

# Proof and ascertainment of customary law

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## 1 Introduction

In the light of the constitutional recognition of customary law<sup>1</sup> as one of the sources of our law,<sup>2</sup> this article explores whether the Law of Evidence Amendment Act 45 of 1988<sup>3</sup> is still relevant as a basis for its ascertainment during litigation. The questions that are addressed deal with the status of customary law, whether courts may take judicial notice thereof or whether it should be proved, and on what basis? In short, the question is whether the constitutional recognition of customary law has made any difference to prior evidentiary rules or practice with regard to its application in court.

A number of aspects will be covered. Firstly, the statutory recognition of customary law within the colonial era and further will be highlighted. Secondly, the basis for the use of evidence with regard to customary law will be re-evaluated. Thirdly, the extent to which customary law may be ascertained 'readily and with sufficient certainty', as required by the section 1(1) of the Evidence Amendment Act, will be assessed. Finally, several court cases over the last decade will be examined to determine judicial approach towards using (expert) evidence versus taking judicial notice of rules of customary law.

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<sup>1</sup>Although the Constitution itself does not define customary law, a definition is provided in s 1(ii) of the Customary Marriages Act 120 of 1998, namely, 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of these peoples'. The Law of Evidence Amendment Act 45 of 1988 (as amended by the Justice Laws Rationalisation Act 18 of 1996), however, uses the term 'indigenous law' and defines it in subs 1(4) as 'the Black law or customs as applied by Black tribes in the Republic of South Africa'. The term 'customary law', in line with the Constitutional terminology, is used predominantly throughout this article, yet, it is sometimes used interchangeably with 'indigenous law', as required by the context.

<sup>2</sup>See the text accompanying (n 25)-(n 27) below.

<sup>3</sup>Section 1(2) as quoted in text below (hereafter the Evidence Amendment Act).

## 2 The statutory recognition of customary law

South Africa has always been confronted with the problem that faced all African colonies, namely, the co-existence of the imported (colonial) systems (regarded as the common law) and one or more systems of customary law. Courts were thus allowed the discretion to apply customary law subject to an escape clause that was generally known as the repugnancy clause.<sup>4</sup> This clause provided that customary law may be applied in so far as it complies with 'natural justice' or 'equity and morality'.<sup>5</sup> The idea was that a particular customary rule should, according to western perceptions, not be contrary to so-called civilised general rules of conduct and/or legal norms. As a result, '[the courts] frequently felt themselves bound to justify the fact that in accordance with the existing law of the land, they were forced to find that age-old African laws and institutions were uncivilised and hence inapplicable'.<sup>6</sup> A repugnancy clause was widely incorporated in legislation dealing with the recognition of African customary law.<sup>7</sup> Such a clause also found its way into the South African recognition of customary law. Section 11(1) of the Black Administration Act 38 of 1927 authorised commissioners' courts to apply customary law 'provided that such [customary] law shall not be opposed to the principles of public policy and natural justice'. A proviso to this section was added 'that it should not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles'.

The Evidence Amendment Act took the matter a step further by extending the authority to apply customary law to all courts.<sup>8</sup> In terms of section 1 of this Act,

any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles.

the provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.

By empowering all courts to take judicial notice of customary law it also enabled them to exercise their judicial discretion in choosing between common law and customary law. The discretion to apply customary law created a conflict of laws that gave rise to a discussion in literature dealing with the conflict as such

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<sup>4</sup>Bennet *Customary law in South Africa* (2004) 67.

<sup>5</sup>Allott *New essays in African law* (1970) 159-164.

<sup>6</sup>Van den Bergh and Van Niekerk 'The superior courts and legal pluralism in the last decade of the nineteenth century' in Van den Bergh and Van Niekerk (eds) *Libellus ad Thomasium: Essays in Roman law and legal history in honour of Philip J Thomas* (2010) 474.

<sup>7</sup>See Allott (n 5) 158-159 for examples.

<sup>8</sup>Prior to 1988 only commissioners' courts and courts of chiefs and headmen could take judicial notice of customary law.

or its impact on aspects of customary law.<sup>9</sup> The mere recognition, as opposed to application did not create as many problems in practice as one might infer from the literature. In many cases the causes of action as alleged in the pleadings clearly indicated that they were based on customary law. In so far as there were disputes we submit, in retrospect, that Schreiner JA<sup>10</sup> provided an adequate framework in which the courts' discretion should have been exercised, namely one of flexibility, always having a just decision for the parties in mind.

### 3 Judicial notice or proof of customary law

Judicial notice means that a fact is so well known or immediately and accurately ascertainable that it would make no sense to produce evidence on it.<sup>11</sup> In South Africa it has more or less been accepted that customary law is the equivalent of foreign law and had to be proved by expert evidence. As long ago as 1972 Schmidt<sup>12</sup> declared: '*Vir ons howe het Bantoereg en -gewoonte die geaardheid van vreemde reg. Bewys moet gelewer word.*'

On the contrary in *Ngcobo v Ngcobo*<sup>13</sup> the judge warned:

if we were to insist on every usage and practice being proved by evidence as we prove trade and other customs in our Courts, it may render the application of native usage and practice unmanageable, for then Native cases might become too expensive and too protracted.

However, the Appellate Division in *Beyi*<sup>14</sup> confirmed that customary law must be proved as if it were foreign law. There were also other conflicting judgments, but on the whole the courts were reluctant to even apply the *stare decisis* rule.<sup>15</sup>

Since 1988 the question whether judicial notice may be taken of indigenous law has been simplified in that a court could take judicial notice of it so far as such law could be ascertained readily and with sufficient certainty.<sup>16</sup> The pre-1988 judgments in which the courts were reluctant to apply even the *stare decisis* rule

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<sup>9</sup>We mention but a few: Bennett 'Conflict of laws in South Africa' (1980) *THRHR* 28-38; Lehnert *The role of courts in the conflict between African customary law and human rights* (2005) 241-277; Van Niekerk 'Indigenous law, public policy and narrative in the courts' (2000) *THRHR* 403-416.

<sup>10</sup>*Ex parte Minister of Native Affairs: in re Yako v Beyi* 1948 1 SA 388 (A) (hereafter *Beyi*) 397: 'Parliament, in enacting section 11(1), appears to have used a device which may have been expected to permit of some elasticity and provide scope for development, so as to achieve the desideratum of an equitable decision between the parties without laying down any hard and fast rule as to the system of law to be used to attain that end ... The dominant consideration is his own reasoned view as to the best system of law to apply in order to reach a just decision between the parties'.

<sup>11</sup>Schwikkard and Van der Merwe *Principles of evidence* (2009) 479.

<sup>12</sup>*Bewysreg* (1972) 154.

<sup>13</sup>1929 (AD) 233-234.

<sup>14</sup>*Beyi* (n 10).

<sup>15</sup>For example *Saliva v Minister of Native Affairs* 1950 2 SA 310 (AD) 316.

<sup>16</sup>See s 1(1) of the Evidence Amendment Act.

are now partly irrelevant. The question of proof will only arise when the law is not readily ascertainable and with sufficient certainty.

The courts will obviously, as a point of reference, take judicial notice of statutory customary law. They will, for instance, take judicial notice of the Recognition of Customary Marriages Act 120 of 1998. The very title indicates that there are elements of customary law in it. For instance, a requirement for the validity of a customary marriage is that it should be negotiated and entered into or celebrated in accordance with customary law.<sup>17</sup> Another example of statutory customary law is the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, which deals with, inter alia, the disposition of property allotted or accruing to a woman or her home under customary law.<sup>18</sup>

South Africa has also developed a body of non-statutory customary law, amongst other, in the form of judgments,<sup>19</sup> textbooks,<sup>20</sup> and commission reports.<sup>21</sup> These written versions have been the source of customary law for many years. It would actually be quite absurd to require proof of a rule that has been discussed extensively over the years in handbooks and previous judgments. An incongruous situation would arise if an expert should have to refer to the court's own judgment as proof of customary law. Wille<sup>22</sup> confirmed the view that:

a decision of the court, that a particular custom is valid, merely recognises the custom as being law and does not give the custom any greater force or authority than it had before. There is this advantage, however; the validity of the custom is now established: In future legal proceedings it will not be necessary to prove the custom by means of witness; it will be sufficient to quote the decision in question.

We submit that the judgments by the Appeal Courts for Commissioners' Courts also fall within the purview of judgments that hardened into law.<sup>23</sup> Suffice it to say these courts created such a substantial precedence that it cannot be undone. To ignore them would eliminate a large part of unwritten non-statutory customary law. It is suggested that the courts should take judicial notice of such sources.<sup>24</sup>

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<sup>17</sup>Section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998.

<sup>18</sup>See s 4 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

<sup>19</sup>Notably the Native Appeal Courts (later called Appeal Courts for Commissioners' Courts) established in terms of s 13 of the Black Administration Act 38 of 1927.

<sup>20</sup>A good example is Bekker *Seymour's customary law in Southern Africa* (1988) (5<sup>th</sup> ed) 23.

<sup>21</sup>*Inter alia*, the South African Law Commission (hereafter SALC) *Report on Customary Marriages* (1988). The SALC is now the South African Law Reform Commission (hereafter (SALRC) but the report was published while the SALRC was still the SALC.

<sup>22</sup>*Principles of South African law* (1956) 19.

<sup>23</sup>We do not wish to explain where they fell into the hierarchy of courts creating law. It would take us too far afield.

<sup>24</sup>See also Kerr *The customary law of immovable property and of succession* (1976) 330. These judgments were reported annually and were later consolidated in a *Digest of South African native customary case law 1894-1957* (1961) as compiled by HW Warner, and two supplements covering

However, the question that arises is on what basis may the courts reject non-statutory customary law by assuming an 'unofficial' or living version, as discussed further below.

As mentioned earlier, the introduction of the Law of Evidence Amendment Act enabled courts to exercise their judicial discretion in choosing between common law and customary law. The fact that they had discretion to take judicial notice of customary law did not mean that it was, at the time of enactment, fully recognised as a system of South African law. It was equated with foreign law that could, when such law could not, 'be ascertained readily and with sufficient certainty' be proved by evidence. Hence subsection 1(2) of the Act provided that the right to take judicial notice 'shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.'

The interim Constitution<sup>25</sup> confirmed that courts should recognise and apply both common law and indigenous law while the 1996 Constitution of the Republic of South Africa refers to the courts' function of developing either common law or customary law, mindful of promoting the spirit, purport and objects of the Bill of Rights.<sup>26</sup> The application of customary law is further made obligatory. In terms of section 211(3) of the Constitution all courts must apply customary law subject to three conditions; first, when the law is applicable, second, subject to the Constitution and, finally subject to any law that specifically deals with customary law. The crucial questions are thus whether customary law is applicable to a claim or dispute, whether it is compatible with the Constitution and, lastly, whether it has been amended by any law that specifically deals with customary law. These guidelines are applicable to all courts applying customary law and the onus is on the litigant to prove that it is indeed applicable in a particular case.<sup>27</sup>

The above constitutional recognitions have the effect of placing customary law on the same footing as common law. This in turn raises the question as to whether courts should still depend on evidence for ascertaining customary law, while they are obliged to take judicial notice of the common law.

The reason for allowing expert evidence in the past was that customary law, as referred to above, had not been law in the same sense as our common law or statutory law of which presiding officers should always take judicial notice. The judges were (and still are) supposed to know the law or otherwise know how and where to access it. Written sources are available for its ascertainment. Schmidt and Zeffert<sup>28</sup> point out that the practice of judicial notice regarding legal matters

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the periods 1958-1962 and 1996-1997.

<sup>25</sup>See s 181(2) of the Constitution of the Republic of South Africa, Act 200 of 1993; also Sched 4, Principle XIII.

<sup>26</sup>Section 39(2).

<sup>27</sup>Schwikkard and Van der Merwe (n 11) 492.

<sup>28</sup>*Evidence* (as revised by Van der Merwe) (1997) 124.

stem from the fact that the court is the judicial authority entrusted with the functions of declaring and applying the law. Calling witnesses to 'lecture' courts on the law will amount to a farce and will also waste time.<sup>29</sup> Legal counsel should further, by way of argument, play a role in clarifying the nature and ambit of any legal rule in question.<sup>30</sup>

Another instance where the court may hear evidence regarding a law is where a general custom (as distinct from customary law) has legal effect. The court may then hear evidence on the existence and scope thereof.<sup>31</sup> The court has discretion to decide upon the number of witnesses necessary to be convinced in such a case. What is clear is that the court has to be 'satisfied beyond any reasonable doubt that the alleged custom does in fact exist'.<sup>32</sup>

#### 4 Problems with ascertainment of customary law

In the event of a court having to apply customary law, it is faced with the problem that there was and there still is no agreement that the written sources alluded to above, such as textbooks, are authentic versions of customary law.<sup>33</sup> Although some of the sources are excellent compendiums of South African official customary law (formerly called Native or Bantu Law), judges do not consistently regard them as reliable sources of customary law.<sup>34</sup> On the other hand, the judgments of the Appeal Courts for Commissioners' Courts (ACC) were reported and constituted a treasure chest of customary law rules.

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<sup>29</sup>See *inter alia* *Director of Public Prosecutions Kwazulu-Natal v P* 2006 1 All SA 446 (SCA) para 7.

<sup>30</sup>Schwikkard and Van der Merwe (n 11) 489-490.

<sup>31</sup>*Van Breda v Jacobs* 1921 (AD) 330 (this case dealt with the custom established amongst local fisherman when setting their lines for the purpose of catching a shoal of fish seen traveling along the coast – no other fisherman are entitled to set a line in front of theirs with a reasonable distance there from).

<sup>32</sup>*Id* 333 (eleven witnesses were called in this instance).

<sup>33</sup>See Shaper A *handbook of Tswana law and custom* (1955), Bekker (n 20) and Whitfield *South African native law* (1948) as examples of publications that constitute compendiums of customary law and customs.

<sup>34</sup>This has been the personal experience of the first author as expert witness in many legal matters related to the determination of a particular rule of customary law. In addition, it has been noted that, in contrast to earlier judgments, no reference to textbooks have been made in more recent matters. In *Maluleke v Minister of Home Affairs and Radebe* (WLD) case no 24921/2002, the judge, without explanation, ignored the textbook requirement for the validity of a customary marriage, namely, that the bride must be formally integrated into the bridegroom's family. See also *Mabena v Letsoalo* 1998 2 SA 1068 (T) (hereafter *Mabena*) where the court ruled that the mother of the bride could negotiate and accept *lobola* – being neither official nor living customary law, but rather an *ad hoc* decision. See Bennet 'Reintroducing African customary law to the South African legal system' (2009) 57 *American J of Comparative Law* 1-32 for a strong criticism in this regard. See further *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 44 (hereafter *Shilubana*), where the court does not refer to a single source on customary law.

What is more problematic today is that academic opinion<sup>35</sup> has intimated that the written versions alluded to above constituted a type of official law – what the authors and officials thought the law is or ought to be. In addition, customary law has undergone change to adapt to social and cultural circumstances. For example, in some communities, research reveals that the rules of succession based on male primogeniture have literally been replaced by what may be termed ultimogeniture.<sup>36</sup> Some textbook-writers may also still make us believe that all family heads are men. For example, Kruger *et al*<sup>37</sup> discuss patriarchy and the legal status of family heads and heirs without mentioning that there are *de facto* female family heads. Admittedly their status is not cut and dried, but one cannot ignore their existence. This is probably a field where, on the basis of evidence a court may develop customary law. Female-headed households appear to have increased to the extent that matriarchy exists side by side with patriarchy. It is a social phenomenon.<sup>38</sup>

As a result there are now three forms of customary law. Ngcobo J, in his dissenting judgment, in *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the Republic of South Africa*,<sup>39</sup> summed it up as follows:

It is now generally accepted that there are three forms of indigenous law:

- (a) that practised in the community [living];
- (b) that found in statutes, case law or textbooks and indigenous law (official); and
- (c) academic law that is used for teaching purposes.

All of the above forms of customary law differ, which makes it difficult to identify the true customary law. The evolving nature of customary law thus only

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<sup>35</sup>See Bekker and Maithufi ‘The dichotomy between “official customary law” and “non-official customary law”’ (1992) *TRW* 47-60; Bennet T ‘“Official” vs “living” customary law: dilemmas and recognition’ in Claasens and Cousins *Land, power and custom: Controversies generated by South Africa’s Communal Land Rights Act* (2008) 138-153.

<sup>36</sup>Watney *Beginsels van die opvolgingsreg van die Bapedi van Sekwati en Noord-Sothosprekendes in Vosloosrus* (1992) LLD Thesis, RAU, Johannesburg. Primogeniture is the right of the first-born son to inherit as opposed to ultimogeniture that refers to inheritance by the last-born son.

<sup>37</sup>*The Law of Persons in South Africa* (2010) 192-195.

<sup>38</sup>No statistics are available, but reports like the following make it clear that there are many unmarried independent women: ‘We suggest, on the basis of anecdotal accounts by many rural women, that a significant number of women now choose not to marry, and instead to have children on their own, because they regard marriage as an institution that is dangerous to their long-term security’. (Claasens and Ngubane ‘Woman, land and power: The impact of the “Communal Land Rights Act”’ in *Land, power and custom: Controversies generated by South Africa’s Communal Land Rights Act* (2008) 177). Also, the extent of the female-headed households may be gauged by reference to Statistics South Africa 2004 data which indicate that in 2001 there were no less than 61% of female-headed households in formal housing in South Africa.

<sup>39</sup>2005 1 BCLR (CC) para 152 (hereafter *Bhe*). These forms of customary law have been described in a variety of publications – see for instance Bennett ‘Re-introducing African customary law to the South African legal system’ (2009) *American Journal of Comparative Law* 1-32.

compounds the difficulty of identifying it.<sup>40</sup> The South African Law Reform Commission<sup>41</sup> discussed this issue at length and came to the conclusion that, in the absence of evidence that proves a new or more authentic custom, the official version will prevail. The presentation of evidence might thus, in some instances, be essential for a finding of the true customary law. This brings us back to our question, namely, on what grounds may a court depend on evidence of a law, notwithstanding being limited to those who observe it, which is in principle on par with the common law.

We submit that, in view of the elevation of customary law to a source of South African law, as highlighted above, section 1(2) of the Evidence Amendment Act should no longer be used as authority for calling evidence for ascertainment of customary law. Treating it within the same section as foreign law negates the post-democratic status of customary law.<sup>42</sup> The legislature will have to enact a new law. Such a law has in fact been recommended by the South African Law Reform Commission. In a draft Application of Customary Law Bill,<sup>43</sup> it proposed a provision dealing with the proof of customary law per se. The provision allows, on the one hand, for the court to make use of case law, handbooks, expert evidence as well as assessors, and on the other hand, for parties to present evidence. It reads as follows:

**Proof and ascertainment of customary law or foreign customary law**

- 8(1) In order to prove the existence or content of a rule of customary law, or foreign customary law, a court may –
- (a) consult cases, textbooks and other authoritative sources;
  - (b) receive expert opinions either orally or in writing; and
  - (c) appoint assessors from the community in which the rule of customary law applies.
- (2) The provisions of subsection (1) shall not prevent a party from presenting evidence of a rule contemplated in that subsection.

This draft proposal was made more than ten years ago, yet nothing came of it. In the meantime the courts have, without reference to section 1(2) of the Evidence Amendment Act assumed that expert evidence is acceptable as a matter of course.

In addition to recommending a new legal framework for ascertaining customary law, the above draft provision highlights an important aspect in this

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<sup>40</sup>Bekker and De Kock 'Male primogeniture in African customary law: Are some now more equal than others?' (1998) 99 *Journal for Juridical Science* 112-113. See also *Mabena* (n 34) 1074-1075B.

<sup>41</sup>*Report on Customary Marriages* Project 90 (1988) 18-22.

<sup>42</sup>See also Kerr 'Judicial notice of foreign law and of customary law' (1994) *SALJ* 587 at 592 for an earlier suggestion that foreign law and customary law should not figure in the same legislative proposition.

<sup>43</sup>*The harmonisation of the common law and the indigenous law: Report on conflict of laws* Project 90 (1999) Annexure A.



regard, namely, the possibility of the court appointing an assessor. Such an assessor would either be from a representative sample of the relevant community or be an expert in the matter involved.<sup>44</sup> An advantage would be that litigants would be spared the cost of calling their own witnesses.<sup>45</sup> Expert assessors may also assist the court in evaluating expert evidence presented by the parties and may play an important role in an advisory capacity.<sup>46</sup>

Though the words 'judicial notice' are omitted from the draft section above, the reference to cases, textbooks and other authoritative sources for possible consultation, by implication, refers to courts taking judicial notice of customary law. Unlike the rule applicable to common law and statutory law,<sup>47</sup> in the instance of customary law, the leading of evidence (expert or otherwise) is provided for once again. However, in the light of the different forms of customary law, as highlighted above, this seems justified, and indeed essential for determining the existence and contents of a particular customary law rule.

## 5 Judicial approach towards the proof of customary law

In fulfilling their constitutional function of applying and developing customary law,<sup>48</sup> courts should be satisfied that a particular rule of customary law exists. The judiciary have pronounced on it in different ways. In *Maisela v Kgolane* NO<sup>49</sup> it was held that unless judicial notice may be taken of the applicable principles of customary law, the party relying on such principles must prove them. The party must also allege the tribal connection of the litigants and the applicable principles of customary law. The allegations are factual questions that are open to admission or denial by the other party. If denied, it is up to the alleging party to prove such principles. Further, in *Hlope v Mahlalela*<sup>50</sup> the court held that the right to take judicial notice of customary law does not preclude any party to adduce evidence to establish it as a fact.

In *Alexkor Ltd v Richtersveld Community*<sup>51</sup> the court held that customary law must be established by reference to writers on customary law and other authorities and sources. It may include the evidence of witnesses if necessary.

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<sup>44</sup>*Id* para 10.28.

<sup>45</sup>*Id* para 10.27.

<sup>46</sup>See generally Van der Merwe 'Court-appointed experts and the appointment of behavioural expert assessors for sentencing purposes' (2006) 69 *THRHR* 643 at 647 and further for an evaluation of the practice of using expert assessors in a different context.

<sup>47</sup>Schwikkard and van der Merwe (n 11) 490.

<sup>48</sup>Section 39(2) of the 1996 Constitution.

<sup>49</sup>2000 2 SA 370 (T). *In casu* the court held that the principles of customary law do not apply to a sale merely because both parties are black.

<sup>50</sup>1998 1 SA 449 (T).

<sup>51</sup>2004 5 SA 460 (CC) para 54.

The court should added that caution should be exercised when dealing with textbooks and old authorities. This is necessary because of a tendency by courts and writers of land tenure, as was the matter in this case, to view indigenous law through legal conceptions that were foreign to them.

In *Shilubana*<sup>52</sup> van der Westhuizen J unequivocally declared that evidence must be led where necessary, with the emphasis on determining, however difficult, the current practise in a particular community. It was indicated that:

... living customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. However, where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have to examine the law in the context of a community and to acknowledge developments if they have occurred.

The judgment confirms the need for sub-section (2) of the draft Bill above, allowing parties to present evidence regarding a customary law rule, but it raises the question as to whether there should not be more clarity as to its precise wording. It should perhaps be re-phrased to accommodate the official customary law and where appropriate the living customary law.

A matter of concern is that some judgments, in particular *Shilubana and Bhe* (as discussed in more detail below), show that some judges assumed knowledge that certain aspects of customary law had 'developed'. The danger is that, in view of the *stare decisis* doctrine, such perfunctory findings may harden into a new 'official' law rule. The 'development' may, however, differ from one population group to the other. There may even be an urban-rural divide. In addition, in the course of establishing customary law, courts may also be confronted with conflicting views on what customary law on a subject provides.

Some cases in particular illustrate the point of an urban-rural divide. In *Bhe*<sup>53</sup> the judge held that modern urban communities and families were no longer structured and organised along purely traditional lines and that the rules had become increasingly out of step with the real values and circumstances of the societies they were meant to serve and particularly the people who live in urban areas.<sup>54</sup>

It is true that social changes have occurred, but the emphasis on urban areas is a cause for concern. Where does a rural area end and an urban area start? There are vast conurbations where people have not entirely adopted an urban lifestyle. It is estimated that some 22 million Africans still live in rural communal areas, in total larger than twice the size of KwaZulu-Natal.<sup>55</sup>

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<sup>52</sup> *Shilubana* (n 34).

<sup>53</sup> *Bhe* (n 39) para 80 at 618 D-F.

<sup>54</sup> *Id* paras 82-83 at 618H-619B.

<sup>55</sup> Sibanda 'The democratisation of the system of land administration in communal areas and the changing role of the indigenous leadership and institutions in the administration of communal land in South Africa with specific reference to the requirements of the Communal Land Rights Act, 2004

Even in urban areas the wholesale application of the Intestate Succession Act 81 of 1987 is not as well received as the judge might have thought. For many Africans the family home is more than a dwelling that can be converted into money and divided among the surviving spouse and the children. The family home belongs to the family, as stated by Ngcobo J, as he then was, in his minority judgment in *Bhe*:<sup>56</sup> 'The main purpose of succession was to keep the family property in the family. This was essential to the preservation of the family unit.' In this matter a few women and children (probably the tip of an iceberg), raised their concern when it dawned on them that when the family head died, the family home (more accurately the 'household') was sold or up for sale. This would destroy the household as a family unit, described by Mbiti<sup>57</sup> as follows:

the household is the smallest unit of the family, consisting of the children, parents and sometimes the grandparents. It is what one might call 'the family at night', for it is at night that the household is really itself .... The household in Africa is what in European and American societies would be called 'family'. If a man has two or more wives, he has as many households since each wife would usually have her own house erected within the same compound where other wives and their households live.

Surely with the aid of expert witnesses a court could devise a middle way. In this regard, we submit, the minority judgment of Ngcobo J<sup>58</sup> is more satisfactory in that he recognises the need (and Constitutional right) of people living by indigenous intestate law also being governed by it.

In *Mabena*<sup>59</sup> the court had to decide whether a customary marriage had been validly celebrated. Normally such marriages require the consent of the bride and bridegroom's guardians on *lobolo*. However, the court held that the groom could negotiate bridewealth with his prospective bride's mother. The court glossed over the question whether the purported 'rule' in issue was merely the practice of two people entering into a contract, in this case a woman and her future son-in-law. It is in contrast to the traditional view of *lobolo* being negotiations between two families.

While we concede that there are many female headed households where the mother of a bride and her family members could negotiate *lobolo*, there was no evidence to that effect. Bennett's<sup>60</sup> comments in this matter express our concern as follows:

the Court could as well have said that the source of the woman's claim was the Bill of Rights. It had virtually no evidence of a rule of living law. The woman may

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(Act no 11 of 2004) (CLARA)' (2006) *Walter Sisulu University LJ* 1.

<sup>56</sup>*Bhe* (n 39) para 167.

<sup>57</sup>*African religions and philosophy* (1969) 107.

<sup>58</sup>*Bhe* (n 39) para 230.

<sup>59</sup>*Mabena* (n 34).

<sup>60</sup>'Re-introducing African customary law to the South African legal system' (2009) *American Journal of Comparative Law* 18.

have acted in the way that she did simply because the male head of the household happened to be absent and could not be contacted. Her action might have been purely idiosyncratic and not in keeping with a general pattern of behaviour: she might have been a particularly strong-willed character, having no truck with old fashioned, sexist behaviour. Or her action might have been the result of temporary conditions: adult men were away from home at work, thereby compelling women to assume male roles for the time being. Was there any sense of legal obligation in this practice?

One is constrained to say that the judgment was an aberration of judicial law-making.

In *Mabuza v Mbatha*<sup>61</sup> the issue was whether the *ukumekeza* custom was a requirement for a valid Swazi customary marriage. *Ukumekeza* is the formal integration of the bride into the bridegroom's family. The court heard two witnesses, one Shongwe whose evidence the judge found unreliable, and De Villiers who did not know anything about *ukumekeza*. The judge nevertheless came to the conclusion, in other words assumed to himself the knowledge, that there is no doubt that *ukumekeza*, 'like so many other customs',<sup>62</sup> has somehow evolved so much that it is *probably* practised differently than it was centuries ago. That finding was made despite the fact that he only heard De Villiers and Shongwe and the fact that the evidence of both of them were found to be unacceptable. He had no other evidence or sources about *ukumekeza*, except the conflicting submissions of the two parties and yet he came to the above conclusion.

In *Shilubana*<sup>63</sup> the judge made some laudable remarks about the need for expert evidence. Yet he discussed at length the claim of a woman to chieftainship without a shred of evidence nor with reference to any sources. If he had any he would have come to the conclusion that, in that case, Ms Shilubana was entitled to succeed. But his main argument was that the Valoyi tribe had adapted its law. He remarked that the question as to who would succeed her was not before the court.

The essence of the judgment was that the Valoyi royal family adapted (amended) its law to enable Ms Shilubana to succeed in that particular case. Mailula<sup>64</sup> criticises the judgment concluding that the court neglected its mandate to develop customary law. According to him,

the Constitutional Court abdicated its responsibility to develop customary law in accordance with the spirit, purport and objects of the Bill of Rights. This

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<sup>61</sup>2003 4 SA 218 (C).

<sup>62</sup>*Id* para 25.

<sup>63</sup>*Shilubana* (n 34). For a commentary on this judgment see Bekker and Boonzaaier 'Succession of women to traditional leadership: Judgment in *Shilubana v Nwamitwa* based on questionable premises' (2008) *CILSA* 448-461.

<sup>64</sup>'Abdication of judicial responsibility, cultural self-determination and the development of customary law: Lessons from *Shilubana*' (2008) 23 *SAPR/PL* 215-235.

responsibility has been conferred specifically to a court, tribunal or forum in terms of the second component of section 39(2). In stead of undertaking its mandate of developing customary law by interpreting the principle of male primogeniture, in the context of succession to chieftaincy, in accordance with the objects of the Bill of Rights, the Constitutional Court shied away. The Court, in effect, shifted its mandate of developing customary law in accordance with the Constitution to the Royal Family, under the guise of defence.

We are, with respect, tempted to say that in the absence of knowledge or evidence of the rules of succession, the judge chose the easiest way out. Unfortunately being a judgment of the Constitutional Court, it gives the impression that customary law has been developed. But the judge did not develop the customary law of succession to traditional leadership in any way. He only found that in that particular case the Valoyi royal family had amended its law of succession to enable Ms Shilubana to succeed.

## **6 Conclusion**

This article raised the question whether the proof of customary law, in the light of its constitutional recognition, should not be dealt with in the same fashion as common law, namely by way of judicial notice only. It was, however, highlighted that, despite its current status as a source of South African law, its unique evolving nature often necessitates the presentation of evidence in order to identify the 'living' customary law.

It would appear from the above discussion that the judiciary, in general, either take judicial notice of customary law, or recognise the need for evidence in proving customary rules in dispute. In some instances, however, courts ascribed to themselves the faculty to pronounce on the existence and contents of customs. It will be disappointing if the development and application of customary law are exposed to the whims and fancies of the whole spectrum of justices. The situation should be avoided where it, so to speak, is anybody's guess what knowledge of law and custom a particular judge may ascribe to himself.

We suggest that the approach to the proof of customary law should be scrutinised in view of the comments and case law mentioned in this article. A sound legislative direction is needed. The application of the Customary Law Bill should be reconsidered and adopted as law.