

Oral Law in Litigation in South Africa: An Evidential Nightmare?

C Rautenbach*

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Author

Christa Rautenbach

Affiliation

North-West University,
Potchefstroom, South Africa

Email

Christa.Rautenbach@nwu.ac.za

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Abstract

In the past, customary law has been applied rather haphazardly in the courts. Its inherent adaptive flexibility and indeterminate nature created confusion in a court system ill-equipped to deal with litigation dealing with customary law issues. Understandably, customary law was treated in the same way as a common-law custom, which also originates in a community's acceptance of certain standards of behaviour. This meant that anyone averring a rule of customary law had to prove it, except where the rule was contained in a statute or precedent. The courts were not keen to engage in law-making and where the ascertainment of customary law proved to be difficult, they would merely apply the common law. In 1998, the *Law of Evidence Amendment Act* 45 of 1988, which allows the judiciary to take judicial notice of readily accessible customary law, made fundamental changes to this situation. The Act is still in operation, although it must now be interpreted in the light of the *Constitution of the Republic of South Africa*, 1996 (the Constitution). No direction on how this must be done can be found in the wording of the constitutional provisions dealing with the customary law. Besides instructing the courts to apply customary law when "applicable, subject to the Constitution and any legislation that specifically deals with customary law", the Constitution is silent on the way forward. Given the fact that most of the judiciary does not have any knowledge of the content of living customary law and the fact that there are fundamental differences between the evidentiary rules applied in the common and customary laws of South Africa, a few problems are bound to surface when litigating issues involving the customary law. They include: the status of customary law in the South African legal system; the applicability of customary law; and especially the determination of living customary law. The aim of this analysis is to determine if the existing evidentiary rules are appropriate to deal with these challenges in litigating matters involving customary law in the ordinary courts.

Keywords

Customary law; living customary law; judicial notice; ascertainment of customary law; sources of customary law; status of customary law; choice of laws.

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1 Introduction

Customary law is a collective term for the variant of legal systems applicable to traditional communities in South Africa. It is oral law, because it is essentially unwritten.¹ According to Onyango,² the oral aspect of the customary law is based on a social worldview which relies on two operational factors: "reliance on the parties in dispute to accept the final judgment of the people" and "the fear of upsetting the balance" in the community. These two factors give credibility to customary law. The general law, on the other hand, is imposed by institutions and laws detached from the community. For this reason, customary law has been described as a communitarian law consisting of a "body of rules which are recognized as obligatory by its members".³

The communitarian traits of customary law remain the focus of modern definitions of customary law. For example, customary law is described as follows in the *Recognition of Customary Marriages Act*:⁴

'Customary law' means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.

* Christa Rautenbach. B Iuris LLB LLM LLD (NWU). Professor of Law, North-West University, Potchefstroom, South Africa. Email: christa.rautenbach@nwu.ac.za. I am indebted to the National Research Foundation (South Africa) and the Alexander von Humboldt Foundation (Germany) for their financial assistance, the North-West University (South Africa) for research leave, and the Max Planck Institute for Social Anthropology in Halle/Saale (Germany) for providing a stimulating research environment. As always, I remain responsible for any mistakes and my own viewpoints.

¹ Van Niekerk 2008 *Fundamina* 155-170, 165. The ongoing debates on the difference between living and official customary law will not be discussed in this contribution. Although my focus is generally on living customary law as a form of oral law, reference will also be made to official customary law, which is grounded in statutes and precedent.

² Onyango *African Customary Law* 18. He relies on a quote by Kanyeihamba *Commentaries on Law, Politics and Governance* 11.

³ Elias *Nature of African Customary Law* 55.

⁴ *Recognition of Customary Marriages Act* 120 of 1998.

The process of the recognition of customary law⁵ as a legal system worthy to stand alongside its Western⁶ counterpart — the common law⁷ — was a long and winding road to travel,⁸ but customary law finally received constitutional protection in the transitional Constitution⁹ and again in the final Constitution.¹⁰ The final Constitution instructs the courts to "apply customary law when that law is applicable".¹¹ The words "apply" when it is "applicable" seem to be a bit circular, but it is generally accepted that they refer to the choice of law rules.¹² Nevertheless, the relevant scholarly debates deal mostly with theoretical aspects pertaining to the scope and meaning of this constitutional directive,¹³ and not much attention is paid to its relevance in legal practice.

The judiciary, for one, is faced with the intricacies of adjudicating oral law within the framework of a fixed set of evidentiary rules, which allows them to take judicial notice of the common law,¹⁴ however ambiguous, but not of customary law when it is uncertain. This is as a result of section 1(1) of the *Law of Evidence Amendment Act*,¹⁵ which gives a discretion to the courts

⁵ In the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 the word "peoples" was replaced by "people" for no apparent reason. An earlier definition contained in the *Law of Evidence Amendment Act* 45 of 1988, which is incidentally still in operation, refers to "indigenous law" as "the law or custom as applied by the Black tribes in the [South African] Republic". The terms "indigenous law" and "customary law" are used synonymously in the literature. These definitions are not without problems. See, for example, Rautenbach and Bekker *Introduction to Legal Pluralism* 18-20.

⁶ "Western" in this context refers to the two countries which played a major role in the colonisation of South Africa, namely the Netherlands (more specifically the province of Holland in the 17th century, which ruled from 1652-1795 and again from 1803-1806) and Britain, which ruled from 1795-1803 and again from 1806-1961.

⁷ The term "common law" used here does not refer to English common law but to the mix of Roman-Dutch and English law distinguishable from customary law.

⁸ For a general overview of the historical development, see the South African Law Commission (SALC) (renamed the South African Law Reform Commission in 2003) *Report on the Harmonisation of the Common and the Indigenous Law* 5-12 and the sources cited there.

⁹ Customary law was recognised in s 181 and Principle XIII of the *Constitution of the Republic of South Africa* 200 of 1993 (the transitional Constitution).

¹⁰ Customary law is recognised in s 211 of the *Constitution of the Republic of South Africa*, 1996 (the final Constitution or Constitution). See in general Rautenbach 2003 *Stell LR* 107-114.

¹¹ Section 211(3) of the Constitution.

¹² Rautenbach and Bekker *Introduction to Legal Pluralism* 39.

¹³ See the sources cited in Rautenbach and Bekker *Introduction to Legal Pluralism* 48-53.

¹⁴ As explained by Schwikkard *et al Principles of Evidence* 489-490, a party may not lead evidence in order to prove or clarify a legal common law rule although they may do so by way of argument. Also see Zeffert and Paizes *South African Law of Evidence* 877.

¹⁵ Section 1(1) of the *Law of Evidence Amendment Act* 45 of 1988. Although the common law rules allow for judicial notice in the case of the rules of the common law

to take judicial notice of customary law only when it "can be ascertained readily and with sufficient certainty". The courts are in no position to take judicial notice of living customary law because it is as yet an unrecorded social practice known only to the community.¹⁶

Before the *Law of Evidence Amendment Act*, customary law was applied in the courts rather haphazardly. Its inherent adaptive flexibility and indeterminate nature created confusion in a court system ill-equipped to deal with litigation where the customary law was involved. Understandably, customary law was treated in the same way as a common-law custom, which also originates in a community's acceptance of certain standards of behaviour.¹⁷ This meant that anyone averring a rule of customary law had to prove it, except where the rule was contained in a statute or precedent. As explained by Bennett, the equation of common-law custom and customary law was the court's way of indirectly acknowledging that "it had no competence to pronounce on rules generated by community practice".¹⁸ The courts were not keen to engage in law-making, and where the ascertainment of customary law proved to be difficult they would merely apply the common law.¹⁹ We thus found the interesting situation that customary law was treated by the judiciary both as a question of fact and a question of law. Living customary law was deemed to be a question of fact which could be established only by evidence, and since official customary law could be authenticated by reference to written texts, it was deemed to be a question of law.²⁰

The *Law of Evidence Amendment Act*²¹ that allows the judiciary to take judicial notice of readily accessible customary law is still in operation, although it must now be interpreted in the light of the Constitution.²² No direction on how this must be done can be found in the wording of the constitutional provisions dealing with the customary law. Besides instructing the courts to apply customary law when "applicable, subject to the

and established facts, those rules do not allow for judicial notice in the case of the rules of the customary law. See the discussion at 4 below.

¹⁶ Rautenbach and Bekker *Introduction to Legal Pluralism* 48.

¹⁷ See the discussion by Bennett *Sourcebook of African Customary Law* 138. *Breda v Jacobs* 1921 AD 330, namely: the custom must have been in existence for a long period; the relevant community must generally observe the custom; and the custom must be reasonable.

¹⁸ Bennett *Sourcebook of African Customary Law* 138.

¹⁹ Bennett *Sourcebook of African Customary Law* 140.

²⁰ Bennett *Sourcebook of African Customary Law* 141.

²¹ *Law of Evidence Amendment Act* 45 of 1988.

²² Section 39(2) of the Constitution provides as follows: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Constitution and any legislation that specifically deals with customary law", the Constitution is silent on the way forward. Given the fact that most of the judiciary does not have any knowledge of the content of living customary law,²³ and the fact that there are fundamental differences between the evidentiary rules applied in the common and customary laws of South Africa,²⁴ a few problems are bound to surface when litigating issues involving the customary law. They include: the status of customary law in the South African legal system;²⁵ the applicability of customary law;²⁶ and especially the determination of living customary law.²⁷

Fortunately, a number of high court judgments have been delivered dealing with most of these issues. South Africa follows the rule of *stare decisis*, and precedent is thus an important source of law.²⁸ The discussion that follows deals with a few of these pioneering decisions and the principles we can glean from them. The aim of this analysis is to determine if the existing evidentiary rules are appropriate to accommodating the challenges oral law presents in litigating matters involving customary law in the ordinary courts.

²³ Some law schools have introductory undergraduate courses dealing with a very basic overview of customary law. However, these courses deal mainly with official customary law because living customary law is difficult to teach for a number of reasons, one being its ever-changing nature and another its close connection with specific communities.

²⁴ A few of those differences include the following: "(a) the legal range of customary law is narrower than that of the common law; (b) customary law is based on the ethos of reconciliation and solidarity, rather than vindication and individuality, which are salient features of the common law; (c) a single unified system of customary law does not exist, whilst the common law (although largely uncodified) consists of unified legal rules; and (d) customary law is 'living' law which depends for the most part on social practices, whilst the common law can be found in written authorities (old authorities, statutes, judicial decisions and custom)". See Rautenbach "Mixing South African Common and Customary Law of Intestate Succession" 222-240, 237. In addition, the customary courts are community courts where the traditional leader performs "judicial" functions in addition to his or her executive functions. The proceedings in the court are usually informal and aimed at the restoration of the community's equilibrium. There are no formal rules of evidence, no onus, no distinction between fact and law, and hearsay evidence is allowed to a certain extent. See Rautenbach 2005 SAJHR 331.

²⁵ See s 2.

²⁶ See s 3.

²⁷ The difference between official and living customary law is dealt with in general at 4 below.

²⁸ Literally, to stand with what was decided. This phrase refers to the courts adhering to their own precedents. The court confirmed in *Shabalala v Attorney-General, Transvaal; Gumede v Attorney-General, Transvaal* 1995 1 SA 608 (T) that the principle still applies in South Africa.

2 Equal status of customary law

Although there is no more doubt re the status of customary law, my arguments relating to the choosing and ascertainment of customary law are closely related to its *status quo* and it may be helpful to give a brief overview of the main developments.

The first indication of the equal status of the common law and customary law came in the form of a principle formulated in the transitional Constitution.²⁹ Principle XIII stipulated as follows:³⁰

... Indigenous law,³¹ *like common law*,³² shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

Although the final Constitution does not refer to the common law and customary law simultaneously, as this statement does,³³ it contains other textual indications of their equal status. One such example is section 39(2), which requires the courts to "promote the spirit, purport and objects of the Bill of Rights" when developing the common or customary law. In addition, numerous decisions of the Constitutional Court have confirmed their equal status. For example, in *Alexkor Ltd v The Richtersveld Community*³⁴ the Court pronounced:

While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.

Also in *Gumede v President of the Republic of South Africa*³⁵ it was reiterated that both the common and the customary law "sit under the

²⁹ The transitional Constitution contains a list of principles in schedule 4 which had to be taken into account when the final Constitution was adopted. S 71(1)(a) of the transition Constitution provided as follows: "A new constitutional text shall comply with the Constitutional Principles contained in Schedule 4".

³⁰ Emphasis provided. S 181 of the transitional Constitution indirectly recognised customary law by recognising the institution of traditional leadership, which operates under a system of customary law.

³¹ The final Constitution replaced the term "indigenous law" with the term "customary law", which is also the term preferred by the judiciary and used in scholarly literature.

³² Emphasis provided. It is interesting to note that this provision indirectly recognises the common law as well. The 1996 Constitution does not mention recognition and common law in a similar context, but only the customary law.

³³ Although it does refer to the application of customary law by the courts in s 211(3), it does not say "like the common law". See the discussion at 3 below regarding the applicability of customary law.

³⁴ *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 460 (CC) para 51. Confirmed in *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 43.

³⁵ *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) para 22. Confirmed in *MM v MN* 2013 4 SA 415 (CC) para 43.

umbrella of one controlling law – the Constitution" and "customary law ... lives side by side with the common law and legislation".

However, the constitutional recognition of customary law removed only the first hurdle standing in the way of its becoming a worthy member of the South African legal order, especially in adjudicating matters involving issues in customary law.³⁶ It is one thing to give recognition but another thing to determine exactly *what* is being recognised and *when* it must be applied in court. The *what* question deals with the ascertainment of customary law rules and the *when* question deals with the issue of the application or the choice of laws.³⁷ Let us deal with the latter question first.

3 Choice of law: the *when* question

The fact that customary law shares the podium with the common law does not mean that it applies automatically in any given case. In contrast to the common law, which is the general law of South Africa, the customary law applies only when it is applicable.³⁸ In spite of its equal status, customary law is not a law of general application. It is a personal legal system which applies only to people living under a system of customary law. The qualification "when it is applicable" thus means that in given circumstances the courts will have to decide whether the customary law is applicable. This has to be done in accordance with the rules pertaining to the choice of law. South African law does not have a legal guide describing what those rules are, but before 1994 a set of principles which Bennett refers to as "judge-made choice of law rules" had been developed.³⁹ These choice-of-law rules were based on a sense of reasonableness and common sense, and mostly depended on the choice made by litigants.⁴⁰

Since 1994 there have been no decided cases that had to deal with this question specifically, because in most cases it was evident that the applicable law was customary law. There is no reason to believe that the

³⁶ In this context the expression "legal order" refers to the body of laws that make up the legal system of South Africa, including the common and customary law and all their sources.

³⁷ Also referred to as the conflict of laws or interpersonal conflict of laws.

³⁸ Section 211(3) of the Constitution.

³⁹ Rautenbach and Bekker *Introduction to Legal Pluralism* 42.

⁴⁰ See in general Rautenbach and Bekker *Introduction to Legal Pluralism* 42-44. Also see SALC *Report on the Harmonisation of the Common and the Indigenous Law* 27-33 for a discussion of some of the circumstances which may play a role in deciding which legal system might be the most appropriate one to apply, if the litigants cannot agree on the appropriate law to be applied.

pre-1994 choice-of-law rules no longer apply.⁴¹ Nevertheless, the stipulation in the Constitution that "[t]he courts must apply customary law when that law is *applicable*, subject to the Constitution and any legislation that specifically deals with customary law"⁴² prompted the South African Law Reform Commission to investigate the issues pertaining to the choice-of-law rules post-1994 because, in the words of the Commission:⁴³

The courts now need to know when they must apply rules from customary or common law, because notwithstanding recognition of customary law as part of the general law of the land, the circumstances in which it is to be applied are still vague.

The outcome of the investigation resulted in a detailed report containing a proposed Bill on the Application of Customary Law,⁴⁴ which was submitted in 1999 to the then Minister of Justice and Constitutional Development, PM Maduna.⁴⁵ In essence, the Commission recommended that the application of the customary law "should remain a matter of judicial discretion" but that there should be "clear and explicit choice of law rules to indicate when the common or customary law will be applicable to the facts of the case".⁴⁶ The lack of further action from the department, and the continuing nonexistence of "clear and explicit choice of law rules", however, have not (yet) hampered the court's adjudication of customary law issues. They have applied customary law in a succession of cases without pondering much on the absence of formal choice-of-law rules. The viewpoint is generally that a litigant who wishes to have an action determined in terms of customary law must first prove that customary law is applicable. If it cannot be proven, the common law will apply.⁴⁷ This requirement is not strange at all, if one considers that the South African law of evidence requires a litigant to prove what he or she asserts anyway.⁴⁸ The default law is the common law because it has a wider range than customary law and, if a party cannot prove that customary law applies, the common law will be the applicable system. In other words, the common law applies to the whole of South Africa, whilst the customary law applies only to a limited category of people.

⁴¹ Section 229 of the transitional Constitution provided for the continuance of laws in force before its commencement and clause 2 (schedule 6) in the final Constitution contains a similar provision.

⁴² Section 211(3) of the Constitution. Emphasis provided.

⁴³ SALC *Report on the Harmonisation of the Common and the Indigenous Law* 1.

⁴⁴ SALC *Report on the Harmonisation of the Common and the Indigenous Law* 109.

⁴⁵ To date, there are no indications that this proposal is receiving further attention from the department of justice and constitutional development, and it has certainly not been submitted to parliament for discussion.

⁴⁶ SALC *Report on the Harmonisation of the Common and the Indigenous Law* xvi.

⁴⁷ See in general *Maisela v Kgolane* 2000 2 SA 370 (T) 376-377.

⁴⁸ According to *Pillay v Krishna* 1946 AD 946 952, this is the third rule of proof.

Although it seems to be business as usual, the minority judgment in *Bhe v Magistrate, Khayelitsha*⁴⁹ makes it clear that any choice-of-law rules based on racial grounds will be treated with caution and due consideration of the facts of each case. According to Ngcobo J, who delivered the minority decision, the determination of choice of law must be "fair, just and equitable in the circumstances of the case"⁵⁰ and must be informed by the following aspects: respecting the right of traditional communities to observe customary law; the preservation of customary law subject to the Constitution; and protecting vulnerable members of traditional communities living under a system of customary law.⁵¹ Although the Court's sensitivity towards racial considerations is understandable in the light of the political climate in South Africa, it is difficult to see how race could not play a role in deciding the applicable legal system, because the customary law generally applies only to members of African traditional communities. There are no known cases where one or both of the parties were not African, but of course the possibility that someone of another race may be acknowledged by a traditional community as a member of the community might lead to interesting developments in future.⁵²

For now, the issue of applicability remains unresolved and it might remain unresolved until such time that a court is directly confronted with the problem of choice of laws. Until this happens, there seems to be no dire need to formalise choice-of-law rules and each case will be dealt with on an *ad hoc* basis.

We have reached the stage where there seems to be no doubt as to the *status* of customary law and, although it is less clear, the *application* of customary law seems to be fairly uncontroversial as well. There is, however, another area where the customary law in litigation remains fuzzy, namely the ascertainment of customary law in the courts.

⁴⁹ *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 236. This case dealt with the unconstitutionality of the customary rule of male primogeniture, and resulted in its declaration of invalidity. The majority of the Court found it unnecessary to develop the rule and held that the *Intestate Law of Succession Act* 81 of 1987, a common law Act, has to apply to all estates.

⁵⁰ *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 239.

⁵¹ In accordance with the pre-1994 position regarding the choice-of-law rules, Ngcobo J explains that the starting point should always be the agreement between the parties. If no agreement has been reached as to the applicable law, other circumstances of the case must be considered to resolve the dispute relating to the choice of law. The final choice must be based on reasonableness, keeping in mind the particular circumstances of the case.

⁵² One example could be where the parties belong to different social circumstances but contractually agree that the customary law of a particular society would apply to the execution of the contract.

4 Ascertainment of customary law: the *what* question

In general, the judiciary finds the common law mostly in written sources, which include the Constitution, legislation, precedent, authoritative texts and, on the odd occasion, custom (which is distinct from customary law).⁵³ Flowing from the presumption that all courts know the law that they apply, the general rule is that judicial notice must be taken of the common law. Parties are thus not allowed to lead evidence to clarify common-law rules. They may advance arguments pertaining to the nature and scope of such rules but the final decision about the content of the law is made by the presiding officer.⁵⁴ There might be issues that do not fall within the knowledge of the judge, which warrant expert guidance. For example, in criminal cases, although tried in terms of the common law, where the so-called "cultural defence"⁵⁵ has been raised during a trial, the courts have allowed experts to testify about the existence of cultural practices.⁵⁶ The presumption that courts know the law is based on the fact that the common law is a fairly uniform, inflexible system which depends largely on written sources.⁵⁷ The judicial officer need only consult those sources to find the law. As already explained, one exception is where a party alleges that a common-law custom exists. In such a case, the court may allow evidence in a criminal case as to the existence and scope of the custom, to be satisfied beyond any reasonable doubt that the custom does in fact exist.⁵⁸ Proving a common-law custom is thus a question of fact.

In terms of the common law, a judicial officer may also take judicial notice of certain facts which are general knowledge or can easily be ascertained without the need to present evidence to prove them.⁵⁹ Examples include the

⁵³ This is the common-law principle for proving a common-law custom, which is an exception to the general law of the land. See the discussion at 1 above and note 17 in particular.

⁵⁴ Schwikkard *et al Principles of Evidence* 489-490.

⁵⁵ There is no such thing as a formal "cultural defence" in South African law, although there are a few decisions where the defence of an accused relied on culture. See the discussion of Rautenbach and Matthee 2010 *J Legal Plur* 118-126.

⁵⁶ In *Jezile v S* 2015 2 SACR 452 (WCC) the accused appealed his conviction and sentence for various counts of rape, human trafficking and assault of an underage girl. The accused raised as one of his defences the practice of *ukuthwala*, which entails in general the mock abduction of a girl to marry her. Both the state and the accused called expert witnesses to explain the meaning and prevalence of the custom and, in addition, the Court elicited the assistance of *amici curiae* to further assist the Court.

⁵⁷ SALC *Report on the Harmonisation of the Common and the Indigenous Law* 99.

⁵⁸ Bekker and Van der Merwe 2011 *SAPL* 120.

⁵⁹ Also see Bekker and Van der Merwe 2011 *SAPL* 117: "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."

decline of the value of money, political and constitutional conditions, animal behaviour, social conditions, crime, historical facts, and the conditions of roads.⁶⁰ In a very interesting case dealing with the constitutionality of the ritual of bull killing during a Zulu festival, the Court also relied on its own experiences regarding the ritual to come to the conclusion that the applicants' conclusion that the ritual is cruel to animals was unsubstantiated.⁶¹ In *Smit v His Majesty King Goodwill Zwelithini Kabhekuzulu*,⁶² Van Der Reyden J commented:⁶³

As will appear from the direct evidence of persons who have attended the ceremony, *such as myself*, and the evidence of experts on Zulu customs and traditions, the applicants' belief is ill-informed and is based on a jaundiced and distorted view of the Ukweshama [bull killing].

And also:⁶⁴

I have on many occasions attended the ceremony and have personally witnessed the killing of the full (sic). I dispute the allegations regarding the killing of the bull.

Even though these examples exist, courts should apply the process of judicial notice with caution because it deprives the parties of the opportunity to cross-examine the witnesses.⁶⁵

Thus, to summarise: the common law of evidence obliges a judicial officer to take judicial notice of the common law and to consider evidence regarding a common-law custom, and gives a discretion to such an officer to take judicial notice of certain well-known facts.

The nature of customary law is different. Depending on its source, it can be categorised as either official customary law or living customary law. The official customary law includes, amongst other things, legislation,⁶⁶

⁶⁰ See the examples given by Schwikkard *et al Principles of Evidence* 478-489.

⁶¹ See *Smit v His Majesty King Goodwill Zwelithini Kabhekuzulu* 2009 JDR 1361 (KZP), and also the discussion by Rautenbach "Umkhosi Ukweshwama: Revival of a Zulu Festival" 63-89.

⁶² *Smit v His Majesty King Goodwill Zwelithini Kabhekuzulu* 2009 JDR 1361 (KZP) 10. Emphasis provided.

⁶³ *Smit v His Majesty King Goodwill Zwelithini Kabhekuzulu* 2009 JDR 1361 (KZP) 10. Emphasis provided.

⁶⁴ *Smit v His Majesty King Goodwill Zwelithini Kabhekuzulu* 2009 JDR 1361 (KZP) 10.

⁶⁵ Schwikkard *et al Principles of Evidence* 479.

⁶⁶ For example the *Recognition of Customary Marriages Act* 120 of 1998; *KwaZulu Act on the Code of Zulu Law* 16 of 1985; *Black Administration Act* 38 of 1927; *Traditional Leadership and Governance Framework Act* 41 of 2003

precedent,⁶⁷ authoritative textbooks⁶⁸ and reports,⁶⁹ whilst living customary law reflects the present-day customs and practices of traditional communities.⁷⁰ It is generally accepted that *Alexkor Ltd v The Richtersveld Community*⁷¹ was the first case that dealt with the distinction between official and living customary law, but this is not correct. It might be the first Constitutional Court judgment post 1994 dealing with this distinction, but it is obvious from earlier precedents that the judiciary was fully aware of the importance of the difference. For example, in 1944 in *Sigcau v Sigcau*⁷² the Appellate Division acknowledged the challenges of oral Pondo law, which had to be proved by means of evidence:

On appeal from that decision this Court is faced with a difficult problem. Pondo law and custom is a body of unwritten law save for certain decisions of the Native Appeal Court and statements as to Native Law and Custom made by native assessors which are recorded in the reports of the Native Appeal Court, and save for certain passages in books dealing with native custom. But even such records as there are little more than records of traditions, records of what someone at some time said the custom was. In the reported cases the recorded opinions of assessors naturally harden into law and certain books are to some extent accepted as accurately stating what native custom is. But apart from making what use is possible of these scanty records, *the only way in which the Court can determine a disputed point, which has to be decided according to native custom, is to hear evidence as to that custom from those best qualified to give it and to decide the dispute in accordance with such evidence as appears in the circumstances to be most probably correct.*

Also in *Mabena v Letsoalo*,⁷³ in which judgment was delivered in 1997, the Transvaal High Court acknowledged that "customary law exists not only in the 'official version' as documented by writers; there also is the 'living law', denoting 'law actually observed by African communities'".

The fact that living customary law is sourced in the community and is therefore flexible has challenged the reasoning of the judiciary on a number of occasions, and their approach to this problem has not been consistent. At least two issues seem to occupy the minds of the judiciary. The first one is the question of whether or not the different types of customary law (official and living) warrant different approaches in determining its content. The second issue deals with the question of whether a court should take judicial

⁶⁷ Including also the judgments of the abolished Appeal Courts for Commissioners' Courts.

⁶⁸ The textbook written by Schapera *Handbook of Tswana Law and Custom* is among one of the popular textbooks that was used as authority in the courts.

⁶⁹ For example, Reports of the South African Law Reform Commission.

⁷⁰ Rautenbach and Bekker *Introduction to Legal Pluralism* 49.

⁷¹ *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 460 (CC) paras 54-60. In general see Ozoemena 2015 *PER* 977.

⁷² *Sigcau v Sigcau* 1944 AD 67 76. Emphasis provided.

⁷³ *Mabena v Letsoalo* 1998 2 SA 1068 (T) 1074.

notice of living customary law as a question of law or a question of fact.⁷⁴ As already pointed out, the Constitution does not provide answers to either of these questions and, while on the subject, neither does the *Law of Evidence Amendment Act*, which is still operable. Before the commencement of this Act, customary law had to be proved "in the same manner as any other custom".⁷⁵ During the existence of the commissioners' courts, the then Appellate Division held that "in the ordinary courts of law [African] custom must be proved in the same manner as any other custom".

The *Law of Evidence Amendment Act* changed this position. Section 1(1) of this Act stipulates:

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 and natural justice⁷⁶

In addition, section 1(2) of the Act allows a party to adduce evidence to establish a rule which is in doubt.⁷⁷ The term "ascertainment" is derived from the verb "to ascertain" which means to "find (something) out for certain" or "to make sure of".⁷⁸ Thus, it should be evident that a court can take judicial notice only of something that is clear. Considering the main differences between official and living customary law,⁷⁹ it should also be obvious that

⁷⁴ The questions are similar in other pluralistic jurisdictions – see, for example, Gorang 2015 *JLPG* 93-95.

⁷⁵ *Mosii v Motseoakhumo* 1954 3 SA 919 (A) 930C-D. The position in the commissioners' courts was different. They were established to hear cases between Africans only. It was unnecessary to prove customary law in those courts because, as explained in *Ngcobo v Ngcobo* 1929 AD 233 236, "[t]he customs and usages form the unwritten law. Many of these must be well known to the Judges and ascertainable from decided cases and treatises upon Native customs. 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 unworkable, for then Native cases might become too expensive and too protracted". The Commissioners' Courts were established in terms of the *Black Administration Act* 38 of 1927 and abolished in 1986 by the *Special Courts for Blacks Abolition Act* 34 of 1986.

⁷⁶ Emphasis provided.

⁷⁷ Section 1(2) of the *Law of Evidence Amendment Act* 45 of 1988 provides: "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." Authors have argued that this provision is redundant and should be repealed. See Bekker and Van der Merwe 2011 *SAPL* 122.

⁷⁸ See English Oxford Living Dictionaries 2017 <https://en.oxforddictionaries.com/definition/ascertain>.

⁷⁹ According to Ngcobo J, who delivered a dissenting judgment in *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) paras 42-49, there are three types of customary law, namely: living customary law practised in the community; law found in statutes, precedent and textbooks; and law taught in academic institutions.

only official customary law can provide a readily accessible source of those rules. Therefore, this provision cannot be interpreted other than as giving a discretion to a judicial officer to take judicial notice of the official customary law, because that is the only customary law that can be determined with certainty. If there is a dispute as to the existence of an official rule, however, a party may use section 1(2) to adduce evidence to establish the new rule.⁸⁰ Seen this way, the official customary law appears to be a question of *law*. As pointed out by Bennett in practice:

This provision has been applicable only when an official version of customary law is in issue. The courts are in no position to take judicial notice of the living law, which by its nature, is usually an as yet unrecorded social practice.⁸¹

Thus, section 1(1) of the *Law of Evidence Amendment Act*⁸² assists the court only if the rule to be determined is official customary law. The situation regarding living customary law seems to be different. Until recently⁸³ living customary law was treated as fact rather than law, similar to proving a common-law custom.⁸⁴ This means that customary law that could not be determined by consulting official sources (legislation or precedent) had to be proved by means of evidence, such as that of anthropologists, members of the community and/or traditional leaders.⁸⁵ Also, in a more recent decision, *Hlophe v Mahlalela*,⁸⁶ the High Court held that where customary law is not readily ascertainable with sufficient certainty, a party relying on customary law must prove it "by adducing expert evidence to *establish it as a fact*".⁸⁷

Bennett⁸⁸ seems to have the distinction between official and living customary law in mind when he explains that customary law can be treated as *law* or *fact*. When it is treated as *fact*, thus as living customary law, witnesses should be called. After hearing the evidence the court will then draw a legal conclusion based on the facts. When it is treated as *law*, thus

⁸⁰ Evidence in terms of this s was allowed in *Mabena v Letsoalo* 1998 2 SA 1068 (T) 1075 to prove the development of a rule to allow the mother of a woman to negotiate *lobolo* on her behalf.

⁸¹ Rautenbach and Bekker *Introduction to the Legal Pluralism* 48.

⁸² *Law of Evidence Amendment Act* 45 of 1988.

⁸³ A different view was taken in *MM v MN* 2013 4 SA 415 (CC), which is discussed below.

⁸⁴ See *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 1 SA 388 (A) 394-395; *Mosii v Motseoakhumo* 1954 3 SA 919 (A) 930; and *Masenya v Seleka Tribal Authority* 1981 1 SA 522 (T) 524 where customary law had to be proven similar to a common-law custom. However, all of these cases were handed down before the *Law of Evidence Amendment Act* 45 of 1988 came into operation.

⁸⁵ Bennett *Application of Customary Law* 19. Also see Harris 1998 *JCULR* 78.

⁸⁶ *Hlophe v Mahlalela* 1998 1 SA 449 (T).

⁸⁷ *Hlophe v Mahlalela* 1998 1 SA 449 (T) 457E-F. Emphasis provided.

⁸⁸ Bennett *Sourcebook of African Customary Law* 141.

official customary law, the rules must be validated or determined by referring to authentic texts such as legislation, precedent and other authoritative sources.

The different approaches to determining the content of official and living customary law can also be explained by referring to the fundamental differences between the two types or branches of customary law. The official customary law refers to those rules which have been written down, either in an Act, as a precedent, or in any other authoritative written source. Those rules may be taken into account by means of judicial notice, which can then be "updated" by means of evidence. They might, however, not accord with contemporary changes in the communities where they apply, and this may call for development in terms of section 39(2) of the Constitution. However, in the case of living customary law, the rules are grounded in the community. Unless a judicial officer is a member of such a community, there is no way he or she is going to know what the content of the customary law rules is. The presentation of evidence would thus be essential to find the applicable law. These steps are necessary to distinguish between rules which can be regarded as mere social practices and those that are binding and thus regarded as law. After determination of the legal rules, their constitutionality can also be tested in terms of the Constitution, and developed, if need be.

It seems, however, as if these differences between official and living customary law and between law and facts were disregarded by the majority in *MM v MN*,⁸⁹ where Froneman J stated that the "[d]etermination of customary law is *a question of law*, as is determination of the common law".⁹⁰ In addition, he declared that:⁹¹

... a court is obliged to satisfy itself, *as a matter of law*, on the content of customary law, and its task in this regard may be more onerous where the customary-law rule at stake is a matter of controversy. With the constitutional recognition of customary law, this has become a responsibility of the courts. It is incumbent on our courts to take steps to satisfy themselves as to the content of customary law and, where necessary, *to evaluate local custom in order to ascertain the content of the relevant legal rule*.

Although the Court may claim to regard the customary law as a "matter of law", the words "to evaluate local custom in order to ascertain the content of the relevant legal rule" seems to cast doubt on the contention. Surely this practice cannot mean anything other than to require factual evidence from

⁸⁹ *MM v MN* 2013 4 SA 415 (CC).

⁹⁰ *MM v MN* 2013 4 SA 415 (CC) para 47. This case has also been referred to as *Mayelane v Ngwenyama* in the literature.

⁹¹ *MM v MN* 2013 4 SA 415 (CC) para 48. Emphasis provided.

which the Court can deduce a rule of customary law, which makes its determination a matter of fact?⁹² The Court allowed additional evidence and testimony of individuals involved in polygynous Tsonga marriages, advisors to traditional leaders, traditional leaders and other experts, such as anthropologists, which eventually led to a plethora of conflicting evidence.⁹³ Why then was it so important to say that customary law is a matter of law and not a matter of evidence? Could it be that the Court did not want to create the impression that it was treating customary law differently from the common law? This seems to be the case, if one considers this explanation given by the Court:⁹⁴

We do not think this picture of Xitsonga [Tsonga] customary law that the further evidence has given us should be viewed as presenting a difficulty in deciding the case before us. It is a necessary process that courts must go through to *give customary law its proper place*.

Although the Court's sentiments regarding the "proper place" of customary law are laudable, it is my contention that a different approach to the determination of customary law does not relate to its status at all. The status of the customary law is uncontested, but to determine its content, especially that of living law, requires a different approach than in the context of the common law. Thus, I agree with the dissenting viewpoint of Zondo J, who held that "[c]ustoms and usages 'traditionally observed' by any group of people [are] a question of fact and not of law. When there is a material dispute of fact in a matter brought to court by way of motion proceedings, it cannot be decided on the papers" and, therefore, additional evidence should not have been allowed.⁹⁵

The dissenting viewpoint in *MM v MN*⁹⁶ regarding the evidentiary rules when dealing with the issue of ascertainment clearly illustrates the difficulties the judiciary is faced with. The problem is exacerbated by a piece of legislation that is out-dated. The *Law of Evidence Amendment Act*⁹⁷ stems from a time when foreign law and customary law were treated the same. They do not have the same status - the common and customary law do. It is not fair to expect the courts to bend the rules of evidence to accommodate customary law at all costs, especially at the cost of legal certainty. Therefore, I partly

⁹² The court directed the parties and the *amici curiae* to file additional statements regarding the content of Tsonga customary law, which they did in an abundant fashion, leaving the court with a diversity of conflicting responses. See *MM v MN* 2013 4 SA 415 (CC) para 53 note 51.

⁹³ *MM v MN* 2013 4 SA 415 (CC) para 54.

⁹⁴ *MM v MN* 2013 4 SA 415 (CC) para 60. Emphasis provided.

⁹⁵ See *MM v MN* 2013 4 SA 415 (CC) para 126.

⁹⁶ *MM v MN* 2013 4 SA 415 (CC).

⁹⁷ *Law of Evidence Amendment Act* 45 of 1988.

agree with the recommendations made by Bekker and Van der Merwe.⁹⁸ To begin with, the reference to the customary law⁹⁹ in section 1(1) of the *Law of Evidence Amendment Act* should be deleted; the Act should apply only to the ascertainment of foreign law. A court should be allowed to take judicial notice of the official customary law as if it were taking notice of the common law. Secondly, as proposed by the authors, section 1(2) of the *Law of Evidence Amendment Act* should no longer be used as authority for calling witnesses to ascertain living customary law, because mentioning it in the same breath as foreign law negates the equal status of customary law and common law. In its stead the draft provision contained in the proposed Application of Customary Law Bill should be enacted. This proposal was made more than 17 years ago by the South African Law Commission, but was not taken any further.¹⁰⁰ It provides as follows:

- 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.¹⁰¹

⁹⁸ Bekker and Van der Merwe 2011 *SAPL* 122.

⁹⁹ The Act uses old terminology, namely indigenous law.

¹⁰⁰ SALC *Report on the Harmonisation of the Common and the Indigenous Law* 111.

¹⁰¹ Currently there is no provision for the appointment of assessors in the Constitutional Court, but their participation in the High Court and magistrates' courts could be a great advantage. Existing legislation makes provision for two types of experts. Firstly, a magistrate may appointment "expert" assessors in civil matters. This provision could provide a handy tool to obtain the services of customary law experts in cases dealing with custom which might fall beyond the scope of the presiding officer's expertise. The assessors need not be persons with legal training and could be, for example, traditional leaders or authoritative members of the community. The words "advisory capacity" also make it clear that the assessor has no voice in the actual determination of the outcome of the case. There is, however, the issue of costs, because the cost of securing the appointment of an assessor shall be costs in the action, which might discourage parties from obtaining the services of assessors during civil proceedings. Secondly, a magistrate may appoint so-called "lay assessors" in criminal cases in terms of s 93ter of the *Magistrates' Courts Act* 32 of 1944, if he or she thinks it would be "expedient for the administration of justice". Assessors (up to two) can be appointed at two stages: before any evidence has been led or after a verdict of guilty has been delivered and the presiding officer is considering a "community-based punishment". In order to decide if it would be expedient for the administration of justice, the presiding officer should take into account, amongst other things, the "cultural and social environment from which the accused originates". If, however, the accused is standing trial on a charge of murder, the presiding officer must appoint two assessors, unless the accused requests that the trial proceeds without assessors. The Act does not prescribe minimum skills or experiences for an assessor to be appointed in trials or during sentence, but it is common practice to summon a respected member of the community of the accused.

- (2) The provisions of subsection (1) shall not prevent a party from presenting evidence of a rule contemplated in that subsection.

This provision confers a discretion upon the court to consult official sources and expert opinions, and to appoint assessors, in order to determine the existence of a customary law rule. In the light of the fact that the Constitution recognises customary law subject to the Constitution and other legislation, consideration should be given to adding the word "legislation" as a source which might be used as well. Although criticism has been raised against the fossilisation of customary law in statutes, they remain a helpful official source of customary rules. Contemporary customary law statutes such as the *Recognition of Customary Marriages Act*¹⁰² have been hailed by the judiciary as:¹⁰³

... a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country.

Although the Act is not flawless and certain provisions have been declared unconstitutional,¹⁰⁴ it is generally regarded as a welcome development in South African law. It does not codify the customary law of marriage in its entirety and acknowledges the relevance of customary law regarding the negotiations and celebrations of the marriage;¹⁰⁵ the determination of blood relations and affinity;¹⁰⁶ the customary rights and powers of females;¹⁰⁷ maintenance arrangements;¹⁰⁸ and the validity of customary marriages concluded before the commencement of the Act. The Act thus combines the judicial approach to law and to facts.

My understanding of this mixed approach is as follows. Step 1, the presiding officer takes judicial notice of the official customary law, for example the consent of the spouses' requirement, because they are empowered by the law of evidence to take judicial notice of the law. However, the requirement that the marriage be celebrated in terms of customary law needs an additional step, because the relevant customary rules for the celebration,

¹⁰² *Recognition of Customary Marriages Act* 120 of 1998.

¹⁰³ *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) para 16.

¹⁰⁴ For example, s 7(1) was declared unconstitutional in *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) as far as it relates to monogamous customary marriages. All monogamous customary marriages entered into before the Act came into operation are, as from 8 December 2008 (the date of the judgment), *ipso facto* in community of property and of profit and loss between the spouses.

¹⁰⁵ Section 3(1) of the *Recognition of Customary Marriages Act* 120 of 1998.

¹⁰⁶ Section 3(6) of the *Recognition of Customary Marriages Act* 120 of 1998.

¹⁰⁷ Section 6 of the *Recognition of Customary Marriages Act* 120 of 1998.

¹⁰⁸ Section 7 of the *Recognition of Customary Marriages Act* 120 of 1998.

which differ from community to community, do not fall within the personal knowledge of the presiding officer. Thus, step 2 follows, namely determining those rules. He or she cannot take judicial notice of it because they do not fall within his or her personal knowledge, and the parties must prove it by way of evidence of fact, from which the court then draws a conclusion of the relevant customary rules. During this process, constitutional arguments can be raised to attack the constitutionality either of the official customary law rule (during step 1) or of the living customary rule (during step 2). Moreover, during step 1 the court must "when interpreting any legislation", thus also when interpreting customary law statutes, promote "the spirit, purport and objects of the Bill of Rights".¹⁰⁹ Similarly, during step 2, if the "spirit, purport and objects of the Bill of Rights" necessitates it, the judiciary must develop the customary law.

In *Shilubana v Nwamitwa*¹¹⁰ there was no official customary law that regulated the succession to leadership within a traditional community. The rules had to be determined by looking at living customary law. Thus, there was no step 1, which explains why the court held that the content of a particular customary norm must be determined by following a specific process. In the light of its importance, the relevant section is cited in full.¹¹¹

... First, it will be necessary to consider the traditions of the community concerned. Customary law is a body of rules and norms that has developed over the centuries. An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common-law paradigm, in line with the approach set out in *Bhe*. Equally, as this court noted in *Richtersveld*, courts embarking on this leg of the enquiry must be cautious of historical records, because of the distorting tendency of older authorities to view customary law through legal conceptions foreign to it.

It is important to respect the right of communities that observe systems of customary law to develop their law. This is the second factor that courts must consider. The right of communities under s 211(2) includes the right of traditional authorities to amend and repeal their own customs. As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated.

It follows that the practice of a particular community is relevant when determining the content of a customary-law norm. As this court held in *Richtersveld*, the content of customary law must be determined with reference to both the history and the usage of the community concerned. 'Living' customary law is not always easy to establish and it may sometimes not be

¹⁰⁹ Section 39(2) of the Constitution.

¹¹⁰ *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC).

¹¹¹ *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC) paras 44-49. Notes omitted.

possible to determine a new position with clarity. Where there is, however, 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 a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.

Thirdly, courts must be cognisant of the fact that customary law, like any other law, regulates the lives of people. The need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights. In *Bhe* the majority of this court held that it could not leave the customary law of succession to develop in a piecemeal and sometimes slow fashion, since this would provide inadequate protection to women and children. The possibility for parties to reach agreement on the devolution of an estate was explicitly left open in order to facilitate the development of customary law so far as possible, consistent with protecting rights. The outcome of this balancing act will depend on the facts of each case. Relevant factors in this enquiry will include, but are not limited to, the nature of the law in question, in particular the implications of change for constitutional and other legal rights; the process by which the alleged change has occurred or is occurring; and the vulnerability of parties affected by the law.

Furthermore, while development of customary law by the courts is distinct from its development by a customary community, a court engaged in the adjudication of a customary-law matter must remain mindful of its obligations under s 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights. This court held in *Carmichele v Minister of Safety and Security* that the section imposes an obligation on courts to consider whether there is a need to develop the common law to bring it into line with the Constitution, and to develop it if so. The same is true of customary law.

To sum up: where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of s 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law.

It is evident from this passage that the duty to place evidence of a customary law rule before the court remains on the parties alleging the existence of such a rule. If there are differences between past and present practices, the latter will be recognised if they are consistent with constitutional values and rights.

5 Conclusion

The South African judiciary seems to have a disadvantage in comparison with its counterparts in traditional courts.¹¹² Traditional courts do not apply

¹¹² Those courts still operate under the *Black Administration Act* 38 of 1927. S 12 confers civil jurisdiction on a traditional authority to hear cases between Africans and s 20 confers criminal jurisdiction on such an authority to litigate crimes committed within the jurisdiction of the traditional authority. See in general, Rautenbach "South Africa: Legal Recognition of Traditional Courts" 121-151.

the common law rules of evidence to determine the law. In other words, they do not consider questions dealing with fact or law. Furthermore, it is a well-known fact that a traditional authority has the power to make and develop the customary law.¹¹³ They derive this power from custom and not from the Constitution. The general courts, however, derive the power to develop both the common and customary law from the Constitution. The South African judiciary adjudicates customary law by using tools of evidence firmly rooted in the common law. Considering this, is it then fair to expect it to deal with the ascertainment of customary law without guidance in the form of legislation which would ensure at least conformity and consistency in dealing with customary law in the general courts?

Although I essentially agree with the viewpoint of the majority in *MM v MN*¹¹⁴ that "the recognition of customary law as a legal system that lives side-by-side with the common law and legislation requires innovation in determining its 'living' content", I am not convinced that a total disregard of the rules of evidence qualifies as such an innovation. There is an assurance in the knowledge that the actions of a court are to a certain extent predictable, uniform and in line with existing law. For this reason, the dissenting judgment of Zondo J in *MM v MN*¹¹⁵ is legally sound and to be preferred. He did not agree with the majority judgment's total disregard of the rules of evidence. His starting point in considering the second marriage concluded by the deceased was to look at the official customary law, namely the requirements in terms of the *Recognition of Customary Marriages Act*.¹¹⁶ According to him the crucial question to ask was if the second marriage had been "negotiated and entered into or celebrated in accordance with customary law".¹¹⁷ If yes, then the second marriage was valid and, if no, it was invalid. In this case the second wife had not presented any evidence to support her claim that she too had been married to the deceased, and she had not discharged the onus of proving that a marriage did indeed exist; there was thus no need to investigate if the consent of the first wife was necessary to conclude a second marriage. Zondo J rightly points out that the majority's call for additional evidence regarding the existence of a custom that requires the consent of the first wife created the situation where

¹¹³ Schapera 1957 *J Afr L* 150: "[A]mong the Tswana, chiefs have from time immemorial had the power to change the law, either by abolishing or amending an existing usage or establishing a new rule of conduct." Also see *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC); Mmusinyane 2009 *PER* 150-154.

¹¹⁴ *MM v MN* 2013 4 SA 415 (CC) para 43.

¹¹⁵ *MM v MN* 2013 4 SA 415 (CC) para 43.

¹¹⁶ *Recognition of Customary Marriages Act* 120 of 1998.

¹¹⁷ As required in terms of s 3(1)(b) of the *Recognition of Customary Marriages Act* 120 of 1998. See *MM v MN* 2013 4 SA 415 (CC) paras 101-102.

the court was faced with conflicting evidence which could not be resolved, because the evidence could not be subjected to cross-examination.

The difficulties the Constitutional Court was facing in *MM v MN*¹¹⁸ are exemplary of how difficult it is to adjudicate living customary law. The case was heard by ten judges. Six of them delivered the majority judgment and the other four delivered dissenting judgments, arguing that it was not necessary to develop living customary law as the majority had. It is therefore my contention that it would be in the interest of legal uniformity and certainty that legislation be enacted to regulate the approach to ascertaining customary law in the courts. The proposals made by the South African Law Commission in 1999 would be a good starting point.¹¹⁹ This would obviate the judiciary's having to perform legal gymnastics to circumvent the restraints set by the rules of evidence in determining the content of living customary law.

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List of Abbreviations

J Afr L	Journal of African Law
J Legal Plur	Journal of Legal Pluralism and Unofficial Law
JCULR	James Cook University Law Review
JLPG	Journal of Law, Policy and Globalization
PER	Potchefstroomse Elektroniese Regsblad / Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
SAPL	Southern African Public Law
Stell LR	Stellenbosch Law Review