

***Gumede v President of the Republic of South Africa*: Harmonisation, or the creation of new marriage laws in South Africa?**

Introduction

The Recognition of Customary Marriages Act 120 of 1998 has introduced renewed life for African customary marriages. The Act was hailed for putting an end to the humiliating rejection of indigenous marriages as true marriages and the concomitant hardship this institutionalised prejudice meted out to a large section of South African society.

However, the Act also engendered much criticism for, among other things, the retention of the institution of *lobolo* and the legalisation of polygyny. (For academic discussions of the Act, to name a few, see the following: Robinson 'The evolution of the concept of marriage in South Africa: The influence of the Bill of Rights in 1994' (2005) *Obiter* 488 at 494ff; Van Schalkwyk 'Law reform and the recognition of human rights within the South African family law with specific reference to the Recognition of Customary Marriages Act 120 of 1998 and Islamic marriages' (2003) *De Jure* 289 at 291; Bonthuys 'Accommodating gender, race, culture and religion: Outside legal subjectivity' (2002) *SAJHR* 41; Pieterse 'It's a "black thing": upholding culture and customary law in a society founded on non-racialism' (2001) *SAJHR* 364 at 382ff; Bronstein 'Confronting custom in the new South African state: An analysis of the Recognition of Customary Marriages Act 120 of 1998' (2000) *SAJHR* 558; Maithufi 'The Recognition of Customary Marriages Act of 1998' (2000) *THRHR* 516; Church 'The convergence of the western legal system and the indigenous African legal system in South Africa with reference to legal development in the last five years' (1999) *Fundamina* 8.)

Nevertheless, this Act is the first comprehensive piece of legislation to endeavour to remedy the gender and the racial

inequality entrenched in the official customary law which had evolved since colonial times, as well as the perceived injustices of the unwritten patriarchal system of customary law. Since the dawn of the new constitutional democracy and the recognition of customary law as an important facet of the South African sources of law model, the courts have, with renewed vigour, thrown their weight behind efforts to reform both official and living customary law. The extent of the reform has ranged from abolishing core institutions of African customary law to the progressive development of official customary law in line with living law, fundamental indigenous African principles, and the dictates of the Constitution. Significant decisions include *Mthembu v Letsela* (2000 3 SA 867 (SCA)); *Nkosi v Bührmann* (2002 1 SA 372 (SCA)); *Alexcor Ltd v Richtersveld Community* (2003 12 BCLR 1301 (CC)); *Bhe v Magistrate Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the Republic of South Africa* (2005 1 BCLR 1 (CC)); *Wormald NO v Kambule* (2006 3 SA 562 (SCA)); *Shilubana v Nwamitwa* (2008 (9) BCLR 914 (CC)).

In one of the more recent decisions, *Gumede v President of the Republic of South Africa* (CCT 50/08 [2008] ZACC 23), the Constitutional Court once again faced the challenge of resolving the conflict between official customary law and the Constitution. The Court was approached, in terms of section 167(5) of the Constitution, for the confirmation of an order of the High Court declaring constitutionally invalid certain sections of the Recognition of Customary Marriages Act, of the KwaZulu Act on the Code of Zulu Law 16 of 1985 and certain sections of the Natal Code of Zulu Law (Proc R155 of 1987), which regulate the proprietary consequences of customary marriages. This decision takes the development of a body of official customary law, aligned with constitutional dictates, a step further. Unfortunately, like some preceding decisions, the *Gumede* decision further deepens the divide that is evolving between the unwritten, living customary law and the official customary law entrenched in legislation and judicial decisions. In fact, it rids official customary law of some of the last substantial vestiges of African customary marriage and so, in effect, brings the piecemeal legislative and judicial obliteration of the official African customary marriage to a conclusion.

***Gumede*: The facts and background**

Mrs and Mr Gumede, both domiciled in KwaZulu-Natal, entered into a monogamous customary marriage in 1968 and four children were born of their marriage. Since she was forbidden by her husband to take up

employment, Mrs Gumede never worked and could not contribute to the accumulation of the family's estate which included two family homes. She was always the primary caregiver of the children.

After forty years, the marriage broke down irretrievably. Mrs Gumede had no family and was dependent for financial support upon her children and her old-age pension. In 2003, Mr Gumede instituted divorce proceedings which were pending before the Divorce Court at the time of the Constitutional Court hearing. Mrs Gumede approached the High Court to obtain an order invalidating the discriminatory legislative provisions on which the Divorce Court could rely.

The High Court declared section 7(1) of the Recognition of Customary Marriages Act invalid. It provides that '[t]he proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law'. It also declared invalid the words 'entered into after the commencement of this Act section', in section 7(2) of this Act, which provides that:

A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

The Court further declared section 20 of the KwaZulu Act on the Code of Zulu Law and section 20 of the Natal Code of Zulu Law inconsistent with the Constitution and hence invalid. These measures provide that the family head is the owner of, and has control over, all property in the family home. It declared that section 22 of the Natal Code, which provides that the inmates of a kraal are in respect of all family matters under the control of, and owe obedience to, the family head, likewise invalid.

The Minister of Home Affairs and the KwaZulu-Natal Member of the Executive Council for Traditional Leaders and Local Government Affairs resisted the confirmation order and appealed against the order of the High Court (in terms of s 172(2)(d) of the Constitution). The reasoning was that the impugned legislation is justifiable in terms of the constitutional imperative to apply customary law when it is applicable; and that the distinction between marriages concluded before and after the commencement date of the Recognition of Customary Marriages Act is justifiable in terms of the Constitution. It was further averred that Mrs Gumede should have approached the Divorce Court - which had the power to make an equitable order after

hearing evidence - for relief and that her claim for invalidating the legislative provisions was premature.

Decision and discussion

In a lengthy judgment the Constitutional Court took great pains to explain that any distinction between the consequences of customary marriages entered into before and after the Recognition of Customary Marriages Act came into operation is discriminatory, inconsistent with the Constitution and invalid. Ostensibly, though, the two provisions are patently discriminatory, obviously unfair and not justifiable.

The inequality and unconstitutionality of the distinction between the patrimonial consequences of pre-recognition and post-recognition customary marriages were all along so glaring that it is surprising that Parliament adopted such discriminatory measures at all. In fact, the South African Law Reform Commission warned that 'the constitutional guarantee of equality requires women and men to have equal access to marital property, and to suggest that women be denied this right on the basis of their ethnicity and the date on which they married would be unconstitutional.' (South African Law Reform Commission *The harmonisation of the common law and the indigenous law: Report on customary marriages* (August 1998) 118). Academics subsequently reiterated this view (see, eg, Sinclair *The law of marriage* vol I (1996) 43ff; Bennett *Customary law in South Africa* (2004) 261f; Cronje and Heaton *South African family law* (2004) 47).

In terms of the judgment, all monogamous customary marriages entered into before the Recognition of Customary Marriages Act came into operation are now *ipso facto* in community of property, excluding customary marriages which had been terminated by death or by divorce before the date of the judgment (para 52).

Community of property is obviously incompatible with polygynous marriages. The Court held in this regard that the constitutional invalidity of section 7(1) was limited to monogamous marriages and should not concern polygynous relationships or their proprietary consequences (para 58). The Court did not overlook the fact that this perpetuates the existing inequality between women in monogamous marriages and those in polygynous marriages. It determined that polygynous marriages should continue to be 'regulated by customary law until parliament intervenes' (para 56). Hopefully parliamentary intervention will not involve merely the imposition of western law, but rather the regulation of proprietary consequences in such a way that it preserves the foundational values of the institution of polygyny.

As indicated, the Court also had to adjudicate on the sustainability of the provisions in the Natal and KwaZulu Codes that the family head is the owner of, and has control over all, family property in the family home, and the provision that inmates of a kraal are in respect of family matters under the control of, and owe obedience to, the family head. These provisions are so obviously discriminatory that elaborate reasons for saying so are hardly necessary. It is trite to say that these Codes entrenched a colonial perception of Zulu customary law which did not even approximate true Zulu law. In fact, the Preamble to the Code of Zulu Law of 1878, which formed the foundation of the Codes which followed, attests to this. It stated that customary law was based on the subjection of women and juniors, and on male primogeniture. (McClendon 'Tradition and domestic struggle in the courtroom: Customary law and the control of women in segregation Natal' (1995) *Int J of African Historical Studies* 527 at 532. For a history of the Codes of Zulu law see, generally, McClendon and Brookes *History of native policy in South Africa from 1830 to the present day* (1924) 209).

There appears to be no reason for the continued existence of the Codes. The legal certainty created by the codification is hugely outweighed by the negative effect of the stagnation of the law. In addition, the Codes entrench official law which is neither in line with living customary law nor with the underlying values of that law. It has also been argued that they are, as a whole, unconstitutional (see Bennett and Pillay 'The Natal and KwaZulu Codes: The case for repeal' (2003) *SAJHR* 217-238; Bennett *Customary law in South Africa supra* 70). The KwaZulu Act on the Code of Zulu Law 16 of 1985 was assigned to the Province of KwaZulu-Natal by Proclamation 107 of 1994; and the Natal Code of Zulu Law Proclamation 151 of 1987 was similarly assigned by Proclamation 166 of 1994. These Codes have been repealed by section 53 of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005, with effect from a date to be determined by the responsible Member of the Executive Council by notice in the *Gazette*. No date has been gazetted as yet.

Nevertheless, the Codes have been in operation for more than 130 years and to scrap them will present the courts with practical problems. The body of case law that, over the years, interpreted and applied these Codes has evolved into a clear-cut framework for the interpretation and application of Zulu law. Any decision about the fate of the Codes can certainly not be taken lightly. The question will be whether to replace them with a written version of Zulu law, or leave it to the courts to apply the unwritten living law. Codification,

of course, revives the same old conflict between legal certainty and legal stagnation, and in the present context the additional problem of distortion. Already, in 1938, Lt Col CF Rey, Resident Commissioner of the Bechuanaland Protectorate, warned that codification of Tswana law would be undesirable since it would create a petrified law that would fall out of step with the living law (see his Introduction in Schapera *A Handbook of Tswana Law and Custom* (1938) viii-ix). This prediction has certainly been borne out by the Zulu Codes and the Transkei Marriage Act 21 of 1978.

Understandably, the Constitutional Court further directed that:

[a]ny interested person may approach this Court for a variation of this order in the event of serious administrative or practical problems being experienced as a result of this order (in para 59 (j); this was also ordered in the *Bhe* case para 13 (10)).

There is no doubt that both administrative and practical problems will arise, the gravity of which will have to be assessed holistically and which will depend on the circumstances of each case. In indigenous law and culture, family relationships are notoriously complex and a completely different meaning is attached to the concept of property and individual ownership. Nevertheless, with regard to marriage, customary law has now been suspended and the parties are by judicial decree married in community of property whether they like it or not and irrespective of how this will impact on the interests of other members of the extended family. The Court did not make provision for the fact that in customary law there is a distinction between personal property and family property, the latter serving family interests, not individual personal interests. Depending on the family composition, there may be an untold number of people who have an interest in the family property. Upon divorce or death, family property is neither divisible nor for sale. Even in the many households where there is a family head, the house is the family home for up to three generations.

However, the provisions, against which complaint was made, are clearly discriminatory and the Court had no choice but to intervene. The route the Court followed is not really surprising bearing in mind the Legislature's drive to westernise customary law and the Court's unreserved support for the legislative reform (paras 24 and 30). Moreover, the westernisation of official customary marriages has progressed so far that it has become practically impossible to reverse the process. The only vestiges of customary law that now remain are

lobolo (although it is not a requirement for the new statutory customary marriage) and that marriages are required to be ‘negotiated and entered into or celebrated in accordance with customary law’. These last two requirements will be discussed shortly.

The tenor of our further comments is that the Act and the judgment in *Gumede* have finally laid official customary marriages to rest and created a new statutory marriage.

The statutory scheme

The Court indicated that the patriarchal values on which official customary law are premised have been distorted by the creation of an official law which has ‘fostered a particularly crude and gendered form of inequality, which have left women and children singularly marginalised and vulnerable’ (para 17). Yet it has to be borne in mind that no law is responsible for the fact that patriarchy is deeply embedded in our society and imposed by the social structure, and not by an Act of Parliament or the jurisprudence of the colonial ‘native’ divorce and appeal courts. Irrespective of laws and judgments, patriarchal values will continue to direct African customary law, but this does not mean that patriarchy still steers indigenous African society today in the same way it did in the past. Indigenous social structure has undergone a sea-change. The status of women in living customary law has changed dramatically on many fronts. By dint of economic and social circumstances, a large number of women have assumed responsibilities and powers previously reserved for males. Kaganas and Murray state:

So those writing in the area are very aware that changing the law to promote formal equality is not the full answer. Feminists in South Africa, as elsewhere, are increasingly looking beyond law and behind formal equality to identify problems and solutions. (Kaganas and Murray ‘Law and women’s rights in South Africa: An overview’ in Murray (ed) *Gender and the new South African legal order* (1994) 15).

The Court observed that the Recognition of Customary Marriages Act ‘seeks to salvage the indigenous law of marriage from the stagnation of official codes’ (para 24). Maybe that is what it was supposed to do. However, one would have thought that it is all too obvious that the Act is a new codification that is further removed from customary law than the Codes it was meant to replace. For instance -

- (1) The parties may enter into an ante-nuptial contract to regulate the matrimonial property system of their marriage (s 7(2)).

Given this provision, why should they not simply conclude a common law marriage?

- (2) A man who wants to enter into a second or further marriage(s) must make an application to court to approve a written contract which will regulate the future matrimonial property system of his marriages (s 7(6)). Surely this provision does not 'salvage' the customary law of marriage from the stagnation of official codes? Would this contract be a requirement for the validity of the further marriage(s)? It appears that it might be, because the existing wife or wives must be joined in the proceedings. If the existing wife or wives disagree, the proposal to marry may fall apart regardless of a promise to marry or of the existence of a betrothal.

Furthermore, the parties have a duty to ensure that their marriage is registered (s 4(1)). Having a duty seems to be a new version of the outdated 'shall' or the more current 'must', but it is neither. Failure to register the marriage does not affect its validity (s 4(9)). However, it may cause grave problems for parties whose marriages have not been registered. Originally, the registration of existing marriages had to occur within twelve months after the commencement of the Act (which was 15 Nov 2006; s 3(a)) and that of new marriages within three months after their conclusion (s 3(b)). These periods were extended respectively by twelve and three months and, in the case of existing marriages, once more, according to Circular No 27 of 2008 from the Department of Home Affairs, to 2009-11-01. This latest extension has not yet been gazetted.

The uncertainty and ambiguity of the registration process are exacerbated by the fact that it is not exclusively for the benefit of the spouses. Even when one or both of them have died, any person who satisfies the registering officer that he or she has sufficient an interest in the matter is entitled to apply to that officer to enquire into the existence of the marriage (s 4(5)(a)). A registering officer, who may be a clerk in an office of the Department of Home Affairs, accordingly decides whether or not the parties are married. He or she will issue a certificate to confirm this momentous finding which constitutes *prima facie* proof of the marriage. The finding may be overturned only by the High Court.

Under the rubric of 'the statutory scheme' the Court further mentioned that the Recognition of Customary Marriages Act seeks to 'salvage the indigenous law of marriage from ... the inscrutable jurisprudence of colonial 'native' divorce courts and appeal courts' (para 24).

While the 'Native' Appeal Courts may be criticised for creating an official customary law which was not consistent with traditional customary law and, in fact, thwarted any further development of that law, they can certainly not be criticised for creating an 'inscrutable jurisprudence'. On the contrary, their judgements were clear, concise and to the point. They were some of the earliest explanations of customary law in legal language. Despite their flaws, the brevity and clarity of these judgments enabled academics to write learned accounts of customary law. It is actually surprising how popular the former Commissioners' and Appeal Courts were. Litigants literally flocked to them, irrespective of the fact that according to current commentators they distorted and ossified customary law.

As for the 'Native' Divorce Courts, they never played any role in the development, or the undermining, of customary law. They were established to provide an inexpensive and accessible forum for the dissolution of civil marriages entered into by blacks (in terms of the Black Administration Act, 1927, Amendment Act 9 of 1929. In terms of the Divorce Courts Amendment Act 65 of 1997 these courts are now available to all and they have unrestricted divorce jurisdiction).

However, the Constitutional Court failed to mention that there were also numerous High Court and Supreme Court of Appeal decisions that shaped customary law over the years. (See, eg, the Supreme Court Case Index in Bekker *Seymour's customary law in Southern Africa* (1989) xxxix-xl.) There are no statistics available, but a superficial perusal of the case law indices of standard works on customary law confirms that blacks increasingly turned to the High Court to resolve customary law disputes.

In *Gumede*, the Recognition of Customary Marriages Act was hailed as a praiseworthy exercise in the reform of customary law. However, one has to appreciate that under the guise of recognising customary marriages the Legislature has converted them into common law marriages in all but name. The requirements and consequences (except in the case of existing marriages, which have now also fallen by the wayside) have been adapted from common law requirements and consequences. As stated earlier, the only real remnant of a customary marriage is the requirement that the marriage must be negotiated and entered into or celebrated in accordance with customary law. This provision does not necessarily mean that the relevant customary laws in this regard will be applied consistently. In *Mabuza v Mbatha* (2003 4 SA 218 (C)) the Court remarked that it is inconceivable that ceremonial marriage customs may be elevated into

something so indispensable that without them there could be no valid marriage. (See also Nkosi 'The extent of the recognition of customs in indigenous law of marriage: A comment on *Mabuza v Mbatha* (2003) 1 All SA 706 (C)' (2004) *Speculum Juris* 325; *Gladstone (Ramoitheki) v Liberty Group Ltd* 2005 JDR 0762 (WLD).)

The Court further remarked that the Act 'introduces certainty and uniformity to the legal validity of customary marriages throughout the country'. Indeed, one thing is certain, customary marriages are now uniformly regarded as marriages whether they are polygynous or monogamous, but that is where it ends. The fact of the matter is that any party can now allege that he or she was married, or not, depending on which is the most favourable position. Proof of the existence of customary marriages has resulted in an array of cases where no two courts agree on the requirements. (Compare, among others, the divergent opinions expressed in *Fanti v Boto* 2008 5 SA 405 (C); *Mabuza v Mbatha* 2003 4 SA 218 (C) and in *Nontobeko Virginia Gaza v Road Accident Fund* (SCA) unreported case number 314/04.) Increasingly, cases are resolved on an ad hoc basis, especially where the payment of *lobolo* is involved. While defined in section 1(v) of the Act, this important institution is not mentioned elsewhere.

Under the new official version of customary law such cases will no doubt multiply. They may arise across the board for there are many types of domestic unions. With increased economic empowerment, there is much more material gain to lose from being married or unmarried than ever before, for instance, with regard to pension benefits, maintenance for surviving spouse(s), the proceeds from insurance policies, employees' fringe benefits, and the right to bury a deceased spouse.

It is a pity that the essence of a customary marriage has been compromised by rigid rules and subjected to westernised legal processes and judicial decrees. In real life a customary marriage:

is a 'process'. In many societies that 'process' is complete only when the first child is born, or when all the marriage presents have been paid, or even when one's first children are married. Marriage involves many people, and not just the husband and wife, and the transfer of gifts in the form of livestock, money or labour (Mbiti *African religion and philosophy* (1969) 145).

This description of a customary marriage may not be entirely feasible in present social circumstances, but it is fairly certain that the statutory requirements have little to do with customary law.

Adaptation of customary law

In its judgment, the Constitutional Court raised the important question of whether customary law should be developed so as to align it with constitutional dictates (para 29). It pointed out that, because it was dealing with confirmation proceedings, its enquiry was limited to the question of whether the constitutional invalidity order of the High Court should be confirmed. The Court further found that the question of developing living customary law did not arise in this particular instance since no rule of living customary law had been relied upon or impugned in the proceedings. The Codes of Zulu law, which prescribe the patrimonial consequences, were not living customary law and therefore not amenable to development. After all, customary law in codified form or taken up in legislation is no longer customary law but statutory law, and if the constitutionality of statutory customary law is under scrutiny, the relevant statutory provision has to be interpreted to align it with the Constitution or it must be declared invalid. There was, in fact, only one route open to the Court and that was to find the provisions under consideration inconsistent with the Constitution and for that reason invalid.

The Court's finding with regard to the development of official customary law referred only to customary law as it is found in legislation or codification and not to the official customary law entrenched in case law. Notwithstanding, this does not mean that development of the latter is straightforward. Apart from the controversial debate concerning the direct and indirect application of the Constitution, development also involves the application of the precedent system. Distorted versions of customary law have been entrenched in judicial decisions over the years. The courts are not eager to digress from the customary law established in decisions of higher or equal courts because that will put legal certainty at risk. So the opportunity to develop customary law in line with its underlying values is often sacrificed for the sake of legal certainty. Another obstacle in the way of legal development is that the ascertainment of the unwritten residual customary law is time-consuming. It is much easier and more practical to follow a previous decision than to ascertain what the living law actually is. It is therefore primarily the responsibility of the higher courts to ensure that the opportunity to develop customary law in line with its foundational postulates is not discarded lightly.

Theoretically the Constitution confers on indigenous law the status of a source of law. It clearly states that the courts must apply indigenous

law when it is applicable (s 211 (3)) subject to existing legislation dealing with that law. And since the Constitution does not define customary law, we must rely on the Recognition of Customary Marriages Act for its definition. In terms of section 1 of this Act, it is ‘customs and usages traditionally observed among the indigenous people of South Africa and which form part of that culture’ (para 23). There is no doubt that this refers to living indigenous law. The irony, of course, is that while living law constitutes the customs conventionally used among the indigenous people, as a rule, it is *official* customary law that would be ‘readily ascertainable with sufficient certainty’ as the Law of Evidence Amendment Act 45 of 1988 requires in order for it to be applicable.

Before the new constitutional democracy the three sources of our law were legislation, case law and the common law. The common law was the unwritten or historical source of our law, the core around which other law-generating sources revolved. This paradigm was changed when the Constitution elevated indigenous law to an historical source. Where there is no relevant legislation or case law on a particular aspect of customary law, the residual living customary law should apply. Bennett reminds us, however, that it is not that simple:

Although recognition of the living law may be the only principled approach possible, courts have no immediate access to it, mainly because courts of the Western type are socially distanced from the communities they serve. A major problem is now presented: customs are subject to almost infinite variation, and it is impossible to take account of such variety without proving each new custom as it is asserted.

...

Thus, notwithstanding the failings of the official code, this is the version that will in the first instance be available in the court. In fact, its very availability has the effect of creating a *de facto* presumption in its favour (“Official” vs “living” customary law dilemmas of description and recognition’ in Claassens and Counis (eds) *Land, power and custom: Controversies generated by South Africa’s Communal Land Rights Act* (2008) 145; see, also, generally *id* 138-153).

One has to agree with the Austrian sociological jurist, Eugen Ehrlich, that ‘the real law of a community is not to be found in the traditional legal sources, such as statutes and decided cases’ (as stated in Menski *Comparative law in a global context: The legal systems of Asia and Africa* (2000) 114). He sees living law as the law which dominates life itself, (Ehrlich *Fundamental principles of the sociology of law* (1936 tr Moll) 493) and its norms are ‘only imperfectly and partially reflected in the formal law’ (Menski 15).

However, in South Africa, statutes and decided cases remain primary sources of law irrespective of their colonial past, and the creation of official customary law is a further ongoing process. The 'significance of the state and its legal institutions as a source of law' should thus not be downplayed and the gap between theory and practice should not be ignored (*ibid*).

If a court wants to develop a general living customary law, it will search in vain to find an easily accessible source. During the South African Law Reform Commission hearings on the reform of customary marriages (Menski 21-22), the Commission noted that custom could vary enormously, not only in time but also from place to place. However, it pointed out that a nation-wide survey to establish a more authentic customary law was not viable since resources were not available for an undertaking of such magnitude. Further, any restatement of customary law would run the risk of becoming yet another official version of that law.

The concept 'living law' is blithely used as a generic term for all unwritten customary law. However, there is in truth no single body of living law, not even in specific demarcated communities. This intensifies the problem of ascertainment. There is living law which is in synthesis with African values, but there is also a version of living customary law which is not aligned with the underlying fundamental postulates of customary law. The very fact that disputes regarding individual ownership of house property, as in *Gumede*, comes before the courts attests to the existence of living law which has fallen out of step with fundamental indigenous African values. This subversion of living customary law may be attributed to the same historical factors which caused the adulteration of official customary law found in case law and legislation. (We thank our colleague David Taylor of Unisa for this insight.)

Today there is a substantial body of text-based materials on living customary law, both old and recent. There have been numerous LLD theses and LLM dissertations on living customary law in indigenous societies based on empirical research. There are also monographs, articles and books on living customary law. (See, eg, Ndima *The law of commoners and kings* (2004); Mbatha 'Reforming the customary law of succession' (2002) *SAJHR* 259; Prinsloo, Van Niekerk and Vorster 'Knowledge and experience of *lobolo* in Mamelodi and Atteridgeville' (1997) (2) *De Jure* 314-330 and 'Perceptions of law regarding, and attitudes towards, *lobolo* in Mamelodi and Atteridgeville' (1998) (1) *De Jure* 72-92; Watney 'Customary law of succession in a rural and urban area' (1992) *CILSA* 378.)

Between 1959 and 1990, a number of recordings of 'living' customary law of particular communities (or tribes) saw the light as government-sponsored research reports. Their value was limited, because in true anthropological fashion, they did not distinguish between law in the strict sense of the word and concomitant cultural practices. In recording customary law, it is indeed difficult to distinguish between law and custom. Nevertheless, these old records often provide invaluable insight into the underlying principles of African customary law which form the basis of indigenous legal reasoning. There are also a number of authentic versions of customary law, to mention but a few, Schapera *A Handbook of Tswana law and custom* (1938), Krige *The social system of the Zulus* (1950) and Mönnig *The Pedi* (1967). Some of these also constitute social surveys from which law may be extrapolated. One should bear in mind, though, that the old recordings of living law do not represent the living law of today. To regard these old records as immutable and as the true, living indigenous law currently applicable, would be to deny the inherent flexibility and accommodating nature of African customary law.

Having concluded that in this case customary law cannot be developed, the Constitutional Court made the alarming statement that by declaring the impugned sections of the Recognition of Customary Marriages Act invalid, 'we would be rendering customary law consistent with the guarantees and ethos of the Constitution. In other words, customary law would become consistent with the Constitution and it follows, therefore, that it would be unnecessary to develop it' (para 31).

With this reasoning, the Court denied the existence of a living customary law which is applied by millions of South Africans and the role it should play in legal development and law reform. (The importance of living customary law is gaining importance in academic writing: see, eg, Mqoke *Customary law and the new millennium* (2003) 113; Fishbayn 'Litigating the right to culture: Family law in the new South Africa' (1999) (13) *Int J of Law, Politics and the Family* 147; Mbatha 'Reforming the customary law of succession' (2002) *SAJHR* 259 269; Himonga and Bosch 'The application of African customary law under the constitution of South Africa: Problems solved or just beginning?' (2000) *SALJ* 306ff.) The interest in living customary law is not limited to academics. Today, the courts invariably recognise the existence of living customary law, but there is not yet consistency in their perceptions of what constitutes living customary law and where exactly it should fit into the greater scheme of the South African sources of law model and exactly what its role should be in the development and reform of customary law: See, eg, *Shilubana*

v Nwamitwa 2008 (9) BCLR 914 (CC); *Ramoitheki v Liberty Group Ltd t/a Liberty Corporate Benefits* (*supra*); *Bhe v Magistrate, Khayelitsha* (*Commission for Gender Equality as Amicus Curiae*); *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* (*supra*); *Mateza v Mateza* [2005] JOL 14332 (Tk); *Alexkor Ltd v The Richtersveld Community* (*supra*); *Mabuza v Mbatha* (*supra*); *Nkabinde v Road Accident Fund* [2001] 3 All SA 611 (W); *Mabena v Letsoalo* 1998 2 SA 1068 (T).

The Court loses sight of the fact that ‘codified’ indigenous law is nothing but legislation and that it has nothing to do with the living law. As indicated earlier, the regulation of the proprietary consequences is pure western law imposed on an indigenous African institution.

Conclusion

The Recognition of Customary Marriages Act and the judgment in *Gumede* have replaced the African customary marriage with an official statutory marriage. This does not come as a surprise. The decision followed effortlessly in the footsteps of *Bhe* (*supra*) which abolished the customary law of succession. Joining the ranks of other cases and legislation, *Gumede* has made a significant contribution to the development of an official customary law which is in harmony with constitutional principles.

However, this decision confirms the inability or unwillingness of the judiciary -like that of the Legislature - to rise to the challenge of applying customary law in the spirit of its recognition. In a relatively short space of time these institutions have managed to create an official law that is further removed from African customary law and its foundational principles than the adulterated versions created by colonial rule and apartheid.

One can no longer speak of harmonisation of customary law and the common law in South Africa. After all, harmonisation implies that overt discord between legal systems is removed, but that they retain their individuality. What is currently happening in South Africa is the active creation of a new official (customary) law aligned with constitutional dictates but largely stripped of its characteristic African features. This adds another dimension to the already complex South African paradigm of legal pluralism. The new official law, at least, as regards marriage and succession, is in many fundamental respects so far removed from African customary law, that it can be regarded only as a *sui generis* hybrid law with

features of both Western law and African customary law. This new law has diverged from the true living indigenous law to the extent that it is now more aligned with the underlying principles of Western law than those of African customary law. This is not necessarily a bad thing. It is far more desirable to have a legal system which is just and consonant with constitutional dictates, than a fossilised official system of customary law which is neither aligned with constitutional values nor with the underlying principles of customary law. Unfortunately, with regard to marriage and succession the existence of living law as well as the question of whether or not to develop the law have become largely academic.

Ironically, attempted amendments to the stagnated and unjust official or codified customary law does not guarantee that it will not again in future become petrified and fall out of step with the needs of the communities it serves. The risk of fossilising this new customary law by capturing it in legislation becomes very real in the light of the Constitutional Court's restrictive attitude towards statutory interpretation. (See generally Le Roux 'Undoing the past through statutory interpretation: The Constitutional Court and marriage laws of apartheid' (2005) *Obiter* 526 on the narrow textual approach to statutory interpretation adopted by the Constitutional Court.)

Nevertheless, the existence of the new official law does not mean that living customary law, which has adapted to the changing needs of indigenous societies, but is still consistent with the fundamental principles of indigenous African law and culture, does not exist and is not unofficially relied upon by many South Africans. Deep legal pluralism is not dependent on state recognition. It is imperative that this true living law should not be eschewed from the South African sources of law model. In *Alexkor Ltd v The Richtersveld Community* (*supra*) the Court acknowledged the enduring character of living customary law:

It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution (para 53).

While difficult, it is not impossible to ascertain this living customary law. The judiciary is not unaware of this and where the legislation regulating the application and recognition of customary law permits, it has made use of its function to develop the true indigenous law by bringing it in line with the living law and constitutional dictates.

Unfortunately though, because it is often difficult and generally time-consuming to ascertain the living law, the courts frequently resort to the

easier option of abolishing rather than developing the rules and principles of indigenous law that are not consistent with constitutional values.

In *Gumede* it was not an ignorance of African values that prompted the Court to further diminish the African character of customary marriages. On the contrary, the Court had a sound understanding of the real character of customary marriage:

In our pre-colonial past, marriage was always a bond between families and not between individual spouses. Whilst the two parties to the marriage were not unimportant, their marriage relationship had a collective or communal substance. Procreation and survival were important goals of this type of marriage and indispensable for the well-being of the larger group. This imposed peer pressure and a culture of consultation in resolving marital disputes. Women, who had a great influence in the family, held a place of pride and respect within the family. Their influence was subtle although not lightly overridden. Their consent was indispensable to all crucial family decisions. Ownership of family property was never exclusive but resided in the collective and was meant to serve the familial good (para 37).

The Constitutional Court - and the High Court for that matter - was forced by the legislative framework for the application of customary law, as well as by its own restrictive attitude towards statutory interpretation, to follow a particular course of action which left little scope for the development of customary law and even less for judicial activism. Presently, the rules for the application and recognition of customary law and, concomitantly, of substantive customary law officialised in legislation, do not provide enough leeway for the judiciary to develop either the official or the living customary law in line with its foundational African values.

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