

The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage

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Abstract

In pluralistic legal systems, the regulation of non-state law through statute carries the risks associated with codification; namely the ossification and distortion of law. This article examines the effects of statutory regulation on unwritten systems of law in the South African legal context. It argues that the constitutional recognition of customary law in South Africa has forced the state to legislate in this arena, the most notable enactments being the *Recognition of Customary Marriages Act* 120 of 1998 and the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009. The enactments' attempt to align customary law with constitutional values have imported significant portions of the common law to regulate the customary law of marriage and succession. This has resulted in a distortion of customary law to reflect common law values and rules. Furthermore, it is argued that significant lacunae in the enactments have necessitated litigation and resulted in the judiciary playing a significant role in shaping customary law. Finally, despite the incorporation of living customary law into the enactments, the implementation thereof by courts and in practice has – and perhaps inevitably so – ossified and distorted portions of the law. Nonetheless, the article argues that legislation is critical to regulate customary law. It advocates that the shortcomings identified in the article are addressed to ensure a more accurate portrayal of customary law in legislation and the successful implementation thereof.

Keywords

South Africa; distortion; customary law; marriage; succession; official customary law; living customary law

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1 Introduction

In pluralistic legal systems, states often seek to regulate unwritten systems of non-state law, such as indigenous or customary law,¹ to ensure compliance with the overarching legal system. For example, during apartheid, the South African state shamelessly used the *Black Administration Act*² to implement the state agenda of segregation and control of the indigenous population.³ The Act was crafted to solidify state control rather than reflect actual customary law principles.

Today, the South African state equally uses legislation to regulate customary law matters. While such legislation is not steeped in the racist state agenda of the past, it is questionable whether the regulation amounts to a codification of customary law with an inevitable ossification and distortion of the law. This article analyses the consequences of the statutory regulation of customary law through an examination of two of the most prominent pieces of legislation dealing with customary law in South Africa, namely the *Recognition of Customary Marriages Act*⁴ and the *Reform of Customary Law of Succession Act*.⁵

The article first explains the need for statutory regulation in light of South Africa's constitutional recognition of customary law. It argues that legislation seeks to develop customary law to reflect constitutional principles and norms though this may not materialise in practice. Legislative developments tend to distort customary law as common law concepts are imposed on customary law. Ultimately, South African legislation has mixed consequences. Nuanced drafting has sought to capture living customary law practices but on the other hand poor drafting and significant lacunae in legislation have had to be litigated at the expense of mostly women.

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¹ The terms "indigenous" and "customary law" are used interchangeably in South African literature and in this article.

² *Black Administration Act* 38 of 1927 (hereafter the *Black Administration Act*).

³ Langa CJ in *Bhe v Magistrate, Khayelitsha; Shibi v Sithole* 2005 1 SA 580 (CC) para 61 (hereafter *Bhe* case) described the Act as the "cornerstone of racial oppression, division and conflict in South Africa" that had been specifically designed to separate and exclude Africans from the rest of the population.

⁴ *Recognition of Customary Marriages Act* 120 of 1998 (hereafter *Recognition Act*).

⁵ *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 (hereafter *Reform Act*).

2 Constitutional recognition of customary law

Historically, customary law was not recognised as a valid system of law in South Africa.⁶ Recognition was limited for the purposes of controlling the population.⁷ In terms of the policy of indirect rule, the state used traditional leaders and customary law to further the state agenda of segregation and control of the population.⁸ The advent of democracy and adoption of the Constitution was thus a pivotal moment for customary law in South Africa.⁹

The 1996 South African Constitution¹⁰ recognises customary law as a system of law in South Africa. Numerous constitutional provisions cement the recognition and status of customary law and the rights of individuals to have their cultural practices protected.¹¹ This has resulted in the enactment of legislation such as the *Recognition Act* which recognises customary marriages on par with civil marriages for the first time in the country. Furthermore, section 211(3) of the Constitution mandates South African courts to apply customary law where applicable subject to the Constitution and legislation that deals specifically therewith. The subjection of customary law to the Constitution means that customary law practices are not immune from constitutional scrutiny and the legislature must ensure that discriminatory customary law practices are struck down. While courts have played a prominent role in ensuring customary law practices are constitutionally compliant,¹² legislation also abolishes discriminatory

⁶ For a discussion of the historical treatment of customary law, see Himonga and Nhlapo *African Customary Law* 3-17; Bennett *Customary Law* 34-42; Himonga and Bosch 2000 *SALJ* 328; Church 2005 *ANZLH E-Journal* 94-99; and Rautenbach 2008 *JCL* 119-122.

⁷ Himonga and Nhlapo *African Customary Law* 7-9.

⁸ Himonga and Nhlapo *African Customary Law* 7-9; and McClendon *White Chief, Black Lords* 6.

⁹ Himonga and Nhlapo *African Customary Law* 17-20; and Rautenbach 2003 *Stell LR* 107.

¹⁰ *Constitution of the Republic of South Africa*, 1996 (the Constitution).

¹¹ Section 9(3) of the Constitution prohibits discrimination on ethnic or social origin and culture and is interpreted to confer the right to be governed by the law applicable to their particular cultural group. See Himonga and Nhlapo *African Customary Law* 18-19. S 15 provides that nothing in the section prevents legislative recognition of marriages concluded under any tradition, religious or personal or family law systems. Ss 30 and 31 protect the individual and group right to culture respectively. S 39(2) provides for the development of customary law on par with common law while s 39(3) recognises, among others, any other rights contained in customary law to the extent that they are consistent with the Bill of Rights. Ch 12 recognises the role of traditional leaders. S 235 provides for the right of self-determination of any community sharing a common cultural and linguistic heritage.

¹² *Bhe* case; *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) (hereafter *Gumede*); *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC) (hereafter *Ramuhovhi*); and *MM v MN* 2013 4 SA 415 (CC).

practices and regulates customary law. The article examines the consequences of such regulation through the prism of the *Recognition Act* and the *Reform Act*.

3 Development of customary law in line with constitutional values

Years of state manipulation – and indeed manufacture – of customary law conferred power on a select few, typically men at the expense of women and children. For example, during apartheid, the state sought to address the state-induced land shortage among Black¹³ individuals by providing that Black women did not own land independently but rather administered land through their husbands and sons.¹⁴ This reduced the pool of eligible land-owners but was a blow to women's rights.¹⁵ Similarly, in matters of succession, magistrates who administered customary law estates entrenched the principle of male primogeniture – the principle that males inherit in a pre-determined order to the exclusion of females.¹⁶ This was problematic given that customary law succession was broader than mere inheritance; it focused on the responsibility of the heir to care for the deceased's dependents and allowed females and younger siblings to inherit and oral dispositions of property to other family members.¹⁷ Nonetheless, magistrates in their administration of estates solidified male primogeniture as the defining characteristic of customary law succession. The result was that opportunistic heirs claimed the inheritance of property shirking any concomitant customary law responsibility to care for the deceased's family members. This was exemplified in the *Bhe* case in which the deceased's father claimed the property based on male primogeniture and intended to

¹³ During apartheid the South African state racially classified its citizens as "Black", "White", "Indian" or "Coloured". The categorisations are distasteful but necessary to portray the historical position.

¹⁴ The South African state created the land shortage by confining the majority Black population to 13 percent of the land; Osman 2019 *J Legal Plur* 100; and Weinberg 2013 *Acta Juridica* 101-103. The blatant making up of the law was not once off; see s 11(3) of the *Black Administration Act* where the state provided that women married according to customary law were minors under the guardianship of their husbands.

¹⁵ Osman 2019 *J Legal Plur* 100.

¹⁶ Bennett *Customary Law* 335; and *Bhe* case 593.

¹⁷ For a discussion on the general principles of customary law succession, see Rautenbach "Law of Succession and Inheritance" 174; Bekker *Seymour's Customary Law* 273; Kerr *Customary Law of Immovable Property*; and Coertze *Bafokeng Family Law* 240. For a discussion of customary dispositions of property, see Badejogbin 2014/15 *SADC LJ* 10.

sell the property despite the fact that it would leave his granddaughters and their mother homeless.

These distortions of customary law which materialised in practice to the detriment of women and children were problematic with the advent of the Constitution which explicitly prohibits discrimination based on gender and culture.¹⁸ The clash was perhaps inevitable and Himonga describes the conflict between customary law and human rights as an "established fact".¹⁹ Thus, at a very basic level, South African legislative interventions seek to develop customary law in line with constitutional values and eradicate discriminatory customary law practices. For example, the *Recognition Act* addresses the limitations imposed on women and provides that spouses have equal status and capacity ending the minority status of women and the impediments to their ownership of property.²⁰ Similarly, the *Reform Act* gives effect to the Constitutional Court's declaration that male primogeniture is unconstitutional²¹ and allows for the equal inheritance by males and females.

While statutory enactments aim to regulate customary practices and bring them into line with the Bill of Rights, the oft unanswered question is whether legislative changes are effected in practice. Himonga,²² in an insightful article, explains the limitations of legislation and judicial decisions to bring about change on the ground. First, statutory interventions tend to offer complex and foreign solutions that are not always compatible with customary law and the context within which it operates.²³ Secondly, rights are often protected through complex litigation which is inaccessible to most people.²⁴ These impediments are best exemplified by the protection offered in the *Recognition Act* to women in polygynous marriages.

The *Recognition Act* purports to protect the proprietary rights of women in polygynous marriages by requiring men who wish to enter into a polygynous marriage to enter into a court-approved contract – referred to as a section 7(6) contract – regulating the proprietary consequences of the polygynous marriage.²⁵ The unlikelihood of men ever concluding such contracts was

¹⁸ Section 9(3) of the Constitution.

¹⁹ Himonga "Constitutional Rights of Women under Customary Law" 317.

²⁰ Section 6 of the *Recognition Act*. The Act also explicitly repeals s 11(3)(b) of the *Black Administration Act*.

²¹ *Bhe* case.

²² Himonga "Constitutional Rights of Women under Customary Law" 317.

²³ Himonga "Constitutional Rights of Women under Customary Law" 326.

²⁴ Himonga "Constitutional Rights of Women under Customary Law" 326.

²⁵ Section 7(6) of the *Recognition Act*.

made clear in 2010 – 10 years after the enactment of the *Recognition Act* – when the Women's Legal Centre found only three such contracts had been registered.²⁶ Ignorance of the law and the inaccessibility of the courts and legal services all likely impede implementation of the provisions. Consequentially, the protection offered by section 7(6) is rendered largely superfluous.

Accordingly, it is questionable whether legislative interventions like the *Recognition Act* and *Reform Act* change customary practices, such as the power relations between spouses and the protection of women's rights.²⁷ There is a real risk that these enactments remain paper law with limited implementation in the lives of those it is meant to regulate.

Statutory interventions, nonetheless, have an important function. They signal the intent of the state which has a responsibility to regulate customary law practices and ensure their constitutional compliance. The state cannot ignore discriminatory practices or wait for development of practices by communities themselves. While such development may be more organic and authentic, it is likely to be slow and piecemeal and untenable in the new constitutional era. Given the limitations of legislation to effect change, however, other measures like educational outreach programmes and the incorporation of customary institutions such as the extended family and community structures may be necessary for the realisation of rights. These measures complement legislation and are not a substitute therefor.

More importantly, legislation is arguably effective at the interface between state and non-state law. For example, the Master's Office currently administers the estates of individuals who live according to customary law but die without a will.²⁸ Recent empirical research reveals that when officials administer estates they adhere to the statutory framework rather than customary law principles of succession.²⁹ Similarly, courts enforce the statutory provisions regardless of conflicts with customary law. Even if the immediate effect of the judgment is limited to the litigants, such judgments

²⁶ Women's Legal Centre *Recognition of Customary Marriages* 18.

²⁷ For example, the *Recognition Act* provides for the registration of customary marriages as a means of proving the existence of the marriage and aiding women in asserting their marital rights. De Souza, however, discusses how in reality registration is often a hindrance to the realisation of rights; De Souza 2013 *Acta Juridica* 239.

²⁸ Section 1 of the *Reform Act*.

²⁹ Himonga and Moore *Reform of Customary Marriage* 228-273.

may also gradually shape the living customary law practices.³⁰ Thus when state institutions administer customary law then legislation is an effective tool for change.

In summary, legislation generally develops the law in line with the state agenda, which in South Africa is the constitutional rights and values. While this may have limited practical impact initially, it changes the implementation of the law by formal state institutions which hopefully filters down to lived realities.

4 Distortion of customary law

The development of customary law in line with constitutional values carries with it the undeniable risk of alteration of the law. For example, the *Recognition Act*³¹ incorporates large amounts of common law,³² such as the *Matrimonial Property Act*³³ and *Divorce Act*,³⁴ to regulate customary law marriages. The gravitation towards common law is unsurprising given its historical dominance but it inevitably changes the nature of customary law marriages. Himonga goes as far as to refer to such marriages as "common law African customary marriage".³⁵

Some changes, however, are deliberate and meant to develop customary law in line with constitutional values. For example, the *Recognition Act* requires parties be over the age of 18 years and the consent of both spouses to marry according to customary law.³⁶ These provisions were aimed at addressing underage and forced marriages³⁷ and are welcomed as necessary developments to protect the rights of women and children.

On the other hand, some changes may significantly change the nature of customary law and bring into question the value of the constitutional

³⁰ For example, the *Bhe* judgment is said to be effectively enforced to the benefit of Ms Bhe and her daughters; Himonga "Constitutional Rights of Women under Customary Law" 321.

³¹ See ss 7(3), 7(5), 8(3), 8(4) and 10(3) for how the *Recognition Act* incorporates common law statutes.

³² South Africa is a mixed legal system comprising of Roman law, Roman-Dutch law, English law and African customary law. While common law usually refers to judge-made law, it is used in the article to refer to the body of law that draws its values from Roman law, Roman-Dutch law and English law in the form of both legislation and precedent.

³³ *Matrimonial Property Act* 88 of 1984.

³⁴ *Divorce Act* 70 of 1979.

³⁵ Himonga 2005 *Acta Juridica* 84.

³⁶ Sections 3(1)(a)(i) and (ii) of the *Recognition Act*.

³⁷ SALC *Project 90, Discussion Paper 74* 52-56, 74-78.

recognition of customary law. For example, the *Reform Act* – which is essentially a codification of the *Bhe* decision – replaces the customary law principle of male primogeniture with the common law *Intestate Succession Act* to regulate the devolution of estates. Historically, customary law succession focussed on succession to status and the identification of successor who could step into the shoes of the deceased and assume the deceased's responsibilities.³⁸ The successor inherited the property as an ancillary to the assumption of the deceased's status and as a means of fulfilling their responsibilities.³⁹ The *Black Administration Act* changed the nature of customary law succession by shifting the focus from the assumption of status to the distribution of property and winding up of the estate. It allowed heirs to inherit property while discarding any responsibility towards the family. The *Reform Act* as read with the *Intestate Succession Act* consolidates this position and perpetuates the focus on the distribution of property. It is silent on customary law issues such as the customary heir's duty of support but given the individualised framework adopted, it is unlikely that such a duty would be imputed to an heir. Of course, this does not preclude the oldest son, outside of the statutory framework, stepping into the shoes of the deceased and assuming the ceremonial role as head of the household. But any duties or obligations of the household head would not be legally enforceable. The devolution of property further cements common law individualised notions of ownership of property over broader family entitlements to property typical of customary law. The result is that the customary law of succession has arguably been replaced with the common law. This is problematic given the explicit constitutional recognition and protection of customary law and individuals' rights to adhere to their cultural practices.

The distortive changes to customary law are equally reflected in the area of marriage. For example, the proprietary consequences of all monogamous customary marriages are described in terms of the notions of in community and out of community of property.⁴⁰ This secures the rights of spouses in a marriage but overlooks the family entitlements to property that exist in customary law. In customary law, the broader family – such as children, siblings and grandparents – may have an entitlement to use property often

³⁸ Kerr *Customary Law of Immovable Property* 136; Olivier, Bekker and Olivier *Indigenous Law* 160; Bekker and De Kock 1992 *CILSA* 368; and Hunter *Reaction to Conquest* 122.

³⁹ Church and Church 2008 *Fundamina* 9

⁴⁰ Section 7(1) of the *Recognition Act* as read with the *Gumede* case.

described as family or house property.⁴¹ The family head controls the property with a duty to manage it in the best interests of the family but does not own the property.⁴² Given the various entitlements of use to such property, it should arguably not fall within the joint estate which is exclusively owned by the spouses. Having the joint estate subsume family property would obliterate the rights of other family members to the property and confer on spouses greater rights to the property than they had under customary law. The *Recognition Act*, however, does not explain how the joint property regime interacts with the customary law entitlements to property, whether certain forms of property are excluded or how rights and entitlements to such property are regulated. Little regard is had to whether the common law proprietary regime is an appropriate solution for describing customary ownership of property or how it fits in the customary law setting. In all likelihood, customary notions of house and family property are likely to be eradicated over time as joint ownership is enforced by the state and other formal institutions.

The *Reform Act* and *Recognition Act* thus reveal an unfortunate consequence of statutory regulation in South Africa; customary law is forced into a common law mould. The familiarity and dominance of the common law, the developed jurisprudence thereon and the difficulty of describing customary entitlements to property means that common law is often invoked to regulate customary law matters.⁴³ The result, however, is an eradication of customary law principles as highly sanitised versions of customary law are created and protected.

5 Lacunae in the legislation

Both the *Recognition Act* and *Reform Act* are the product of years of legislative deliberation and consultation.⁴⁴ Surprisingly, however, there have

⁴¹ Mbatha 2002 *SAJHR* 262; and Himonga and Moore *Reform of Customary Marriage* 233.

⁴² Bekker *Seymour's Customary Law* 74-75.

⁴³ This difficulty in describing customary entitlements to property is exemplified by the critique of the *Communal Land Rights Act* 11 of 2004 in that it failed to capture the family-based nature of land rights; see Claassens and Mnisi 2009 *SAJHR* 506-507. A discussion of whether and how customary entitlements to property may be described in legislation is beyond the scope of this article.

⁴⁴ The South African Law Reform Commission commissioned numerous investigations into the best approach to reform the customary law of succession; see SALC *Project 90, Issue Paper 4*; SALC *Project 108, Issue Paper 12*; SALC *Project 90, Discussion Paper 93*; and SALC *Project 90, Report on Conflicts of Law*. This process of investigation is also discussed in Rautenbach and Du Plessis 2003 *De Jure* 20; and Moodley *Customary Law of Intestate Succession* 73-79. In 2004, the SALRC released a report on the responses received and making

been glaring lacunae in the *Recognition Act* which have had to be filled by the judiciary. For example, the *Recognition Act* recognises polygynous customary marriages, but the regulation thereof is sparse. As discussed previously, the Act requires a husband who wishes to enter into a further customary marriage to conclude a court-approved section 7(6) contract regulating the proprietary consequences of the marriages. The Act, however, does not stipulate the consequences of failing to conclude a section 7(6) contract or whether the consent of the first wife is required for a subsequent customary marriage, nor does it even simply regulate the relationship between wives in a polygynous marriage. The result is that the South African judiciary has played a significant role in implementing the provisions by deciding that while a section 7(6) contract is not required for a second customary marriage, the consent of the first wife is required.⁴⁵ In addition, parties have challenged the constitutionality of several provisions such as the proprietary consequences of customary marriages and the courts have been called upon to regulate the proprietary consequences of customary marriages concluded before the commencement of the Act.⁴⁶

In summary, the regulation of customary law in South Africa has not been comprehensive despite lengthy preceding deliberations on the interventions. Poor drafting has necessitated litigation for the realisation of rights which has meant that the judiciary has played a significant role in shaping customary law. It underscores the need for better legislation and maximisation of the skills and expertise of the legislature rather than an over-reliance on the judiciary to correct unconstitutional and vaguely drafted legislation.

6 Accommodation of living customary law

In literature on customary law, the distinction between official and living customary law is well-known.⁴⁷ Official customary law refers to the written

recommendations for reform, see SALRC *Project 90, Report on the Customary Law of Succession*. In respect of marriage, see SALC *Project 90, Discussion Paper 74*; and SALC *Project 90, Report on Customary Marriages*.

⁴⁵ *MN v MM* 2012 4 SA 527 (SCA); and *MM v MN* 2013 4 SA 415 (CC). Also see *Palesa v Moleko* 2013 4 All SA 166 (GSJ) where the court held that a customary marriage concluded during the subsistence of civil marriage is invalid. While s 10(4) of the *Recognition Act* prohibits such marriages, it does not specify the consequences of a contravention thereof and courts have interpreted the provision to mean that such a marriage is invalid.

⁴⁶ *Gumede and Ramuhovhi*.

⁴⁷ Himonga and Bosch 2000 *SALJ* 319-331; Diala 2017 *J Legal Plur* 143; Bennett "'Official' v 'Living' Customary Law" 138; Sanders 1987 *CILSA* 405; Himonga and Nhlapo *African Customary Law* 27; and Bekker and Maithufi 1992 *JJS* 47. The

versions of law found in legislation, precedent and books, while living customary law on the other hand refers to the actual practices of people.⁴⁸ Official versions, however, are often treated with caution given the historical distortions effected by the state. Living versions represent a more authentic account of people's practices – though not necessarily a constitutionally compliant version of the law. The South African Constitution furthermore recognises and protects living customary law,⁴⁹ bringing sharply into question how statutory regulation accommodates living customary law.

The *Recognition Act* and *Reform Act* should be lauded as they attempt to incorporate living customary law within their provisions. The *Recognition Act* stipulates the requirements for all customary marriages concluded after the commencement of the Act; namely parties must be over 18 and consent to marry according to customary law and the marriage must be negotiated and entered into or celebrated in accordance with customary law.⁵⁰ Customary law is in turn defined as the "customs and usages traditionally observed amongst the indigenous African people of South Africa and which form part of the culture of those people" and is understood to refer to living customary law.⁵¹ In requiring a marriage to be concluded in accordance with living customary law, the Act does not codify the requirements for a customary law marriage but rather requires that people comply with living customary law, whatever that may be. It accords with the SALRC's recommendation that legislation be flexibly drafted to recognise variation between indigenous communities in their marriage customs and developments in customary law as they occur.⁵² The *Recognition Act* thus purports to give effect to living customary law rather than comprehensively reduce customary law to writing.

The *Reform Act* adopts a similar approach in defining beneficiaries for the purposes of inheritance with reference to customary law. Distinctive

distinction is also widely acknowledged in case law, see *Bhe* case para 87; and *Mabena v Letsoalo* 1998 2 SA 1068 (T) 1074.

⁴⁸ Hamnett *Chieftainship and Legitimacy* 6; *Alexkor Ltd v the Richtersveld Community* 2004 5 SA 460 (CC) 480 (hereafter *Alexkor*) para 53 and *Bhe* case paras 86-87; Bennett and Bleazard 2009 *Recht in Afrika* 1-2; Bennett *Customary Law* 6-7; and Himonga and Nhlapo *African Customary Law* 33-34.

⁴⁹ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 1996 4 SA 744 (CC) para 197; *Alexkor* para 52; and *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 46. Academics argue that the Constitution protects living customary law; see Mwambene 2017 *AHRLJ* 37; Bennett 2009 *Am J Comp L* 8; Lehnert 2005 *SAJHR* 247; Himonga and Bosch 2000 *SALJ* 328.

⁵⁰ Section 3(1) of the *Recognition Act*.

⁵¹ Rautenbach 2003 *Stell LR* 107 fn 8; Mwambene 2017 *AHRLJ* 39.

⁵² SALC *Project 90, Report on Customary Marriages* 43.

customary law practices such as seed raiser arrangements,⁵³ woman-to-woman marriages⁵⁴ and customary adoption⁵⁵ are recognised but the Act does not elaborate or explain these practices and their requirements. The practices are defined with reference to customary law – similarly defined as in the *Recognition Act* to refer to living customary law⁵⁶ – which requires an examination of how a community understands the practice. This incorporation of living customary law positions the Act as a flexible and adaptive regulation of customary law rather than a static, codification of customary law principles.

While the incorporation of living customary law practices in both enactments is commendable, it has not always resulted in the recognition and implementation of living customary law. The ambiguous nature of requiring a marriage to be negotiated and entered into or celebrated in accordance with customary law has unsurprisingly led to a plethora of cases in recent times as parties dispute the requirements of marriage. In some cases, courts have embraced the nuanced wording and adopted an almost family specific approach as to whether a marriage has been concluded. The court examines what the families of the spouses agreed would be required for a customary marriage to come into existence. For example, in *Mathaba v Minister of Home Affairs*, there was a dispute regarding the existence of a customary marriage on the basis that the handing over of the bride, argued to be an essential of a customary marriage, had not taken place.⁵⁷ The court emphasised the need to understand what the families agreed to as being necessary for a customary marriage to come into existence rather an automatic application of a fixed rule.⁵⁸ Similarly, in *Fanti v Boto*, the court noted that the families of the spouses have to agree acceptable arrangements for the payment of *lobolo*.⁵⁹

On the other hand, some courts in determining the existence of a customary marriage gravitate towards official versions of customary law. Courts apply a finding from one case with no acknowledgment as to the differences in the systems of customary law. For example, in *Matlala v Dlamini*,⁶⁰ the court

⁵³ Section 2(2)(b) of the *Reform Act*.

⁵⁴ Section 2(2)(c) of the *Reform Act*.

⁵⁵ Definition of "descendant" in the *Reform Act*.

⁵⁶ The *Reform Act* adopted the definition used in the *Recognition Act* for the purposes of consistency; see Portfolio Committee on Justice and Correctional Services 2008 <https://pmg.org.za/committee-meeting/940>. One minor difference is that the *Reform Act* uses the word "people" while the *Recognition Act* uses "peoples".

⁵⁷ *Mathaba v Minister of Home Affairs* 2013 JOL 30820 (GNP).

⁵⁸ *Mathaba v Minister of Home Affairs* 2013 JOL 30820 (GNP) para 17.

⁵⁹ *Fanti v Boto* 2008 5 SA 405 (C) para 23.

⁶⁰ *Matlala v Dlamini* 2010 ZAGPPHC 277 (3 June 2010).

applied the finding from *Fanti v Boto* which dealt with Xhosa customary law though neither of the litigants in the *Matlala* case were isiXhosa. Consonant with this approach, some judgments do not even mention the system of customary law in question.⁶¹ The result is that the variation among systems is glossed over and customary law distorted as the practices of one community are transposed onto another. Customary law is treated – like the common law – as a single system of law undermining the rich nuances of the law. Thus, despite the *Recognition Act* anticipating that individuals would comply with the requirements of their respective communities, a standard set of requirements for marriage has emerged; namely, family participation, the negotiation of *lobolo* and handing over of the bride.⁶²

However, it is problematic where judgments are viewed as binding precedent rather than sources of law. It would mean that a court's finding sets the requirements of a marriage rather than the practices of the community. The further indiscriminate application of precedent risks distorting the law and hindering the recognition of developments in customary law. For example, the recent high-profile case of *Sengadi v Tsambo* was criticised for not strictly requiring the handing over of the bride as set in precedent.⁶³ The critique never considered whether the community and family themselves dispensed with this requirement and reflects the tendency to anchor the requirements of marriage in precedent rather than recognising developing customary law practices.

Unfortunately, the court's approach of favouring official customary law in the form of precedent and the resultant distortion of the law comes as no surprise and was exemplified in the implementation of the *Black Administration Act*. In the pre-constitutional era, the *Black Administration Act* regulated the devolution of estates of Black individuals who died without a will and provided among others, that "all other movable property devolved in accordance with Black law and custom". "Black law and custom" was not defined and there was no explicit reference to the principle of male primogeniture in the provisions. This meant that magistrates, responsible for the administration of estates, could have recognised living customary law practices of succession; giving effect to variation in practices among groups and recognising developments in the law. Magistrates were further

⁶¹ *Maluleke v Minister of Home Affairs* 2008 JDR 0426 (T); and *Sengadi v Tsambo* 2018 JDR 2151 (GJ).

⁶² Bakker 2018 *PELJ* 2.

⁶³ Senake 2018 <https://www.sowetanlive.co.za/sundayworld/lifestyle/talk/2018-11-13-judge-got-it-all-wrong-in-sengadi-tsambos-cas>.

empowered to hold an enquiry to determine the rightful heir when it was in dispute and give directions as to the distribution of the property.⁶⁴

Despite the potential for the recognition of living customary law in the broad and flexible wording in the *Black Administration Act*, magistrates and courts glossed over the variation and evolving nature of customary law and assumed the principle of male primogeniture represented customary law succession.⁶⁵ The statutory provisions were interpreted and applied as a rigid rule that property devolved in accordance with the principle of male primogeniture without any investigation as to whether the principle had evolved or was applied differently in a community.⁶⁶ Even where the statutory provisions expressly allowed for a deviation from customary law, male primogeniture was still given effect to. For example, the regulations to the *Black Administration Act* empowered the Minister to make an equitable distribution of property, where customary law would have an inappropriate or inequitable outcome.⁶⁷ However, the Ministerial discretion was rarely exercised⁶⁸ even where it appeared appropriate. For example, in *Mthembu v Letsela*⁶⁹ the litigant and her child were urban dwellers who were not maintained by the customary heir, being the deceased's father, who claimed the estate based on customary law and sought to eject the litigant and her child from their home. Maithufi notes that the application of customary law appeared inequitable, but the Minister did not exercise the discretion and the property devolved in accordance with male primogeniture.⁷⁰

The experience of the *Reform Act*, on the other hand, has been vastly different thus far. There are no reported cases on the *Reform Act* and courts have not been called upon to adjudicate upon customary law practices such as seed raiser arrangements, woman-to-woman marriages and customary adoption. The lack of litigation may be due to several reasons. Estates are administered at the Master's Office and the practices may be recognised at the Master's Office with no need for court involvement. Litigation is also costly and beyond the reach of many ordinary South Africans. Thus, the lack of litigation should not be equated with the effectiveness of the

⁶⁴ SALC *Project 90, Discussion Paper 95 11*.

⁶⁵ SALC *Project 90, Discussion Paper 95 11*.

⁶⁶ Mbatha 2002 SAJHR 260.

⁶⁷ Regulation 2(d) of GN R200 of in GG 10601 of 6 February 1987 (*Regulations for the Administration and Distribution of the Estates of Deceased Blacks*). The regulations were amended by GN R1501 in GG 24120 of 3 December 2002 (*Amendment of the Regulations for the Administration and Distribution of Estates*).

⁶⁸ Kerr *Customary Law of Immovable Property* 235.

⁶⁹ *Mthembu v Letsela* 1997 2 SA 936 (T).

⁷⁰ Maithufi 2002 *De Jure* 207 220.

legislation. Furthermore, the practices, while recognised in the Act, may not be common across South Africa. In this regard, Himonga and Moore's⁷¹ recent empirical research on customary law succession in South Africa found little to no evidence of such practices rendering the value and usefulness of such recognition questionable.

In light of the above, it is apparent that the flexible and innovative drafting of legislation is not sufficient for the recognition of living customary law. Given the ambiguity the incorporation of living customary law introduces into a statute, litigation is to be expected. Thus, the judiciary plays an important role in ensuring the implementation of nuanced regulation and avoiding the ossification and distortion of the law. Greater attention must be paid to the implementation of the law and courts must be directed to judiciously recognise and promote the development of living customary law.

7 Conclusion

In South Africa, the constitutional recognition of customary law as an equal to common law spurred regulation of the law. The state has two pressing interests in such regulation. First, to correct years of non-recognition and distortion visited upon customary law during the apartheid and colonial eras. Second, to ensure customary law practices are constitutionally compliant and discriminatory practices struck down. The *Recognition Act* and the *Reform Act* are the two most prominent pieces of legislation in the South African context and the article analysed the consequences thereof to extract lessons for further legislative attempts.

Legislation is most frequently used to regulate customary law in line with constitutional values. The article acknowledges historical critiques of the effectiveness of legislation in this regard but nonetheless advocates for such legislation. Legislation is vital to signal the intent of the state and alternative measures should be viewed as complementary rather than as a substitute therefor. In addition, legislative interventions are effected by formal state institutions, such as courts and the Master's Office, which have increasing interactions with customary law. Such implementation is likely to impact lived realities, albeit gradually. Accordingly, legislation is a critical intervention and states should focus on improving the implementation thereof.

⁷¹ Himonga and Moore *Reform of Customary Marriage* 228-273.

Unfortunately, the *Recognition Act* and *Reform Act* manifest the most egregious problems with statutory regulation; namely, moulding customary law into a common law construct. In regulating customary law, both enactments draw heavily on the common law, fundamentally changing the nature of the customary law of marriage and succession. Nuances in customary law, such as the layered entitlements to use of property, are glossed over. This overlooks the value of customary law as a system of law and reflects the dated prejudice that the common law is an ideal to be emulated. In this regard, statutory regulation must be cautious of the importation of common law rules and values. Moreover, in a South African context, it undermines the constitutional recognition of customary law. Recognition is hollow if statutes simply seek to impose common law to regulate customary law matters. While development of customary law is undeniably necessary, it is still customary law that should be accentuated and reflected in these statutes. This does not deny that where customary law practices are discriminatory, they must be struck down. Rather customary law must be developed where possible and when struck down, the solutions proffered to fill the lacunae must reflect customary law values and principles.

More surprising in the South African context, is the significant lacunae found in the *Recognition Act*. Over the last several years, litigants have challenged the proprietary consequences of marriage and sought clarity on matters related to polygynous marriages. Poor, Black women have for the most part shouldered the costs of vague and ambiguous drafting as women have had to increasingly rely upon courts for the realisation of their rights. This sounds a warning bell that further enactments should be precise and clear and not rely upon the most vulnerable in society to create a jurisprudence thereon.

Finally, the South African enactments are to be commended for the incorporation of living customary law. Neither statute purports to codify customary law marriage or succession by reducing its principles to writing as fixed and rigid rules. Rather they regulate customary law practices and define practices with reference to living customary law, which remains subject to the Constitution.⁷² While this introduces ambiguity and has resulted in significant disputes regarding the existence of a customary marriage, the uncertainty is a result of the recognition of the variable nature of customary law rather than poor and vague drafting, and should be embraced. The legislature and judiciary should seek to give effect to the

⁷² Section 211(3) of the Constitution provides that customary law is subject to the Constitution and legislation that specifically deals therewith.

nuances and variation as it is part of the law's richness and it should not be eradicated through rigid rules and precedent.

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List of Abbreviations

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| AHRLJ | African Human Rights Law Journal |
| Am J Comp L | American Journal of Comparative Law |
| ANZLH E-Journal | Australia and New Zealand Law and History E-Journal |
| CILSA | Comparative and International Law Journal of Southern Africa |

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| J Legal Plur | Journal of Legal Pluralism and Unofficial Law |
| JCL | Journal of Comparative Law |
| JJS | Journal for Juridical Science |
| PELJ | Potchefstroom Electronic Law Journal |
| SADC LJ | Southern African Development Community Law Journal |
| SAJHR | South African Journal on Human Rights |
| SALC | South African Law Commission |
| SALJ | South African Law Journal |
| SALRC | South African Law Reform Commission |
| Stell LR | Stellenbosch Law Review |