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Author

CN Himonga

Affiliation

University of Cape Town and
University of Zambia

Email

Chuma.Himonga@uct.ac.za

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Abstract

This special edition comprises a selection of contributions delivered at a conference hosted by the Chair in Customary Law, Indigenous Values and Human Rights at the University of Cape Town in collaboration with its research partner, the Research Chair on Legal Diversity and Indigenous Peoples at the University of Ottawa, on "The Recording of Customary Law in South Africa, Canada and New Caledonia" in May 2018.

Keywords

Recording; codification; customary law.

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Editorial

The recording or writing of customary law, the subject of this special issue, is a longstanding debate in Africa. Colonial territories in Africa that were subjected to Britain's policy of indirect rule were some of the early locations of this debate. The debate was framed by the role of customary law in the administration of justice in a legal system catering for the "natives" alongside the system of justice designed for white settlers in the colonial territories. Within this context, several factors drove the quest to record customary law: The oral nature of customary law; the problems associated with ascertaining the content of an unwritten system of law, which was compounded by the lack of knowledge of customary law by colonial judicial officers and other state administrators responsible for its application; the absence of a single, uniform system of customary law; and the need for quick disposal of cases to speed up the machinery of justice.

Scholars' response (sometimes with the support of colonial governments) to these factors and challenges in the administration of customary law was the initiation of projects on recording or writing customary law of different kinds, but largely in the form of restatements. Projects on recording of customary law typified by the London School of Oriental and African Studies Restatement Project in the 1970s aimed to restate customary laws by abstracting and systemising the unwritten rules and principles of African substantive law.¹ Other forms in which customary law was recorded included codifications, in which rules of customary law were reduced to statutory provisions applied by courts as sources of customary law.²

Another common strategy to resolve the determination of the content of customary law in colonial contexts was legislative mechanisms whose provisions permitted the courts to ascertain customary law by means of judicial notice where circumstances permitted; calling witnesses to attest the existence and content of the customary rule in issue in the proceedings;³

* Chuma Himonga. LLB (Uni Zambia) LLM and PhD (Uni London), Professor of Law emeritus, University of Cape Town, South Africa. Professor of Law, University of Zambia, former holder of the South African Department of Science and Technology (and National Research Foundation of South Africa) Chair in Customary Law, Indigenous Values and Human Rights at the University of Cape Town, and National Research Foundation (South Africa) rated researcher. Email: Chuma.Himonga@uct.ac.za.

¹ On this project, see Hinz "Ascertainment of Customary Law" 6. Recent years have seen renewed attempts at the recording of customary law under the auspices of the Customary Law Ascertainment Project of the Human Rights and Documentation Centre in the Faculty of Law at the University of Namibia. This initiative takes the form of self-restatements of the customary laws of the traditional communities of Namibia (see Hinz "Ascertainment of Customary Law" 6).

² See, for example, *Natal Code of Zulu Law*, Proc R151 of 1987.

³ See for example, s 1 of the *Law of Evidence Amendment Act* 45 of 1988.

or sitting with assessors who were knowledgeable on the customary law in issue.⁴

However, these and other mechanisms, such as the use of precedent in the fashion of the received law doctrine of *stare decisis*, proved inadequate to resolve the conundrum of determining the content of customary law. Instead, they introduced other problems, such as the ossification and distortion of customary laws to the detriment of both the persons who were subject to customary law and the development of customary law as a system of law.

Interestingly, the issue of determining the content of customary law has not in the least abated in post-colonial African legal systems for several reasons, four of which are worthy of note.

First, although the cadre of judicial officers who apply customary in the courts has changed from white settlers to Africans who are closely associated with the ethnic groups whose customary laws they apply, for various reasons, the latter also have little or no knowledge of customary law.⁵

Second, post-colonial African legal systems have largely continued to apply the colonial legislation to ascertain customary law with or without minor amendments. Additionally, in some countries, the received law doctrine of precedent has penetrated the legislative provisions for the application of customary law by requiring lower courts to refer to the decisions of superior courts to determine customary law.⁶ For example, in interpreting this kind of provision in *Kishindo v Kishindo*,⁷ the Malawian High Court held that, under section 64 of the *Malawi Courts Act*, customary law has to be established by evidence and the High Court and the Supreme Court will create a binding precedent on customary law.⁸ Thus, even though the received law doctrine of *stare decisis* is, generally, unsuited to ascertaining living customary law, which derives its norms from social practice as opposed to the dictates of the state (see Rautenbach in this volume), this doctrine has been used to address the problem of ascertaining customary law.

⁴ See for example, s 61 of the *Local Courts Act*, Chapter 29 of the Laws of Zambia and s 8 of the *Subordinate Courts Act*, Chapter 28 of the Laws of Zambia.

⁵ See generally, Diallo and Himonga "Interactional Pluralism in Africa".

⁶ See for example, s 64 of the *Malawi Courts Act*, Cap 3:02 Laws of Malawi. This section provides that "a court may judicially note any decisions of its own or of any superior court" in "determining the customary law applicable in a like case".

⁷ *Civil Cause No 397 of 2013* (cited by Msokera *Appropriate Dispute Resolution for Women* 36).

⁸ See Msokera *Appropriate Dispute Resolution for Women* 36.

Third, the constitutional recognition of customary law in several African countries has heightened the imperative for the application and development of customary law by state actors, especially the courts. Foremost in this regard is the recognition of customary law by the South African post-apartheid Constitution and the affirmations by the courts, including the Constitutional Court, of the pluralistic nature of the legal system and the role and status of customary law in this system. These high-level recognitions of customary law place pressure on state actors, such as the courts, to search for authentic versions of customary laws and to apply these laws in their own right.

Finally, the emergence of scholarship representing shifts in legal theory on the concept of law from hard core legal positivism and centralism to legal pluralism has resulted in the widening of the concept of law to include customary law. This development in legal theory and the conceptualisation of customary law have accentuated the problem of how to determine the content of customary law. The concept of deep legal pluralism has gained ground in legal theory, leading to the recognition that living customary law comprises the norms derived from the current practices of people subject to customary law. The legitimacy of this concept has in turn led to the emergence, especially in South Africa, of jurisprudence that has jettisoned the relevance of written forms of state customary law, generally known as official customary law, to judicial proceedings on customary law in favour of living customary law. However, the determination of the content of living customary law has not been easy and the courts have lamented this problem.⁹ Among the factors for this problem are: the oral, dynamic and evolving nature of living customary law; the persistent multiplicity of different customary laws in a given country; differences in the customary laws even within the same ethnic groups; and the contestations over the content of customary law in contexts of change, especially as these affect power and gender relations among men and women.

Furthermore, most of the research of the Chair in Customary Law, Indigenous Values and Human Rights at the University of Cape Town (the Chair)¹⁰ revealed major challenges in the area of ascertaining customary law. It is apparent from this and other research in Southern Africa that as a result of courts being unable to determine the living customary law of the

⁹ See the acknowledgment of this problem by the Constitutional Court of South Africa in *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole* 2005 1 SA 580 (CC) para 87.

¹⁰ See Himonga and Moore *Reform of Customary Marriage*; Maphalle *Succession in Woman-to-Women Marriages*; Diala *Judicial Recognition of Living Customary Law*; Badejogbin *Analysis of the Process of Ascertainment and Application of Customary Law*; Dennison *Status, Rights and Treatment of Persons with Disabilities*; and Osman *Administration of Customary Law Estates*.

people, a glaring discrepancy has emerged between the law applied by state actors and that applied by the people.

The issues of determination of the content of customary law highlighted above have raised a question as to whether there is a need to revisit and investigate models of recording living customary law to make it more accessible and amenable to state and other non-indigenous actors in legal systems where customary law operates. The central concern surrounding this question is the danger of distorting customary law and stripping it of its ability to evolve and to reflect the grounded realities of people who live under it. It is this question that prompted the Chair, in collaboration with its research partner, the Research Chair on Legal Diversity and Indigenous Peoples at the University of Ottawa,¹¹ to organise a conference on "The Recording of Customary Law in South Africa, Canada and New Caledonia" in May 2018.

The first objective of the conference was to create a platform for a select and diverse group of national and international indigenous community experts and scholars on indigenous law to revisit the critical issue of ascertaining indigenous law with special reference to the recording of the laws of indigenous communities in South Africa, Canada and New Caledonia. The second objective was to analyse the methodologies for recording and ascertaining indigenous law emerging in international scholarship. The third objective was to learn from scholars on different continents who are grappling with similar issues on ascertaining indigenous law.

In addition to these specific objectives, the conference aimed to promote the intensification of research on indigenous law with respect to ascertainment and methodologies suitable for recording this law without the associated risks of ossifying and distorting it.

¹¹ This research collaboration was conducted under the research Partnership on "The State and Indigenous Legal Cultures: Law in Search of Legitimacy". The research team and partners under this Partnership consisted of four research groups. The first was the Canada group, which was composed of five universities including the University of Ottawa and the University of Victoria, on the one hand, and four Aboriginal partners, on the other hand. The second group was the Africa group composed of the DST/NRF Chair in Customary, Indigenous Values and Human Rights at the University of Cape Town, researchers at the University of Bordeaux in France and the National House of Traditional Leaders of South Africa. The third team was the Pacific group, consisting of the University of Queensland and researchers from several French-speaking universities. The composition of the research team and partnership was aimed at the co-production of multisectoral knowledge by academic and non-academic partners (especially Aboriginal and indigenous communities in Canada, the Pacific and Africa).

It was also hoped that the conference outcomes would inform the solution to the challenges related to the application of oral systems of indigenous law in countries sharing the British legacy of plural legal systems consisting of, among others, indigenous law.

The reference in the objectives of the conference to the "recording of customary law or indigenous law" was meant to cover any form of writing down of customary law – whether, for example, codification, restatement, self-restatement or precedent. Thus, the focus of the conference was on writing down of customary law. This meaning of "recording customary law" has been maintained in this special issue.

The papers in this volume bring perspectives on recording customary law relating to determination of the content of this system of law from Africa, Canada and the Pacific. These perspectives provide examples of new thinking on this subject.

Dennison's paper is a good place to start the discussion of the papers in this volume as it provides a historical link between colonial-era codifications of customary law and the present. His paper reveals the interesting resilience of colonial-era codifications of Baganda customary law in Uganda, to the extent that these codes inform and shape current conceptions of Baganda customary law. Consequently, while acknowledging the limited scope of this finding from his research, Dennison aptly cautions scholars, researchers, policy makers and change agents to be open to the continuing role of colonial-era customary codifications within modern semi-autonomous social fields.

The paper by Badejogbin continues the narrative about the prevalence of the problem of determining the content of customary law in the post-colonial African territories mentioned earlier in this editorial. Taking Nigeria and South Africa as reference points, this paper highlights the challenges of ascertaining customary law, especially in the context of the application by the courts of living customary law as opposed to official customary law.

Cocoo's paper speaks to a different kind of customary law codification, namely, the code of practice being developed by the Atikamekw and Nehirowisiw Nation in Canada (the Nation). The code of practice will comprise the rules regulating the Nation's natural resources and way of life. In a bid to take charge of its own destiny and to promote the recognition of its normative orders and values within the system of political governance of Canada, and as a way of ensuring the legitimacy of the code among its people, the Nation has adopted a collective and consensual approach to the writing down of the code. The objectives of the code of practice – to transmit the people's normative knowledge; to adapt the rules to the contemporary

context; and to foster the recognition of the Nation's normative practices and principles by non-natives and governments – define the nature of the code. Unlike the conventional colonial-era notion of codification of customary law, which, as already intimated, has largely fallen out of favour, the code has the following features: it derives its normative repertoires from the Nation's peoples and it is designed to adapt to contemporary realities. Significantly, under the code, the oral tradition remains at the core of processes of transmission and distribution of responsibilities and territorial rights.

Thus, the form of recording of customary law adopted by the Nation seeks to avoid the ossification and reification of normative rules and practices that are otherwise intended to be flexible and adaptive to change and to the contexts in which they are applied.

Osman's paper uses the *Recognition of Customary Marriages Act*¹² and the *Reform of the Reform of the Law of Succession and Related Matters Act*,¹³ both of South Africa, to show how legislation has been used to regulate the customary law of marriage and succession without codifying it in the conventional sense. That is, the legislation has to some extent preserved the flexibility of living customary law by avoiding a rigid representation of this system of law. At the same time the paper reveals unfortunate consequences of legislative regulation of customary law that have resulted in the ossification and distortion of customary law. The gist of the overall argument of this paper is that in the South African post-colonial and apartheid contexts, legislation has been used, and can continue to be used, to innovatively regulate living customary law. However, portions of legislative regulation are not appropriately framed to avoid the ossification and distortion of customary law by the legislation itself and by the courts in their implementation of the legislation. Thus, more work is required to aid the determination of the content of customary law within the legislative approach to the regulation of customary law taken by South Africa.

A novel idea of piecemeal recording of living customary law through judgments from mainstream courts dealing with customary law is discussed in Rautenbach's paper. She argues that a precedent from a court that has applied living customary law in reaching its decision is a source of living customary law that courts can use as precedent in subsequent cases. She further argues that any ossifying effect of precedent on living customary law in the proposed approach can be mitigated by the fact that the recorded rule "could be reversed or developed when there is a change in the community"

¹² *Recognition of Customary Marriages Act* 120 of 1998.

¹³ *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.

or, in other words, "as the circumstances change or when a new precedent setting judgment is delivered".

Napoleon's paper draws attention to the complexity of recording of indigenous law itself. At the same time, the paper identifies a unique method of recording customary law by analysing recorded or published oral histories or stories of the people whose indigenous law is under consideration.

In conclusion, the papers in this volume bring different perspectives on the solution to the conundrum of determining the content of customary law across continents. While some papers show a continuum in the challenges and solutions of determining the content of living customary law across the historical epochs of African countries, others show the need for refining the solutions for resolving the challenges for determining the content of customary law. Yet other papers bring out new models of dealing with the conundrum from which jurisdictions across continents can learn.

The papers also contribute to long-term research endeavours on ascertaining customary law by providing either the subject matter or the methodologies and hypothesis for future research. For example, Osman's paper is a call for further research in changes that should be made to the South African approach that incorporates living customary law into legislation. Rautenbach's paper explicitly speaks to the need for empirical research to establish whether case law or precedent is regarded as an authoritative source of law by persons living under customary law. Finally, Dennison's paper sets the hypothesis for research into the impact of colonial-era codifications or recording of customary law on the shaping of living customary law in current customary law frameworks, as well as the methodology for this kind of research.

All in all, the papers reflect a reasonable achievement of the conference objectives that birthed them.

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