may exercise jurisdiction.

⁷⁹ Section 4(4)

80 Mnisi Weeks (2011) op cit n 78

81 Section 1

- ii. There is no protection for women and their right of participation in local affairs.
 - Although a traditional court is defined to include (in addition to the king, queen or senior traditional leader presiding) "a forum of community elders who meet to resolve any dispute which has arisen", the Bill does not follow up with any attempt to ensure the gender diversity of this forum. Again, it is instructive to compare this with the Law Commission proposals, which displayed direct sensitivity to this very issue. Indeed, the Commission was so exercised by this issue that in Section 4 of the draft Bill it proposed three possible formulations of the provision:

A customary court must be constituted in accordance with customary law: Provided that in accordance with Section 9 of the Constitution and Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, no less than half the members constituting the court must be women.

Alternatively

A customary court is constituted in accordance with customary law: Provided that in constituting the court effect shall be given to Section 9(3) of the Constitution and Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 as to the need for the reasonable representation of both men and women in public institutions.

Alternatively

- a) Subject to Subsection (2) a customary court is constituted in accordance with customary law.
- b) In order to comply with Section 9(3) of the Constitution a customary court must include both men and women in its composition.
- In addition to the protection of women's right to participate in local affairs in general, there is an even more direct need to protect women during litigation, a process in which they are uniquely vulnerable. Again here, the current Bill is found wanting.
 - This is not to say that the Bill is silent on the matter, but simply that the protections provided are weak and in some instances meaningless. Section 9(2)(a)(i) places a duty on the presiding officer to ensure that "women are afforded full and equal participation in the proceedings as men are". While this appears to address the problem, the placing of the duty on the presiding officer means that any woman who considers that her rights are under threat needs to challenge her situation and to claim the right herself. This renders such protection more theoretical than real. There are many reasons of culture and socialisation that make it unrealistic to expect women to

- make these challenges in a court room full of men and directed to an authority such as a king, queen or senior traditional leader.
- Similarly, Section 9(3)(b) appears to protect the equal right of everybody to represent members of the family by providing that "a party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the family in accordance with customary law and custom". The highlighted words are unfortunate. They render the ostensible right granted totally nugatory. If the right is to be reckoned in terms of customary law, which is notoriously patriarchal, then in fact the grant is meaningless for women. An even more important flaw in this failure of the Bill to protect women's participation more directly is brought into sharp relief by the plight of widows. In many systems of customary law widows are subject to various constraints and limitations during their mourning period, including the prohibition on their public appearances, and the belief that they bring bad luck. These traditional practices and attitudes mean that a widow may not only find herself debarred from appearing in court and representing herself but also that this may happen at a time when she is in fact most in need of legal protection herself, such as when she is in dispute with her husband's relatives over issues of inheritance or even her very status as a continuing member of the household.

The Bill paid lip service to the values stated in its memorandum and in the Objects and Guiding principles in Sections 2 and 3 where the claim is made that the legislation aims to "affirm the values of the traditional justice system" and "enhance access to justice".

Ironically, the Traditional Courts Bill starts off from a good premise: the need to recognise and affirm the values of the traditional justice system while at the same time transforming this system to align with constitutional values. Where the exercise went wrong was that the reform template was untidy, in several senses, thus giving the lie to the noble ideals espoused in the preamble.

In the first place, the Bill missed the point about access to justice being at the heart of the exercise and instead looked at the legislation strictly from the point of view of authority. It compounded this mistake with a wholly untenable provision criminalising the exercise of a citizen's right to a choice of forum, a standard entitlement in dual systems.

Next, the Bill opted for distinctly formalistic adherence to the requirements of gender parity in cases where substantive equality should have been the objective.

Finally, the Bill ignored "living" customary and appeared not to be alive to the fact that this is the version of customary law that is not only protected, but is required, by the Constitution.

Can we do law reform better?

The review in the preceding sections of this paper leads to the inescapable conclusion that despite valiant efforts on the part of the courts and the legislature, there is still a long way to go before we can be satisfied that the project of integrating African values into the South African legal system is on track. In the field of law reform, in particular, there is a need to think differently.

Inspired by criticism both to existing legislation (the RCMA) and proposed law (the Traditional Courts Bill), I propose an *approach* to law reform that would begin the process of rethinking the "Africanisation" project. 82 Essentially, the proposal is to grasp more boldly the merits of infusing African values into South Africa's legal and moral arena. This necessitates in the first instance an acknowledgement of the existence of African values, which display a different emphasis from the western world view, and that these values do have a positive contribution to make in creating the new society.

In the real world, this is easier said than done. In the field which traverses the area of human rights generally and the intersection of human rights with African culture in particular, especially the cultural diversity that is promised by the South African constitution, there are constraints, pitfalls and obstacles that present themselves in attempting to make sense of how this can be achieved.

⁸² It is important to emphasize that these ideas are neither new nor original but are inspired by growing evidence that the debate is gathering momentum. I am indebted to Dial Ndima's doctoral thesis (op cit n 7) for the discussion in this section and the argumentation adopted. See also Mqeke RB, The use of customary practices to combat the spread of HIV/AIDS in some rural areas of South Africa, *Lesotho Law Journal* Vol. 19 (2010) 224-240

Ndima has referred to this as the need for state institutions to "unlearn colonial pedigrees". Putting this another way, the writer or commentator in this area has to overcome a natural tendency for his or her audience to default to the comfort zone of common law whenever the questions get too difficult to answer.

In previous explorations of this topic one has referred to the South African constitution as "an undecided constitution" for precisely this reason that it holds out the promise of *both* human rights observance and cultural diversity⁸³. In these discussions the point, not really original, has been made that both the notion of human rights and the notion of culture are complex ideas that need deep and constant interrogation; more particularly, that the constitution enjoins us to eschew simple answers to a complex problem and that our civic duty is to put in the effort required to realise a truly multicultural future. Throughout, the argument has been advanced that such a future cannot be reached on the basis of the perceived dominance of one culture over another one which is generally considered to be delinquent.

What the debate has always needed is a clear, unambiguous and consistent assertion that there is content to the notion of "African values"; that this content contains principles and norms that are morally good and which deserve to inform the emerging culture of a new South Africa; that overreliance on ready-made western pathways is a form of 'copping out', representing the lazy option when what is needed is for all of us to put in the hard work to realise the dual promise of the constitution; and finally, that the materials for undertaking this hard work already exist in both value systems to enable the weaving of a cultural fabric that will garner consensus from all sides of the ethnic spectrum that makes up the South African population.

The argument is that in 20 years of democracy both the legislature and the judiciary have too often opted for the lazy path, in contrast with the more difficult path described above that these institutions should be following. That path is to take seriously the constitution's attempt to infuse African values into the common culture of the new South Africa, including its legal culture. This line of thinking is not a new invention. It has been the cry of various writers and commentators virtually since the beginning of the decolonisation period in Africa. This movement has recently resurfaced in various

⁸³ Nhlapo "African Family Law Under an Undecided Constitution: The Challenge for Law Reform in South Africa" in Eekelaar en Nhlapo (ed) *The Changing Family: Family Forms and Family Law* (Hart Publishing) Oxford - 1998

forms, such as the concept of the cultural defence⁸⁴ and the notion of the receptor approach⁸⁵. The former, explores the extent to which a claim by an accused to have been following his or her culture in pursuing a particular course of action would be a defence against a criminal charge flowing from the same action. This is squarely in the territory of "western notions of justice versus local culture". The latter approach, associated with the work of Professor Tom Zwart of Utrecht, seeks to change the mindset that views legislative abolition of local customs and cultural practices as the only way that a state can meet its international obligations to observe human rights. According to this approach, international obligations are about human-rights-compliant outcomes, not about method: thus, if there exist cultural institutions which can incubate a human rights norm they should be used and, if weak, they should be strengthened. In this way, human rights cease to be viewed as a foreign imposition but become grounded instead in the local normative framework.

The Receptor Approach makes indigenous or local systems and practices the starting point. This is important in eliciting the support and buy-in of the local population. What is not usually realised or acknowledged is the fact that there is significant attraction in non-western societies for the argument that human rights are a western imposition with limited applicable in non-western contexts. It is the appeal of this argument that encourages dictators and despots to claim immunity from international supervision of their human rights records. To introduce well known and socially accepted local mechanisms in promoting human rights effectively undercuts these arguments.⁸⁶

Somewhere in between these reflections there runs the thread of an exhortation to all countries to engage in more honest law reform in relation to cultural practices and customs, especially where such honesty is mandated by the constitution. There are identifiable instances where the legislature and the courts could have done a better job in using customary law (as required by the constitution) as a starting point in undertaking law reform rather than defaulting, without too much resistance, to the common law whenever the going gets tough.

⁸⁴ Bennett TW (2010) The cultural defence and the custom of *thwala* in South African law *University of Botswana Law Journal*: 3-26.

⁸⁵ Zwart T, Relying on Africa's strengths in the area of human rights: the Receptor Approach in Nhlapo et al (ed) *African Culture, Human Rights and Modern Constitutions*, University of Cape Town (Cape Town) - 2013

⁸⁶ While this may be sound in theory, it is not completely unproblematic in practice. Pursued without caution it may encourage a return to dubious authoritarian practices. In South Africa, for instance, recent work on the custom of *ukuthwala* (the abduction of under-aged girls ostensibly for purposes of marriage) has revealed that many communities believe that the solution lies in the revival of *amabutho* (the age-regiment system) or some other means of strengthening the hand of traditional rulers and parents. But as illustrated by the preceding discussion around the Traditional Courts Bill, this solution may be a double-edged sword.

We should avoid the careless ousting of African values in favour of common law substitutes whose only merit is that they are easily to hand. The legislative intention telegraphed by the Draft Recognition of Customary Marriages Amendment Bill⁸⁷ is a case in point. It is remarkable for the government to propose to the legislature that death be added, willy nilly, to the list of grounds for termination of a customary marriage⁸⁸. It displays a monumental ignorance of the nature of customary marriage and the concepts of shared belonging and group solidarity that underpin African kinship. The only plausible explanation for the proposal is that it matches the grounds for termination found in the common law. State institutions need to have the courage of their convictions and to invest in finding the true basis of a particular African practice and then to attempt honestly to make it the starting point of any reforms, after ascertaining that it does not perpetuate harm.

Central to this exercise is the careful distinction between *official* customary law and *living* customary law. It is the living customary law that has the capacity to display values, principles and behaviours that present no problem for the Bill of Rights and other constitutional imperatives. If we follow faithfully what has happened to these values over time and what people actually do in their day-to-day lives in observance of them, then we are likelier to find constructive lessons that have more capacity to enrich public morality than the artificial values rigidified in official customary law.

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⁸⁷ B110-98

⁸⁸ Subsection 6B inserted by Clause 4(e). No registering officer may register a customary marriage where one spouse is deceased. There are other problematic clauses in the draft Bill: the requirement in s 4 (2) that an application for registration must be lodged by both spouses; the deletion of s 4 (5) which allows persons with sufficient interest to enquire into the marriages of their parents or grandparents where registration has been refused.