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RESEARCH ARTICLE

Custom Versus Customary Law: Does South African Jurisprudence Draw the Distinction?

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Abstract

This article presents a critical analysis of whether South African courts employ established theoretical concepts to delineate the boundaries between custom and customary law. To facilitate a comprehensive understanding, the article begins by providing an overview of the South African legal system, laying the groundwork for the subsequent discussion. The article then delves into prominent theories that address the differentiation between custom and customary law, providing a succinct summary of each. Finally, the article examines the degree to which these theories have been embraced by the courts. Notably, the article uncovers the courts' emphasis on factors such as certainty and the protection of human rights when deciding whether to apply customary law, rather than relying solely on the distinction between custom and customary law.

Keywords: customary law; custom; South Africa

Introduction

The ascertainment of customary law has long perplexed legal scholars. While much has been written about proving customary law in the courts, there is relatively little information about how courts determine the transition from a mere habit to a recognized and enforceable rule of customary law. In addressing this gap, sociologists and theorists have explored the nuances between custom and customary law, offering theoretical definitions for each.

This article analyses South African jurisprudence to assess whether courts differentiate between custom and customary law when dealing with claims of customary law. To provide a comprehensive context, the article commences with a broad overview of the South African legal system, explaining why the distinction between custom and customary law is significant within this framework. The article then provides a succinct discussion of prominent theories that address the differentiation between custom and customary law.

Finally, the article examines South African jurisprudence to assess whether, and if so how, courts grapple with the complex issue of determining when conduct or custom qualifies as customary law. The article evaluates the extent to which the theoretical framework aligns with the practical way in which the courts apply customary law. The jurisprudence reveals a different narrative to one that focuses on rigorous adherence to legal theories. In applying customary law, courts adopt a

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pragmatic approach that focuses on broader factors, such as legal certainty and the safeguarding of human rights.

African customary law in the South African legal system

African customary law has a chequered history in the South African legal system. In the pre-constitutional era, the state, in accordance with the policy of indirect rule, used African customary law[1] and its traditional institutions to control the population. Any state recognition and application of customary law was for the purposes of controlling the black population rather than a recognition of customary law as a legitimate and independent system of law.[2] African customary law was further subject to the repugnancy proviso, meaning that the application of customary law could not conflict with principles of public policy and natural justice.[3] A version of this proviso remains in the Law of Evidence Amendment Act,[4] although it has fallen into disuse and is regarded as unconstitutional without actually having been declared as such.[5]

The adoption of the South African Constitution in 1996 (the Constitution) was a turning point in the legal recognition of customary law in South Africa. The Constitution recognizes customary law as an independent and original source of law that is meant to be developed and applied by the courts.[6] This recognition cements the plurality of the country's legal system in which customary law is meant to exist and be applied alongside common law. Furthermore, the Constitutional Court, which is the apex court in South Africa, has repeatedly affirmed the status and importance of customary law and the fact that it is meant to feed into, nourish and become a part of the amalgam of South African law.[7] The Constitution mandates courts to apply customary law where applicable, subject to the Constitution and any legislation that specifically deals with it.[8] The application of

1 For the purposes of this article, the terms "African customary law", "customary law" and "indigenous law" are used interchangeably.

2 A historical discussion of the treatment of customary law in the pre-constitutional era is beyond the scope of this article. For a discussion of this, see CN Himonga and T Nhlapo (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014, Oxford University Press) at 3–22.

3 Black Administration Act 38 of 1927, sec 11(1). For a discussion of this clause, see NS Peart "Section 11(1) of the Black Administration Act No 38 of 1927: The application of the repugnancy clause" (1982) *Acta Juridica* 99.

4 Law of Evidence Amendment Act 45 of 1988, sec 1(1).

5 The current status of the provision is ambiguous in South African law. In *Mthembu v Letsela* 2000 (3) SA 867 (SCA), paras 41–47, the court considered whether a customary law rule offended public policy as contained in sec 1(1) of the Law of Evidence Amendment Act, but found that it did not do so. In *Mbuza v Mbatha* 2003 (7) BCLR 743 (C), para 31–32, the court regarded the repugnancy clause as unconstitutional without declaring it to be such. Finally, in *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) at 552, the court endorsed the approach that customary law should be tested against the Constitution of the Republic of South Africa, 1996 and not against public policy.

6 *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC), para 51. Several constitutional provisions recognize the existence of customary law: sec 39(2) provides that, when developing customary law, courts must promote the spirit, purport and objects of the Bill of Rights; sec 39(3) recognizes the existence of any other rights and freedoms in customary law to the extent that they do not conflict with the Bill of Rights; sec 211(1) recognizes the institution, status and role of traditional leadership, according to customary law, subject to the Constitution; and sec 211(2) recognizes traditional authorities that observe a system of customary law subject to any applicable legislation and customs. In addition, secs 30 and 31 protect individual and group rights to culture, which have also been interpreted as recognizing customary law: *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA), para 24. For a discussion of constitutional legal pluralism, see C Himonga "The Constitutional Court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law" (2017) *Acta Juridica* 101 at 104–8.

7 *Alexkor v Richtersveld*, ibid.

8 The Constitution, sec 211(3) provides that the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

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customary law is thus subject to constitutional scrutiny; the Constitution has been used by the courts both to strike down and to develop customary law.[9]

The Constitution does not define customary law, but it is defined in legislation as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".[10] The statutory definition does not specifically address the question of when a custom may be considered a part of customary law, but refers to the practices forming part of the culture of the indigenous people of South Africa. The definition thus appears to require that the practice first be cultural and, secondly, that it be a practice of the indigenous people of South Africa. The High Court recently stated, however, "that indigeneity and culture are attributes of customary laws themselves, not the people who choose to be governed by them",[11] thus suggesting that non-indigenous persons may practise customary law. The requirements of indigeneity and culture, however, are rarely canvassed in the jurisprudence and tend to be glossed over in the literature; they are thus not the focus of this article.[12]

There are several indigenous groups in South Africa, with each group having its own version of customary law; therefore, no single system of customary law exists in the country. Generally, the nine official indigenous languages[13] are taken to represent the various systems of customary law, although there are variations within these broad systems in different communities. There are, nonetheless, sufficient similarities between the groups that they may be discussed as a collective or in terms of the broader groups, namely the Nguni, Tsonga / Shangaan, Sotho or Venda.[14]

Finally, the distinction between official and living customary law underpins the customary law discourse. Official customary law encapsulates the codified, static versions of customary law found in legislation, judicial precedent, commissions of inquiry, codifications, restatements, academic writing and textbooks.[15] Living customary law, on the one hand, is understood to be the actual, unwritten practices of people; thus Woodman refers to it as "people's customary law" or "practised customary law".[16] Official customary law is often out of sync with living customary law, and the Constitutional Court has warned that written sources of customary law must be treated with caution because of their often distorted accounts of the law.[17] There is, however, no clear line

9 In *Bhe v Magistrate, Khayelitsha; Shibi v Sithole* 2005 (1) SA 580 (CC) the court declared the customary principle of male primogeniture unconstitutional. In *MM v MN* 2013 (4) SA 415 (CC) the court developed Tsonga customary law to require the consent of the first wife for a subsequent customary marriage. For a discussion of how courts may develop customary law, see W Lehnert "The role of the courts in the conflict between African customary law and human rights" (2005) 21/2 *South African Journal on Human Rights* 241.

10 Recognition of Customary Marriages Act 120 of 1998, sec 1.

11 *Lijane v Kekana* (21/43942) [2023] ZAGPJHC 5 (3 January 2023), para 18.

12 For example, in A Hutchison "Uncovering contracting norms in Khayelitsha stokvels" (2020) 52/1 *The Journal of Legal Pluralism and Unofficial Law* 3, the author examines the use of contracts in the informal economy through empirical research conducted in Khayelitsha, a township in Cape Town. The author unearths commercial norms used in the economy but acknowledges that it is debatable whether the norms can accurately be described as "African customary law" with no further discussion of the norms and whether they have a cultural basis. However, this question would be critical in determining the constitutional recognition and protection of these norms and their enforceability in courts. For a discussion of when a practice may be considered cultural, see O Ampofo-Anti and M Bishop "On the limits of cultural accommodation: *KwaZulu-Natal MEC for Education v Pillay*" (2015) *Acta Juridica* 456.

13 The nine official indigenous languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, isiNdebele, isiXhosa and isiZulu: the Constitution, sec 6(1).

14 C Rautenbach and AE Tshivhase "Nature and sphere of African customary law" in C Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* (6th ed, 2021, LexisNexis) 17 at 22–23.

15 In *Bhe v Khayelitsha; Shibi v Sithole*, above at note 9, para 152 the court distinguished between customary law practised by people, written versions of the law and academic law used for teaching purposes. Generally, the written versions of the law and the law used for teaching purposes are conflated and treated as official customary law.

16 G Woodman "Legal pluralism in Africa: The implications of state recognition of customary laws illustrated from the field of land law" (2011) *Acta Juridica* 35 at 45.

17 *Alexkor v Richtersveld*, above at note 6, para 54.

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between official and living customary law and the distinction is frequently contested and critiqued.[18] Official and living customary law may often overlap, and in South Africa statutory provisions often define practices in terms of customary law, thereby giving effect to the provisions of living customary law.[19] Diala further explains that, given the adversarial nature of the South African legal system, judgments reflect a version of customary law pleaded by litigants and people's practices, even if that version constitutes a minority view.[20] Accordingly, official sources of customary law, such as fieldwork and judgments, may record living practices, although it is argued that the recording process itself may change the nature of the law.[21] Finally, Diala asserts that the concept of living customary law is an academic construct aimed at distinguishing between community practices and formal, codified legal accounts of the law.[22] However, litigants do not invoke this concept, and it does not effectively describe how courts resolve disputes, as all judgments, whether grounded in contemporary practices or not, are categorized as official customary law.[23]

Despite this critique, courts have acknowledged the concept of living customary law, but its ascertainment and enforcement are difficult because of the diverse and unwritten nature of the law. Courts may take judicial notice of customary law when "it can be ascertained readily and with sufficient certainty".[24] Given that only written versions of the law can be easily ascertained, this provision facilitates courts taking judicial notice of statute and precedent.[25] Historically, the ascertainment of living customary law was treated as a question of fact that had to be proved by means of evidence such as that of expert witnesses, community members and traditional leaders.[26] However, as can be imagined, courts struggle with ascertaining such varied and unwritten systems of law, and much has been written about these difficulties.[27] For example, courts sometimes struggle to ascertain customary law because they are situated a distance away from the communities they serve or the custom is subject to infinite variation.[28]

There is, however, less focus on how courts distinguish between custom and customary law when they ascertain the law, which is the focus of this article. This distinction is vital as it is customary law (and not mere custom) that has constitutional recognition and is meant to be applied by South Africa's courts. This therefore begs the question of how courts distinguish between custom (the habits and practices of a community) and customary law, a recognized and justiciable system of law in South Africa.

Customary law, because it is constitutionally acknowledged, has legal authority and offers redress for those governed by its principles. By contrast, ordinary customs, while important as expressions of community identity, lack the same legal standing and cannot provide the necessary framework for justice and the equitable resolution of disputes. This crucial differentiation raises a fundamental question: how do courts distinguish between customs, that are merely the habits and practices of a

18 AC Diala "Legal pluralism and the future of personal family laws in Africa" (2021) 35/1 *International Journal of Law, Policy and the Family* 1 at 7.

19 Himonga and Nhlapo *African Customary Law*, above at note 2 at 35–36.

20 Diala "Legal pluralism and the future", above at note 18 at 8.

21 TW Bennett "Re-introducing African customary law to the South African legal system" (2009) 57/1 *American Journal of Comparative Law* 1 at 21.

22 Diala "Legal pluralism and the future", above at note 18 at 9.

23 Id at 12.

24 Law of Evidence Amendment Act, sec 1(1).

25 C Rautenbach "Oral law in litigation in South Africa: An evidential nightmare?" (2017) 20/1 *Potchefstroom Electronic Law Journal* 1 at 12–13.

26 Id at 13.

27 JC Bekker and IA van der Merwe "Proof and ascertainment of customary law" (2011) 26 *Southern African Public Law* 115; CN Himonga and C Rautenbach "Recognition, application and ascertainment of customary law" in Rautenbach (ed) *Introduction to Legal Pluralism*, above at note 14, 37; and Himonga and Nhlapo *African Customary Law*, above at note 2 at 49–68.

28 Bennett "Re-introducing African customary law", above at note 21 at 21.

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community, and customary law, a formally recognized and justiciable legal system in South Africa? The distinction between these two concepts is not merely an academic exercise but has far-reaching implications in the legal system. The lack of clear delineation risks undermining the integrity of customary law and diminishes its ability to provide justice for those it serves.

Theoretical perspectives

The distinction between custom and customary law is a difficult issue and there is no clear boundary between what may be considered a practice or custom, and law.[29] Hund describes custom as "no more than regular, habitual or convergent behaviour".[30] Custom is generally external, observable conduct but does not consider why people behave in a particular manner.

Early Roman sources indicated that, for a custom to constitute law, people must have consented to it being law.[31] In other words, "custom is law because people accept it as law".[32] The theory of *opinio necessitatis* [an opinion of law or necessity] explains the transformation of custom into customary law in terms of the idea that "it is known to be law, is accepted as law, and is practiced as law by persons who share the same legal system".[33] However, the theory is subject to criticism for, among others, not accounting for changes and developments in customary law nor explaining the creation of law.[34]

Hund similarly considers the transformation of custom into customary law. Hund endorses Hart's view that a critical reflective attitude is required to elevate conduct from custom to customary law.[35] The critical reflective attitude refers to the notion that members of the community believe that the conduct should be followed, and those who deviate from it are criticized and condemned by other community members.[36] The quantum of community members who must consider the behaviour binding is not specified,[37] and the emphasis is on the point at which the majority of the community should consider the conduct to be binding.[38]

These notions of the distinction between custom and customary law endure today, and most scholars continue to define customary law in terms of external, recognizable, regular social behaviour and the internal perspective that the practice is performed because of an accompanying sense of obligation. For example, Diala posits that the most logical answer to the question of how to distinguish between custom and customary law is that a sense of obligation accompanies customary law; this sense of obligation is not present with a mere custom.[39] He affirms the importance of a critical reflective attitude because it informs why community members may act in one way and

29 Merry discusses these difficulties, highlighting the variation in normative orders and the diversity in situations as compounding factors: SE Merry "Legal pluralism" (1988) 22 *Law & Society Review* 869 at 878–79.

30 J Hund "'Customary law is what the people say it is' - HLA Hart's contribution to legal anthropology" (1998) 84/3 *Archives for Philosophy of Law and Social Philosophy* 420 at 423.

31 A Watson "An approach to customary law" (1984) *University of Illinois Law Review* 561 at 562. The purpose of this discussion is not to view customary law through a westernized lens but to acknowledge the influence that these sources had and continue to have on South African jurisprudence. For example, the leading South African textbook on customary law uses Hund's and Hart's theory, which echoes Roman sources, to explain when custom becomes customary law: Himonga and Nhlapo *African Customary Law*, above at note 2 at 28.

32 Watson, ibid.

33 Id at 563.

34 Id at 566.

35 Hund "'Customary law is what the people say it is'", above at note 30 at 424–25.

36 Id at 423.

37 Id at 427.

38 Himonga and Nhlapo *African Customary Law*, above at note 2 at 28.

39 AC Diala "The concept of living customary law: A critique" (2017) 49/2 *The Journal of Legal Pluralism and Unofficial Law* 143 at 150.

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not in another.[40] This internal aspect thus indicates when a social practice is no longer useful or needs to be developed.

Similarly, Ubink states that, for a practice to constitute a customary law rule, it requires a "fixed line of behavior" and a "normative moment".[41] She explains that "a customary rule can only exist when a fixed line of behavior is followed by a more or less constant group of persons for a certain period".[42] There are, of course, difficulties with this requirement as it raises the issue of for how long a practice must be repeated to constitute a fixed line of behaviour. If the period is too short, the risk is that any change in practice by a substantial group of members of the community may create a new rule of customary law.[43] How do you determine whether the changed behaviour is correct or legal according to customary law, and / or whether the recognition of a changed practice as law denies customary law its normative character?[44] Conversely, if you require a long period of repetitive behaviour, this may hinder the development of customary law and its adaptation to changing circumstances.[45] According to Ubink, in cases of the development of customary law, it is virtually impossible for the court to select the correct living norm, especially given that, in the early stages of the development of a rule, it is likely that the changed behaviour would at first be followed by only a minority of people. This begs the question of the threshold of people who must follow a practice for it to constitute customary law. Must it be most of the community, or will the changed behaviour of a minority suffice? In explaining the normative moment, Ubink states that the custom must be believed to be obligatory. The rules are not followed as a matter of practice but with a belief that they must be followed as a matter of law.[46] Once again though, in the early stages of the development of a rule, this will not be the case, as the conduct may be a response to changing socio-economic conditions rather than a belief about the binding nature of the conduct. Thus, Ubink explicitly acknowledges that the requirements mentioned above may not assist judges in ascertaining the rules of customary law, especially in respect of developing rules in their formative stage, which would not have either the fixed line of behaviour or the normative moment.[47] Furthermore, while Ubink states that "jurisprudence defines two requirements for a practice to constitute a rule of customary law",[48] she refers to literature, not the cases themselves, from 1897 to 1980. Thus, while Ubink writes in 2011, her claims about when a practice constitutes customary law do not reflect current jurisprudence.

Finally, Bishop articulates three requirements that may elevate a customary practice into a customary right, in other words, a custom into customary law.[49] The discussion takes place in the context of litigation about customary law fishing rights and what litigants in the future may have to prove to assert a customary right to fish. First, Bishop argues that the community must practise and be bound by a general system of customary law beyond the fishing practice that the community is trying to assert in court.[50] This would arguably show that the community is an indigenous community practising customary law. Secondly, the exercise of the customary law right to fish must be more than just a pastime and must be governed by rules and principles.[51] Thirdly, the claimant

40 Id at 151.
41 J Ubink "The quest for customary law in African state courts" in J Fenrich, P Galizzi and TE Higgins (eds) *The Future of African Customary Law* (2011, Cambridge University Press) 83 at 85.
42 Id at 99.
43 Ibid.
44 Ibid.
45 Ibid.
46 Ibid.
47 Ibid.
48 Id at 85.
49 M Bishop "Asserting customary fishing rights in South Africa" (2021) 47/2 *Journal of Southern African Studies* 291.
50 Id at 297.
51 Id at 298.

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must be a member of the community and a bearer of the right.[52] This discussion is important for future successful litigation, but offers limited insight into how courts have grappled with distinguishing between custom and customary law.

In conclusion, despite the conceptual difficulties associated with the distinction between custom and customary law, theoretical perspectives continue to maintain this distinction. However, to what extent have these theoretical perspectives been adopted by South African courts in their determination of customary law? The next part of this article considers whether South African jurisprudence distinguishes between custom and customary law in ascertaining customary law.

South African jurisprudence on the determination of customary law as distinct from custom

In one of the early cases that dealt with the ascertainment of customary law, in 1944 the South African Appellate Division[53] acknowledged the difference between custom and law, but did not elaborate on how to distinguish between the two.[54] The court stated that disputes in respect of customary law should be resolved by hearing evidence from those best qualified to give it, and that the court should decide the dispute on the evidence that appears to be most probably correct.[55] This is representative of early South African jurisprudence: in dealing with customary law, courts considered issues of who bears the onus of proving customary law, what it means to take judicial notice of the law and how to prove the law in court,[56] but did not seriously grapple with the distinction between custom and customary law.

Hlophe v Mahlalela

In *Hlophe v Mahlalela* (*Hlophe*),[57] one of the first cases to deal with customary law in the new constitutional era, the Transvaal Provincial Division of the High Court in 1998 considered the impact of the non-payment of *lobolo*[58] on the custody of a child. Conflicting expert evidence on the issue was tendered. One expert testified that the non-payment of *lobolo* would not affect the custody of the child, as custody is always conferred upon the father.[59] In contrast, another expert witness, the grandparents and the literature stated that, according to Swazi custom, the custody of the child is awarded to the maternal grandmother in cases where the *lobolo* payment is incomplete.[60]

In seeking to establish the customary law on the matter, the court stated that, while "one should not adopt a too positivistic approach, it cannot be accepted that all cultural practices are indigenous law".[61] In evaluating the evidence provided, the court noted that certain publications were "written from a cultural rather than a legal perspective" and were "therefore not necessarily authoritative on Swazi law and custom".[62] In respect of the witness testimony, the court stated that "she does not or cannot differentiate between cultural practices and Swazi law. To her it would seem to be one and the same thing".[63] This perceived inability to appreciate the distinction between custom and law led

52 Ibid.
53 The highest court in South Africa in the pre-constitutional era.
54 *Sigcau v Sigcau* 1944 AD 67 at 76.
55 Ibid.
56 *R v Dumezweni* 1961 (2) SA 751 (A) and *Ex Parte Minister of Native Affairs: In Re Yako v Beyi* 1948 (1) SA 388 (A).
57 1998 (1) SA 449 (T).
58 *Lobolo* is defined in the Recognition of Customary Marriages Act 120 of 1998, sec 1 as "property in cash or kind … which a prospective husband or head of his family undertakes to give to the head of a prospective wife's family in consideration of a customary marriage".
59 *Hlophe*, above note 57 at 454.
60 Id at 455–56.
61 Id at 457.
62 Ibid.
63 Ibid.

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the court to question the reliability of the expert evidence furnished.[64] After examining the literature, the court stated that it was unable to ascertain the Swazi law on the matter, but that this was largely irrelevant given that the indigenous law position had been excluded in favour of the common law.[65]

The court in *Hlophe* seemed to embrace fully the theoretical perspective discussed above, namely that for a practice to constitute customary law it must have a normative force.[66] In assessing the literature and evidence, the court seemed to dismiss accounts of cultural practices as not setting out whether the practices had a normative force, regardless of the quality and rigour of the accounts. For example, the publications dismissed by the court were those of the acclaimed social anthropologist Hilda Kuper,[67] best known for her work on Swazi culture.[68] Similarly, the expert witness was the daughter of a Swazi chief, who was regarded as an expert in Swazi culture, had personal knowledge of Swazi culture and had been appointed by the provincial government to assist in the revival of Swazi customs as an expert on Swazi customs.[69] The witness and author were by all accounts experts on Swazi culture, but the court seemed to draw a fine, and puzzling, line between culture and customary law.

The court's approach seems to have been driven, at least in part, by the issue under consideration, namely the custody of a minor child. The court positions the customary law rule (that the non-payment of *lobolo* may be determinative in the custody of a child) as antithetical to the principle of the best interests of the child. It states that, in custody matters, the interests of the child take precedence,[70] seemingly oblivious to the idea that the customary law rules may reflect and incorporate the best interests of the child.[71] Unfortunately, the judgment does not interrogate any of the values underlying the customary law rule nor does it consider the broader customary law ethos within which the rule functions.[72] Rather, the court reduces the customary law rule to the payment of money that "'smacks of' child trafficking which could never be enforced".[73]

At a more fundamental level, the court's approach to ascertaining customary law ignored the nature of customary law, namely that customary law is inextricably intertwined with custom or practice. Given that customary law rules are found in cultural practices, the social practices surrounding the payment of *lobolo* are important for understanding the nature of the implications and implementation of the rule. For example, Himonga questions whether the payment of *lobolo* occupies such a dominant position that it excludes all other considerations regarding the welfare of the child.[74] Is the payment of *lobolo* perhaps one factor and are there perhaps cases where payment does not determine the custody of the child? The accompanying literature and expert testimony as to when the rule is applied or deviated from were never canvassed in the judgment to

64 Id at 457–58.

65 Id at 458.

66 This approach was also adopted by the Land Claims Court in *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (LC), where the court considered a land claim based on customary law by an indigenous community. The court distinguished between custom and customary law and noted that, for the custom to have developed into law, there must be (presumably community) consensus regarding its normative nature (para 48) and that ultimately it had not been proven that the custom constituted law that the state was obliged to recognize.

67 The court refers to her as "Hilda Cooper", but this appears to be an error.

68 "Hilda Kuper" *Wikipedia*, available at: <https://en.wikipedia.org/wiki/Hilda_Kuper> (last accessed 10 March 2024).

69 *Hlophe*, above at note 57 at 456.

70 Id at 458.

71 A Moyo "Reconceptualising the 'paramountcy principle': Beyond the individualistic construction of the best interests of the child" (2012) 12/1 *African Human Rights Law Journal* 142 advocates a more holistic approach in defining the best interests of the child, which includes indigenous beliefs.

72 Himonga provides an insightful critique that considers the value and function of the customary law rules: CN Himonga "Implementing the rights of the child in African legal systems: The Mthembu journey in search of justice" (2001) 9 *International Journal of Children's Rights* 89 at 108–10.

73 *Hlophe*, above at note 57 at 459.

74 Himonga "Implementing the rights of the child", above at note 72 at 109.

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enable these issues to be understood. Himonga explains that "the problem seems to be that the rules regarding *lobola* … are abstracted from, rather than considered within, the context of the underlying values of the African family in which the *lobola* transactions take place".[75] Thus, even if the accounts in the literature and expert evidence did not amount to customary law, they would have provided the context within which the rule is practised and provided a richer and more nuanced understanding of the customary law rule. This is because social practices must be evaluated to identify the relevant customary law rules.[76]

It should be noted that ascertaining customary law would not have obliged the court to apply it, which perhaps was an underlying fear in the case. However, there is a distinction between the ascertainment of the law and its application. The Constitution subjects the application of customary law to the Constitution and legislation dealing with it.[77] Accordingly, the court, after finding the customary law rule, may have nonetheless found that the rule conflicted with the Constitution and should not be enforced or developed in terms of the Constitution.[78]

Unfortunately, the court in *Hlophe* seemed to merge the questions of ascertaining and applying the law. The court's reluctance to apply the law results in its negation of the customs as law and a finding that it could not ascertain customary law. Thus, while the judgment provides some indication that the court was cognizant of this distinction between custom and customary law, it is open to criticism. There is little interrogation and justification about why the customary law rules presented to the court did not amount to customary law, but merely a bald statement by the court to this effect. The court's justification that the evidence was from a cultural rather than a legal perspective is weak given that, as discussed above, customary law is embedded in cultural practices. It is perplexing what legal perspective the court may have required to recognize the customary law rules as law. The rejection of custom as law seems rather to have been driven by a reticence to apply customary law, which is an unfortunate combination of the ascertainment and the application of the law by the court.

Mabena v Letsoalo

In *Mabena v Letsoalo* (*Mabena*)[79] the court considered the issue of whether a customary marriage had been validly concluded in accordance with Pedi customary law given that, among others, the mother of the bride (and not the father) had negotiated and received the *lobolo*.

In determining the issue, the court seemed to pay attention to whether the parties performed the customary marriage rituals in accordance with customary law. The court highlighted the fact that "[t]he respondent said that their marriage was performed according to Pedi custom".[80] This appears to be a check that the behaviour of the parties accorded with the general behaviour of the community. The court noted the testimony of a witness and their account that the rituals followed in

75 Ibid.

76 C Rautenbach "Cultural expertise in South Africa" in L Holden (ed) *Cultural Expertise, Law, and Rights: A Comprehensive Guide* (2023, Routledge) 265 at 266.

77 The Constitution, sec 211(3) provides: "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law." For an interpretation of this section, see Himonga and Nhlapo *African Customary Law*, above at note 2 at 58–60.

78 For example, in *Bhe v Khayelitsha*, above at note 9, the Constitutional Court struck down the customary law rule of male primogeniture and replaced it with the Intestate Succession Act 81 of 1987 to regulate the devolution of estates of individuals who live according to customary law. In *MM v MN*, above at note 9, the Constitutional Court developed Tsonga customary law to require the consent of the first wife for a subsequent customary marriage. See W Lehnert "The role of the courts in the conflict between African customary law and human rights" (2005) 21/2 *South African Journal on Human Rights* 241 for a discussion of how courts may develop customary law while considering the Constitution.

79 1998 (2) SA 1068 (T).

80 Id at 1070.

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concluding the marriage accorded with customary law.[81] There seems to have been some interrogation in cross-examination of the internal aspect, in accordance with Diala's argument about why the rituals were performed in a particular way or the rationale for the conduct. The respondent explained, "[m]y people and I, we do not engage in these customary traditions. We did it as it pleased my mother. It is how we do it at home, it is how we do it according to our custom".[82] The respondent's response to the cross-examination that they did not comply with customary law was, "[w]ell, customs differ, it depends on an individual, how does he or she want to do it".[83] It is clear from the responses that the respondent did not reference a normative moment or belief that the conduct was binding on her. Rather, the intimation was that customary law was flexible and individualistic and determined by each person.

Diala argues that the *Mabena* judgment reflected a litigant's version of the contested practice, as all judgments do, although in this case it appeared to reflect a minority view of the practice.[84] Diala's point is valid, but it raises the critical question: did the litigant's practice constitute customary law or was it a personal practice of the litigant. The litigant's individualized account of customary law contrasts with the theoretical accounts of customary law that require a fixed line of behaviour followed by a constant group of persons and that the conduct is followed because it is considered binding on the individual. The court acknowledged that the respondent's evidence was "somewhat ambiguous",[85] but found, based on literature, "that the circumstances of this case are not unique"[86] and that, in practice, mothers may arrange and receive *lobolo* on behalf of their daughters. The court reasoned that, because there are instances in which mothers negotiate and receive *lobolo* on behalf of their daughters, "the respondent was probably referring to the custom followed by people in similar circumstances to their own".[87]

Mabena contrasts sharply with *Hlophe* discussed above. While the court in *Hlophe* dismissed the account as being cultural and not legal, the approach is markedly different in *Mabena*. The court never considered whether the practice of mothers negotiating *lobolo* on behalf of daughters was merely a pragmatic practice that had emerged in response to changing socio-economic circumstances, such as the emergence of female-headed households, or whether it was a binding customary law rule.[88] There is no consideration of whether this is a legal account of the rule and whether the community regarded the observed rituals as binding. Rather, the court employs its own reasoning to recognize the rule. The court reasoned that recognition of the rule that "a woman who is the head of her family may negotiate for and receive *lobolo* is not repugnant to the customary law of marriage"[89] and accords with the views of the Law Commission (which in reality postulated what should occur rather than described a current state of affairs) and the author Labuschagne.[90] The court found that the respondent's evidence (a single witness) supported the authority and that recognizing the rule would constitute a development in accordance with the spirit, purport and objects of the Constitution.[91]

81 Id at 1071.
82 Id at 1070.
83 Id at 1071.
84 Diala "Legal pluralism and the future", above at note 18 at 8.
85 *Mabena*, above at note 79 at 1074.
86 Ibid.
87 Ibid.
88 Bennett highlights that the court glossed over the issue of the normative status of the practice: TW Bennett "Re-introducing African customary law to the South African legal system" (2009) 57/1 *American Journal of Comparative Law* 1 at 13.
89 *Mabena*, above at note 79 at 1074.
90 The court (ibid) looked at the following statement of the Law Commission: "If a mother is entitled to supply the consent to her ward's marriage, then she would also be entitled to arrange the bride wealth. Under the KwaZulu/Natal Codes (s 59) de jure emancipated women already have this power."
91 Id at 1075.

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Bennett notes that the determining factors in the case appear to be the developing nature of customary law and the fact that the respondent's version accorded with the Constitution.[92] It seemed that the court was eager to recognize the principle that mothers may negotiate *lobolo* because it accorded with constitutional rights and values, rather than because there was evidence of this being a valid customary law rule.[93] Thus, the court appeared to be pushing the development of the law in a particular direction that accorded with constitutional values, without stating as much.

This early approach of South African courts (the judgments in *Mabena* and *Hlophe* were heard in 1998, two years after the enactment of the Constitution) is understandable. After years of the non-recognition and distortion of customary law, the latter was recognized as a valid system of law on a par with common law. This constituted a drastic shift in policy, and courts were now tasked with applying customary law while simultaneously ensuring its compatibility with the Constitution. Courts may have been reluctant to be seen to replicate a history of the non-application of customary law in the constitutional era. This may be why the court in *Hlophe*, in the face of a seemingly problematic customary law rule, preferred to frame its decision not to apply the alleged customary law rule as insufficient evidence of a customary law rule rather than a decision not to apply it. On the other hand, the court in *Mabena* recognized a customary law practice, with scant supporting evidence, because it aligned with constitutional rights, while framing it as a development from the community and not the court itself. Both courts, however, showed very little engagement with the distinction between custom and customary law and appeared to frame their judgments to render the outcomes more palatable to communities and less likely to be resisted.

Shilubana v Nwamitwa

Finally, it should be noted that, historically, only certain courts, namely those of traditional leaders and native commissioners, treated customary law as law.[94] In the High Court, customary law had to be proven in accordance with the common law test for custom.[95] This meant that the practice would have to be long-established, reasonable, uniformly observed and certain.[96] This common law test for custom as a measure for customary law was considered in *Shilubana v Nwamitwa* (*Shilubana*).[97] The Constitutional Court distinguished customary law from common law custom and rejected the common law test for custom for determining the existence of customary law.[98] The court held that requiring a long-established practice would frustrate the recognition of developments in customary law, which are inherently part of the nature of customary law.[99]

The Constitutional Court set out three factors to determine the content of a customary law norm.[100] The court did not reconcile the factors in terms of the external and internal notions articulated by theorists to identify customary law, but they could be explained in such terms. First, the Constitutional Court stated that the court must consider the past practice of the community.[101]

92 Bennett "Re-introducing African customary law", above at note 88 at 13.

93 Id at 18.

94 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC), para 22.

95 *Mosii v Motseoakhumo* 1954 (3) SA 919 (A) at 930.

96 *Van Breda v Jacobs* 1921 AD 330 at 334.

97 Above at note 94. For a discussion of the broader case, see JC Bekker and CC Boonzaaier "Succession of women to traditional leadership: Is the judgment in *Shilubana v Nwamitwa* based on sound legal principles?" (2009) 41/3 *Comparative and International Law Journal of Southern Africa* 449; N Ntlama "Equality misplaced in the development of the customary law of succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)" (2009) 20/2 *Stellenbosch Law Review* 333.

98 *Shilubana*, above at note 94, paras 54–56.

99 Id, para 55.

100 This is discussed in F Osman "The ascertainment of living customary law: An analysis of the South African Constitutional Court's jurisprudence" (2019) 51/1 *The Journal of Legal Pluralism and Unofficial Law* 98.

101 *Shilubana*, above at note 94, para 44.

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This arguably entails consideration of whether there is a history of regular, convergent behaviour in the community with regard to the practice. The first factor could thus be well understood in terms of the requirement that there must be external, observable conduct.

Secondly, the Constitutional Court stated that, when there are indications that the rule is developing, past practice alone is not sufficient, and the court must consider the flexibility of the law and the community's right to develop the law.[102] The court did not elaborate on this, but this second component arguably goes to the internal aspect and the rationale for conduct, namely what communities think about changes and deviations in the law and whether they consider it binding as law. This allows courts to consider practices that may not have a long-established history but may be performed because communities regard them as a development in the law. Interrogating the rationale for conduct may allow courts to distinguish between developments of customary law and the ad hoc conduct of individuals.

Finally, the court stated that the need for flexibility and the community's right to develop its law must be balanced against certainty, respect for vested rights and the protection of constitutional rights.[103] This third factor appears to be an additional consideration to the internal and external requirements articulated by theorists. It suggests that, while the internal and external aspects may be sufficient for the theoretical existence of a customary law rule, for the court to apply a customary law rule there are additional considerations, such as the protection of rights.

MM v MN

In the seminal case of *MM v MN*,[104] the Constitutional Court considered the issue of whether the first wife's consent is required for a subsequent customary marriage and how the content of an applicable customary law norm can be ascertained. In a groundbreaking judgment the Constitutional Court directed the parties to present evidence on the issue of requiring the first wife's consent. The court considered what is required to establish whether a customary law rule asserted by a party is indeed law and whether determining customary law is a question of law or fact. Much has been written about the court's approach to these issues,[105] but this article focuses on how the court grappled with the distinction between custom and customary law in ascertaining the law.

First, the court noted that the constitutional recognition of customary law obliges courts to "evaluate local custom in order to ascertain the content of the relevant legal rule".[106] The intimation is that customary law is found in custom, and that the law must be distilled from custom. However, it is not clear whether the court equates custom and customary law or views them as distinct notions. The court's approach is ambiguous, particularly because Zondo J, in a minority judgment, arguably used the definition of customary law as the customs and usages of a community to conflate custom and customary law.[107] He argued that if, in terms of the customs and usages of a community, the consent of a first wife is required for a subsequent customary marriage, then that is the customary law of the community concerned,[108] the customary law of a community being

102 Id, paras 45–46.

103 Id, para 47.

104 Above at note 9.

105 Osman "The ascertainment of living customary law", above at note 100; C Himonga and A Pope "*Mayelane v Ngwenyama and Minister for Home Affairs:* A reflection on wider implications" (2013) *Acta Juridica* 318; H Kruuse and J Sloth-Nielsen "Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*" (2014) 17/4 *Potchefstroom Electronic Law Journal* 1709; F Osman "Ascertainment of customary law: Case note on *MM v MN*" (2017) 31/1 *Southern African Public Law* 240.

106 *MM v MN*, above at note 9, para 48.

107 Id, para 103.

108 Id, paras 103 and 111.

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determined by the customs and usages that are traditionally observed by the community and form part of their culture.[109]

The court was presented with conflicting evidence regarding whether the first wife's consent is required for a subsequent customary marriage. While some affidavits stated that the consent of the first wife is required for a subsequent marriage, others stated that consent is not required.[110] The evidence further suggested that a wife may be persuaded to consent to a further marriage[111] and the reasonableness of withholding consent may be an issue in whether her consent is required.[112] In recounting the evidence as presented in the affidavits, the court may arguably be said to have been examining local custom to identify the relevant rules. Indeed, the court concluded its summation of the affidavits by thanking the individuals "for the dignified way in which they have explained their customs to us".[113] This is a clear indication that the court viewed the affidavits as presenting evidence of the customs of the community. Unfortunately, the court did not go further to explain how it identified the customary law rules from the evidence presented. Faced with ambiguous evidence, the court noted that the evidence should not be "viewed as presenting a difficulty in deciding the case"[114] and described the perspective gained as "not one of contradiction, but of nuance and accommodation".[115] This appears to be an acknowledgement of the nature and variations of customary law.

The nature of living customary law means that variations in accounts of the law are to be expected, but the court refrained from explicitly providing guidance on how the variations should be addressed. For example, is the evidence of traditional leaders afforded more weight?[116] Is it a mathematical calculation, meaning that, if most affidavits stated that consent is not required, that would be accepted as a representation of the law? More importantly, for the purposes of this article, should we interrogate whether the accounts provided are of customary law rules or mere customs or practices? The judgment does not evince the court grappling with whether the accounts furnished were merely of customs or whether they encompassed a sense of normativity that would render them customary law.

Rather, after recounting the evidence presented on the issue, the court found that Tsonga customary law requires that the first wife must be informed of a subsequent customary marriage and, by implication, that the consent of the first wife is not required.[117] The court did not explain its preference for the evidence indicating that Tsonga customary law requires the husband to inform his first wife about a subsequent customary marriage, while disregarding the evidence that the first wife is required to consent to a subsequent customary marriage.[118] The court concluded that "it is the function of a court to decide what the content of customary law is, as a matter of law not fact".[119]

109 Id, para 103.
110 Id, paras 55–59.
111 Id, para 55.
112 Id, para 57.
113 Id, para 60.
114 Ibid.
115 Id, para 61.
116 In a minority judgment, Zondo J stated that a person who provides evidence need not be an expert witness or occupy a position of authority in the community: id, para 98.
117 Id, para 61.
118 Zondo J critiqued this approach and stated that there is no legal basis for the court's preference of one version of evidence over another. Rather, the matter should be decided on the evidence before the court that Tsonga customary law requires either that the first wife be informed of a subsequent customary marriage or give her consent to it. As the first wife neither was informed about nor consented to the marriage, the subsequent customary marriage is invalid: id paras 126–27.
119 Id, para 61.

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The court further held that Tsonga customary law must be developed to require, to the extent that it does not yet do so, the consent of the first wife for a subsequent customary marriage.[120] This approach of the court to developing the law avoids an interrogation of thorny questions such as whether the practice of obtaining the first wife's consent constitutes a regular, convergent practice (the external practice) performed with a sense of obligation and normativity (the internal aspect). Rather, the courts appear to focus on the third factor articulated in *Shilubana*, namely balancing the need for flexibility against respect for certainty and the protection of rights. Here the court weighs the protection of the first wife's rights to dignity and equality as determinative factors in developing Tsonga customary law to require the consent of the first wife.

Evaluation

It appears that, for the most part, South African courts refrain from examining whether a custom constitutes customary law. The courts do not discuss at any length whether there is sufficient regular conduct for a practice to constitute a custom and, more importantly, whether the practice is performed with a sense of normativity. The jurisprudence is often driven by several other factors, such as the protection of rights and a desire to illustrate customary law's ability to change as freely as any other law.[121] Even in *Hlophe*, where the court sought to distinguish between custom and customary law, this was done in the briefest of manners: the court alluded to there being insufficient evidence that the rules were customary law rules and did not engage further on the matter.

The third factor articulated in *Shilubana*, namely the protection of constitutional rights, perhaps better explains why the court declined to apply the alleged customary law rule in *Hlophe*. The court appears to have found that the customary law rule did not protect the child's interests and therefore preferred the principle of the best interests of the child. Given the paramount role of the best interests of the child in South African law,[122] this is understandable. Similarly, this focus on the protection of rights is found in the *Mabena* judgment. The court in *Mabena* gave effect to an ambiguous customary law rule because it protected the interests of women. Strictly speaking, this focus on the protection of rights merges the issues of ascertaining and applying customary law. Thus, while the *Shilubana* factors are often described as guidelines for ascertaining customary law, they go much deeper to explain the court's application of the law. The courts' focus on the question of whether to apply the law has led to less engagement on what may be considered a more fundamental question, which is whether a custom constitutes customary law. While this may be regarded as a preliminary question in a customary law dispute, the courts have not engaged with it as such.

There is arguably a very good reason for the South African courts' reticence to be involved with difficult examinations of whether a custom constitutes customary law. As noted by Chanock, there is variation and conflict in respect of both the conduct and the normative statements about what communities may consider binding.[123] Courts adjudicating customary law disputes are often presented with conflicting practices and accounts of customary law; to demand that courts make definitive pronouncements about the content of the law may be asking too much. How are courts, which may be unfamiliar with customary law practices, expected to choose between conflicting accounts of the law, as in *MM v MN*? When scant evidence of a practice is provided (which is often the case), how can courts rule definitively on the matter? A definitive pronouncement on the content of the law in these circumstances is dangerous as it may be wrong; yet it may be interpreted as a binding precedent by later courts, which could hinder the development of the law.

120 Id, para 75.

121 Himonga and Rautenbach "Recognition, application and ascertainment", above at note 27 at 54.

122 The Constitution, sec 28(2) provides: "A child's best interests are of paramount importance in every matter concerning the child."

123 M Chanock "Neither customary nor legal: African customary law in an era of family law reform" (1989) 3/1 *International Journal of Law, Policy and the Family* 72 at 74–75.

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Rather than grapple with these difficulties, the court seems to prefer to focus on the question of whether to apply the pleaded customary law rule (regardless of whether it reflects the actual rule), considering other factors such as certainty and the protection of human rights. This approach is commendable as it promotes the development of customary law in accordance with the Constitution. If the development of the law is conducted taking into account the underlying customary law values and the totality of the system of law, this may arguably be the soundest approach. In this regard, Ubink explains that "judges need to take into account the wider customary normative framework and be informed by the *usus* [practice] and *opinio necessitatis* with regard to related customary rules".[124] This ensures that the jurisprudence aligns customary law values and the broader legal system, and guards against wholesale distortions of customary law.

However, can this approach be criticized on the basis that it amounts to a jettisoning of the court's duty to ascertain and apply customary law? If the courts are applying or developing rules to maximise the protection of human rights, does this amount to a distortion of customary law? It can be argued that what is applied by courts is not customary law at all but a court's version of the law.

The reality is that any application of customary law by the courts always amounts to a "distortion" of the law to some degree or another. In other words, "living customary law is transformed on entering the judicial process".[125] This is because, as Bishop explains, in litigation involving customary law, the understanding of customary law must be "converted into the language of rights and rules".[126] The translation of customary law practices "into the language of rights" used by lawyers and courts inevitably distorts customary practices.[127] The nature of legal practice reduces "the richness of practice to barren but precise statements of law".[128] Accordingly, Woodman argues that the courts' application of customary law transforms its nature into state law or official customary law.[129] For, even when courts recognize and apply a customary law rule, they do so through their particular prism, which may reflect legal certainty, the protection of rights and their own legal training.[130] Thus some divergence between the actual practices of people and the rules applied by courts is to be expected, and such divergence alone is not a basis for critique.[131] With this understanding, the court's approach to determining the law may best be described as a pragmatic approach to ascertaining customary law or a "political choice" and, to some degree, an invention of customary law.[132]

The theoretical conception that encompasses the internal and external requirements for the existence of a customary law rule is not the focus of the jurisprudence and perhaps rightfully so, given that it is unclear whether communities subscribe to these notions to determine their law. Do communities require regular, habitual or convergent behaviour performed with a critical reflective attitude to consider a practice to be part of customary law? To answer this question, empirical research is required to understand what communities require for a practice to constitute law. It should be noted, however, that the litigants in the case law do not refer to these aspects as requirements for the existence of a customary law rule. Rather, in the accounts of customary law, there is repeated reference to the flexibility of and variations in customary law. For example, in *Mabena*, the

124 Ubink "The quest for customary law", above at note 41 at 99.

125 Himonga and Nhlapo *African Customary Law*, above at note 2 at 32.

126 Bishop "Asserting customary fishing rights", above at note 49 at 298.

127 Ibid.

128 Ibid.

129 See GR Woodman "How state courts create customary law in Ghana and Nigeria" in BW Morse and GR Woodman (eds) *Indigenous Law and the State* (1988, De Gruyter) 181.

130 Himonga and Nhlapo *African Customary Law*, above at note 2 at 32.

131 GR Woodman "Customary law, state courts, and the notion of institutionalization of norms in Ghana and Nigeria" in AN Allot and GR Woodman (eds) *People's Law and State Law: The Bellagio Papers* (1985, Foris Publications) 143 at 155–56. Woodman provides an excellent account of the factors that may lead to divergence.

132 Ubink "The quest for customary law", above at note 41 at 89.

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witness explicitly stated that the rituals were performed in accordance with their mother's preferences but, moreover, that customs differ and are practised differently. There was no attempt to frame the ritual as a long-established practice nor claim that they considered the practice binding on themselves.

Litigants thus seem to emphasize the flexible and evolving nature of customary law. This means that changes are seen as part of the practice of customary law and no regular, convergent conduct is required to ground it as customary law. This understanding of customary law is not novel and was highlighted by Comaroff in his 1978 study of succession in the Tshidi chiefdom.[133] Comaroff noted that there is a "well-defined repertoire of rules and ideologies associated" with succession to chiefship among the Tshidi, but that these rules are not determinative of the political process.[134] If they were to be considered rules, then 80 per cent of succession cases would be anomalies, and Comaroff argued that succession to chiefship is determined by factors external to the stated prescriptive rules.[135] The appointments nonetheless are still considered part of customary law, because this variation is a product of the nature of customary law. Comaroff's study thus illustrates the point well: conduct that is not grounded in long-established conduct and performed with a sense of normativity may nonetheless be considered as part of customary law by adherents of the law.[136] Outsiders who have sought to make sense of customary law and discern law from practice have conceptualized customary law in terms of its internal and external aspects, but the people themselves have not done so. For people who live according to customary law, the law is in a constant state of development and flux, and the application of the law seems to depend on the negotiating powers of the parties.

Conclusion

The advent of the Constitution in South Africa brought with it the recognition of customary law as a valid and justiciable system of law. Given customary law's elevated status as a system of law, one would perhaps have expected South African courts to distinguish carefully between custom and customary law, as it is the latter that enjoys constitutional protection. However, legal theorists draw a sharp line between custom and customary law that is not evinced in South African jurisprudence. While some jurisprudence alludes to the distinction between custom and customary law, a careful analysis reveals it to be misleading. Rather than splitting hairs about when a custom constitutes customary law, the courts have (despite how it may be cloaked) focused on whether to apply customary law in light of other considerations, such as the need for certainty in applying the law and the protection of rights; this is best articulated in the Constitutional Court case of *Shilubana*.

This approach means that the customary law applied by courts may not accord with the practices of people: an argument made by Woodman years ago. His reasons for the divergence and justification are no less true today. In South Africa's constitutional era, it is arguably better for the court to focus on ensuring that customary law complies with the Constitution, rather than involving itself in disputes as to whether a custom is law. In the face of developing and emerging rules, contestations are to be expected, and they would be impossible for the court to resolve. Thus, South African courts have deftly crystallized what needs to be considered in the application of law. This approach, however, may be unsatisfactory for those who see it as yet another distortion of customary law or an inept judgment that combines the questions of ascertaining and applying the law.

133 JL Comaroff "Rules and rulers: Political processes in a Tswana chiefdom" (1978) 13 *MAN - The Journal of the Royal Anthropological Institute* 1.

134 Id at 2.

135 Ibid.

136 The argument was made by the National Movement of Rural Women, as the second amicus in *Shilubana*, that the appointment of a female chief by the Valoyi (as expressed through the Royal Family, the Royal Council and the traditional community, and endorsed by the relevant government authorities) was within their powers, given the flexible nature of customary law, which is applied differently depending on the circumstances.

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The author argues, however, that it is a pragmatic approach, considering the limitations of courts in authoritatively pronouncing on customary law. Furthermore, the clear and transparent framework provided by *Shilubana* allows for a critical analysis of case law that can distil alleged customary law rules from those applied by courts; it makes explicit the distinction between alleged customary law rules and those applied by courts, which may be informed by other considerations. South African jurisprudence is to be commended in this regard.

Competing interests. None

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