

# African Customary Marriages in South Africa and the Intricacies of a Mixed Legal System: Judicial (In)novatio or Confusio?

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Résumé de l'article

L'Afrique du Sud a un système de droit mixte, comprenant un héritage de lois européennes (venant essentiellement du droit romano-néerlandais, influencé ensuite par la common law anglaise) et des lois autochtones, ou droit coutumier. Ce mélange est évident lorsqu'on regarde les lois sud-africaines du mariage, qui peuvent être divisées en deux catégories : mariages ou unions civiles, et mariage coutumier africain. Depuis 1994, les développements de ces deux catégories de mariage ont été révolutionnaires. La jurisprudence se lit comme une chronique de situations factuelles jamais envisagées par le législateur, et le judiciaire doit faire preuve d'innovation pour résoudre les complications résultant d'un régime constitutionnel de droit mixte. Pour répondre aux défis posés par l'interaction, dans une seule sphère juridique, de deux systèmes de droit en apparence égaux, les tribunaux ont suivi plusieurs approches, incluant le positivisme juridique, l'application de principes de common law et, plus récemment, la notion de constitutionnalisme transformateur. Le principal objectif de cet article est de discuter des approches parfois innovantes ou encore déroutantes que suivent les tribunaux afin de régler les complications créées par un système de droit mixte, particulièrement dans le domaine du mariage entre Africains.

## AFRICAN CUSTOMARY MARRIAGES IN SOUTH AFRICA AND THE INTRICACIES OF A MIXED LEGAL SYSTEM: JUDICIAL (IN)NOVATIO OR CONFUSIO? \*

*Christa Rautenbach and Willemien du Plessis\*\**

South Africa has a mixed legal system comprised of transplanted European laws (the core being Roman-Dutch law, subsequently influenced by English common law) and indigenous laws, referred to as customary law. This mix is also evident in South Africa's marriage laws, which can roughly be divided into two categories: civil marriages or unions, and African customary marriages. Since 1994, the developments in these two categories of marriage have been revolutionary. The case law reads like a jurisprudential chronicle of factual situations never contemplated by the legislator, and the judiciary must resort to innovation to solve the intricacies of a constitutionalized mixed legal system. To deal with the challenges posed by the interaction of two seemingly equal legal systems in one legal sphere, the courts have followed a variety of approaches including legal positivism, the application of common law principles, and, more recently, the notion of transformative constitutionalism. The primary aim of this essay is to discuss the sometimes innovative and at other times confusing approaches followed by the judiciary in dealing with the complexities created by a mixed legal system, especially with regard to marriages between Africans.

L'Afrique du Sud a un système de droit mixte, comprenant un héritage de lois européennes (venant essentiellement du droit romano-néerlandais, influencé ensuite par la common law anglaise) et des lois autochtones, ou droit coutumier. Ce mélange est évident lorsqu'on regarde les lois sud-africaines du mariage, qui peuvent être divisées en deux catégories : mariages ou unions civiles, et mariage coutumier africain. Depuis 1994, les développements de ces deux catégories de mariage ont été révolutionnaires. La jurisprudence se lit comme une chronique de situations factuelles jamais envisagées par le législateur, et le judiciaire doit faire preuve d'innovation pour résoudre les complications résultant d'un régime constitutionnel de droit mixte. Pour répondre aux défis posés par l'interaction, dans une seule sphère juridique, de deux systèmes de droit en apparence égaux, les tribunaux ont suivi plusieurs approches, incluant le positivisme juridique, l'application de principes de common law et, plus récemment, la notion de constitutionnalisme transformateur. Le principal objectif de cet article est de discuter des approches parfois innovantes ou encore déroutantes que suivent les tribunaux afin de régler les complications créées par un système de droit mixte, particulièrement dans le domaine du mariage entre Africains.

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\* The term *novatio* refers to “renewal” or “change” whilst the term *confusio* usually bears the meaning of “mixing” or “combining”, although it can also denote “confusion” or “disorder”. In the context of this article, the term *confusio* includes both meanings depending on the method of judicial reasoning applied in a particular case and the result of that reasoning.

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## Introduction

Since 1994, legal developments in South Africa's mixed legal system<sup>1</sup> have been revolutionary.<sup>2</sup> Marriage law, in particular, has undergone groundbreaking changes over the last few years. In the South African context, the term "marriage law" deals with marriages or marriage-like unions that can broadly be divided into three categories. The first category includes so-called "civil marriages" which are regulated by the *Marriage Act, 1961*<sup>3</sup> and by common law principles.<sup>4</sup> These marriages are monogamous and may only be entered into by heterosexual couples, regardless of their cultural or religious background.<sup>5</sup> For more than five decades, only these marriages were recognized as valid marriages; all other unions

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<sup>1</sup> South Africa's mixed legal system consists of transplanted European laws, referred to as the common law of South Africa, and indigenous laws, referred to as customary law. See Christa Rautenbach, "Mixing South African Common Law and Customary Law of Intestate Succession: 'Potjiekos' in the Making" in Esin Örücü, ed, *Mixed Legal Systems at New Frontiers* (London, UK: Wildy, Simmonds & Hill, 2010) 222 at 222 [Rautenbach, "Potjiekos"].

The common law is chiefly a mixture of Roman-Dutch law and English common law that has been developed by means of legislation and judicial decisions. It can be found in legislation, precedent, Roman-Dutch law, custom, and legal textbooks (see Christa Rautenbach, "Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law" (2010) 60 *J Legal Pluralism* 143 at 144, n 3).

African customary law is the various laws observed by indigenous communities. It is recognized under the *Constitution of the Republic of South Africa, 1996* (s 211 [*Constitution*]) and it can be found in scholarly textbooks, legislation, judicial decisions, and living custom. In terms of the *Recognition of Customary Marriages Act, 1998* ((S Afr), No 120 of 1998, s 1(ii) [*Recognition Act*]), 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." This definition poses its own problems, as pointed out by JC Bekker & C Rautenbach ("Nature and Sphere of Application of African Customary Law in South Africa" in C Rautenbach, JC Bekker & NMI Goolam, eds, *Introduction to Legal Pluralism in South Africa*, 3d ed (Durban: LexisNexis, 2010) 15 at 17-23).

<sup>2</sup> Most of the developments can be attributed to the inclusion of human rights provisions in the *Constitution of the Republic of South Africa Act*, No 200 of 1993 [*Interim Constitution*], which was replaced by the *Constitution* (*supra* note 1).

<sup>3</sup> (S Afr), No 25 of 1961 [*Marriage Act*]. The *Marriage Act* has been regulating marriages in South Africa since 1 January 1962. The act does not provide a definition of a marriage, but the common law definition of a voluntary union between a man and a woman to the exclusion of all others has been accepted as the norm. See *Ismail v Ismail* (1982), [1983] 1 S Afr LR 1006 at 1019, (S Afr SC) [*Ismail*].

<sup>4</sup> For an explanation of what the common law means, see *supra* note 1.

<sup>5</sup> For a general discussion of civil marriages, see DSP Cronjé & Jacqueline Heaton, *South African Family Law*, 3d ed (Durban: LexisNexis, 2010) at 3-107.

that did not fit the bill, including African customary marriages,<sup>6</sup> were treated with suspicion and contempt. The first bill of rights,<sup>7</sup> passed in 1994 and followed by the second and final one in 1996,<sup>8</sup> had an almost immediate influence on traditional views of what constitutes a marriage.

After a long line of judicial decisions challenging traditional views of what constitutes a marriage relationship and what consequences it engenders,<sup>9</sup> the second category came to life on 30 November 2006 with the passing of the *Civil Union Act, 2006*.<sup>10</sup> This act allows heterosexual and same-sex couples to enter into a so-called “civil union” regardless of their cultural or religious background.<sup>11</sup> The requirements for, and consequences of, civil unions are similar to civil marriages, but neither form allows polygyny (marriage between one man and more than one wife). Religious marriages, such as Muslim and Hindu marriages, remain unrecognized under South African law.<sup>12</sup>

This brings us to the third category and the main point under discussion: African customary marriages. In the past, these marriages were recognized only for limited purposes.<sup>13</sup> Again, with the bill of rights as a catalyst, the situation quickly changed, first owing to the courts and then to the legislature.<sup>14</sup> Most notably, the *Recognition Act*<sup>15</sup> came into operation

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<sup>6</sup> For a general discussion of African customary marriages in South Africa, see R-M Jansen, “Customary Family Law” in Rautenbach, Bekker & Goolam, *supra* note 1, 45.

<sup>7</sup> See *Interim Constitution*, *supra* note 2, c 3.

<sup>8</sup> *Constitution*, *supra* note 1, c 2.

<sup>9</sup> For a discussion of one of these cases, see Ann Skelton et al, eds, *Family Law in South Africa* (Cape Town: Oxford University Press Southern Africa, 2010) at 169-70.

<sup>10</sup> (S Afr), No 17 of 2006 [*Civil Union Act*].

<sup>11</sup> The legal consequences of a civil marriage and a civil union are similar, but the latter creates an alternative method for couples who have moral objections to the traditional form of marriage (see Skelton et al, *supra* note 9 at 170-71).

<sup>12</sup> For a general discussion of the legal position of religious marriages in South Africa, see C Rautenbach, NMI Goolam & N Moosa, “Religious Legal Systems: Constitutional Analysis” in Rautenbach, Bekker & Goolam, *supra* note 1, 187. The *Muslim Marriages Bill* (Department of Justice and Constitutional Development, Government Gazette No 33946 (21 January 2011)) was published in 2011. Its aim, as described in the background to the bill, is “to provide statutory recognition of Muslim marriages in order to redress inequities and hardships arising from the non-recognition of these marriages” (*ibid*). The bill applies only to persons who adhere to the Muslim faith and who choose to be bound by its provisions.

<sup>13</sup> See the discussion at subsection I.A, below.

<sup>14</sup> For a discussion, see Skelton et al, *supra* note 9 at 167-70 (regarding civil marriages and unions), 195-97 (regarding religious marriages).

<sup>15</sup> *Supra* note 1.

on 15 November 2000.<sup>16</sup> The purpose of this act, as stated in its title, is to give statutory recognition to monogamous and polygynous customary marriages<sup>17</sup> and to specify the requirements for a valid customary marriage.<sup>18</sup> In addition, the *Recognition Act* addresses issues such as registration,<sup>19</sup> proprietary consequences,<sup>20</sup> dissolution,<sup>21</sup> the capacity of spouses,<sup>22</sup> and ability to change marriage system.<sup>23</sup>

African couples<sup>24</sup> thus have several choices of marriage regime. They may either conclude a civil marriage under the *Marriage Act*, a civil union under the *Civil Union Act*, or a monogamous or polygynous customary marriage under the *Recognition Act*. The latter only applies if both spouses are African.

At the Second World Society of Mixed Jurisdiction Jurists Conference<sup>25</sup> it was illustrated that, although the *Recognition Act* regulates African customary marriages, the act actually follows a hybrid approach that reflects both customary and common law characteristics.<sup>26</sup> At first glance, the combination of these two legal systems seems to be conciliatory, harmonizing the different marriage systems in South Africa. A second glance, however, reveals that the practical implementation of the provisions of the *Recognition Act* has been less harmonious than anticipated. Judicial interpretation to date reflects a discord between law and reality. The relevant issues often come to the fore upon the death of one of the spouses, most notably the husband, where more than one wife remains behind to fight for legal recognition as a spouse. The case law reads like a jurisprudential chronicle of factual situations never contemplated by the legisla-

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<sup>16</sup> See *Recognition of Customary Marriages Act, 1998 (Act No 120 of 1998) Regulations*, (S Afr), No R 1101, s 11 (1 November 2000).

<sup>17</sup> *Recognition Act*, *supra* note 1, s 2.

<sup>18</sup> *Ibid*, s 3.

<sup>19</sup> *Ibid*, s 4.

<sup>20</sup> *Ibid*, s 7.

<sup>21</sup> *Ibid*, s 8.

<sup>22</sup> *Ibid*, s 6.

<sup>23</sup> *Ibid*, s 10.

<sup>24</sup> The term "African" refers to black people living in South Africa. See Christa Rautenbach & Willemien du Plessis, "Reform of the South African Customary Law of Succession: Final Nails in the Customary Law Coffin?" in Jeanmarie Fenrich, Paolo Galizzi & Tracey E Higgins, eds, *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2011) 336 at 338-39, n 16.

<sup>25</sup> (Edinburgh, UK, 27-30 June 2007).

<sup>26</sup> See Marissa Herbst & Willemien du Plessis, "Customary Law v Common Law Marriages: A Hybrid Approach in South Africa", online: (2008) 12:1 EJCL 30 <<http://www.ejcl.org>>.

tor, and the judiciary is forced to resort to innovation to solve the intricacies of a constitutionalized mixed legal system. Recently, the Constitutional Court in *Gumede v. President of Republic of South Africa* referred to this disharmony by stating (in the context of customary marriages):

At one level, the case underlines the stubborn persistence of patriarchy and conversely, the vulnerability of many women during and upon termination of a customary marriage. At another level, the case poses intricate questions about the relative space occupied by pluralist legal systems under the umbrella of one supreme law, which lays down a common normative platform.<sup>27</sup>

Facing the challenges posed by the interaction of two seemingly equal marriage systems in one legal sphere, the courts have followed a variety of approaches to African customary marriages, including legal positivism,<sup>28</sup> the application of common law principles,<sup>29</sup> and, more recently, the notion of transformative constitutionalism.<sup>30</sup> This essay discusses the sometimes innovative, and at other times confusing judicial approaches to these complexities, focusing on the courts' approach to African customary marriages in a mixed legal system that caters to cultural diversity. We begin with a brief historical discussion of the prevalence of customary marriages in South Africa,<sup>31</sup> followed by an overview of civil marriages or unions between Africans.<sup>32</sup> The discussion then proceeds to examine three judicial approaches to African customary marriages.<sup>33</sup> It is not our intention to give a detailed analysis of all the cases dealing with the issues to date. We focus our attention on three recent cases, each following a different judicial approach, to illustrate some of the complexities that arise in a mixed legal jurisdiction.

## I. Legal Framework for Marriages between Africans: Setting the Scene

It is necessary to give a brief historical overview of the recognition of the different marriage regimes pertaining to Africans in South Africa. A distinction should be drawn between customary marriages and civil marriages or unions between Africans. Africans are in a unique position to

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<sup>27</sup> (2008) [2009] 3 S Afr LR 152 at 154, (S Afr Const Ct) [*Gumede*].

<sup>28</sup> See *MM v MN* [2010] 4 S Afr LR 286, (Transv Prov Div) [*MM*]. See the discussion at subsection II.A, below.

<sup>29</sup> See *Maluleke v Minister of Home Affairs* [2008] ZAGPHC 129 (SAFLII) at paras 11ff, (Wit Local Div) [*Maluleke*]. See the discussion at subsection II.B, below.

<sup>30</sup> See *Gumede*, *supra* note 27. See also the discussion at subsection III.C, below.

<sup>31</sup> See the discussion at subsection I.A, below.

<sup>32</sup> See the discussion at subsection I.B, below.

<sup>33</sup> See the discussion at subsection II, below.

choose which legal system, the common or the customary law, should apply to them. All other population groups are subject to the common law and must choose between the *Marriage Act* (civil marriage) and the *Civil Union Act* (civil union).<sup>34</sup> They cannot opt for a marriage under the *Recognition Act*.

### A. Customary Marriages between Africans

When British colonists arrived on South African soil in the nineteenth century, they found a polygynous marriage system that was foreign to them.<sup>35</sup> Missionaries condemned these marriages as a form of slavery where women were bought and sold by the payment of *lobolo* (bride-wealth).<sup>36</sup> The true character of African customary marriages, being an arrangement between families where *lobolo* was seen as an expression of appreciation for the upbringing of the daughter, as well as a measure to ensure that she was treated properly by her husband and his family, was not immediately evident. The customary marriage was a formal, though unwritten, arrangement between two families. It was publicized when the community took notice of the ritualistic transfer of the bride to the family of the groom.<sup>37</sup>

Because of their potentially polygynous nature, customary marriages were regarded as inconsistent with the principles of natural law. For this reason, for many years they went unrecognized by the state.<sup>38</sup> Nevertheless, beginning in 1927, the custom of *lobolo* was protected by the *Black Administration Act*,<sup>39</sup> which prevented the courts from finding this custom

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<sup>34</sup> The limited recognition of certain religious marriages falls outside the scope of this discussion.

<sup>35</sup> See TW Bennett, *Customary Law in South Africa* (Lansdowne, South Africa: Juta, 2004) at 188 [Bennett, *Customary Law*]. The terms “polygynous” and “polygyny” refer to the union of one man with more than one wife. This is the only polygamous marriage form practised in South Africa.

<sup>36</sup> CRM Dlamini, “The Role of Customary Law in Meeting Social Needs” in TW Bennett et al, eds, *African Customary Law* (Cape Town: Juta, 1991) 71 at 78. See also WA Joubert, JA Faris & Joan Church, eds, *The Law of South Africa*, 2d ed (Durban: LexisNexis, 2009) vol 32 at 108-109.

<sup>37</sup> Dlamini, *supra* note 36 at 78-79.

<sup>38</sup> See e.g. *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* [1960] 2 S Afr LR 467, (S Afr SC). See also *Ismail*, *supra* note 3, which was eventually overruled in *Hassam v Jacobs* [2009] 5 S Afr LR 572, (S Afr Const Ct) [*Hassam*].

<sup>39</sup> *Black Administration Act*, (S Afr), No 38 of 1927, amending *Native Administration Act*, No 38 of 1927, s 22(1) [*Black Administration Act*]. The *Black Administration Act* was almost entirely repealed by the *Repeal of the Black Administration Act and Amendment of Certain Laws Act*, (S Afr), No 28 of 2005, including the sections dealing with marriage.



to be against the principles of natural law. Though customary unions were not formally recognized as valid marriages at that stage, some of the consequences of customary unions were regulated by legislation.<sup>40</sup> The uncertainty regarding the exact status of customary unions continued until they were finally recognized as valid marriages on 15 November 2000 by the *Recognition Act*.

Just as customary marriages were not recognized before 15 November 2000, neither was the associated matrimonial property regime regulated. No distinction between in community of property and out of community of property,<sup>41</sup> as in common law marriages, existed; rather, the rules of customary law generally distinguished between family property, house property, and personal property. Family property was controlled by the head of the family, house property by the eldest son of the particular house (or the father—the head of the family—in the absence of a son), and personal property consisted of a few personal items.<sup>42</sup> When a marriage was dissolved, the wife was supposed to return to her own family where the head of that family had to take care of her.<sup>43</sup>

The post-November 2000 regime introduced by the *Recognition Act* is a far cry from the older system. The new regime creates a customary marriage in community of property, unless the parties wish to regulate their matrimonial property by way of an antenuptial contract.<sup>44</sup> Upon a subse-

<sup>40</sup> See e.g. *Bantu Laws Amendment Act*, (S Afr), No 76 of 1963, s 31(1) (“A partner to a customary union ... [shall] be entitled to claim damages for loss of support from any person who unlawfully causes the death of the other partner to such union or is legally liable in respect thereof, provided such partner or such other partner is not at the time of such death a party to a subsisting marriage”); *Workmen’s Compensation Act*, (S Afr), No 30 of 1941, s 4(3) (“In the case of a native, ‘widow’ includes any woman who was associated with a deceased native workman in a conjugal relationship according to native law and custom where neither the man nor the woman was a party to a subsisting marriage”); *Maintenance Act*, (S Afr), No 23 of 1963, s 5(6) (“For the purposes of determining whether a [Bantu African] ... is legally liable to maintain any person, he shall be deemed to be the husband of any woman associated with him in a customary union”).

<sup>41</sup> A marriage in community of property means that the spouses have an undivided and indivisible half share of the joint estate and that they are co-owners of the joint estate. If the spouses concluded a valid antenuptial contract prior to their marriage whereby community of property is excluded, the marriage is referred to as one out of community of property. In the latter case the two spouses retain their own separate estates and no merging of estates occurs. For a discussion of the various common law matrimonial property systems, see Skelton et al, *supra* note 9 at ch 5.

<sup>42</sup> Joubert, Faris & Church, *supra* note 36 at 125-28.

<sup>43</sup> TW Bennett, *Human Rights and African Customary Law Under the South African Constitution* (Cape Town: Juta, 1995) at 125.

<sup>44</sup> See *Recognition Act*, *supra* note 1, s 7(2), which reads:

A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is

quent customary marriage, the husband must apply to a court “to approve a written contract which will regulate the future matrimonial property system of his marriages.”<sup>45</sup> The court must first divide the existing property between the current wife and husband before establishing the new matrimonial property regime by way of an order of the court.<sup>46</sup> It is important to note that customary marriages concluded before the commencement of the *Recognition Act* will continue to be regulated by customary law.<sup>47</sup> Divorce is only possible by way of a court order.<sup>48</sup>

Before November 2000, there was no requirement for the registration of customary marriages, except in the former homelands<sup>49</sup> such as the Transkei, Bophuthatswana, and KwaZulu.<sup>50</sup> The nonregistration of marriages gave rise to a number of court decisions, which ranged from regarding registration as *prima facie* proof of the existence of a customary marriage, to declaring the marriage void.<sup>51</sup> Today, the *Registration Act* places

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a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

In *Gumede v President of the Republic of South Africa* ([2008] ZAKZHC 41 (SAFLII) at para 17, (D&C Local Div) [*Gumede* 2008]) the High Court found the differentiation between customary marriages concluded before and after the commencement of the *Recognition Act* to be unconstitutional, and held the words “entered into after the commencement of this Act” to be invalid. The Constitutional Court confirmed this order in *Gumede* (*supra* note 27).

<sup>45</sup> *Recognition Act*, *supra* note 1, s 7(6).

<sup>46</sup> *Ibid*, s 7(7).

<sup>47</sup> *Ibid*, s 2 (read with section 7(1)). This provision was also declared unconstitutional and invalid in *Gumede* (*supra* note 27). The Constitutional Court in *Gumede* also confirmed the order of invalidity but held that “[t]he order of constitutional invalidity in relation to s 7(1) of the *Recognition Act* is limited to monogamous marriages and should not concern polygamous relationships or their proprietary consequences” (*ibid* at 176).

<sup>48</sup> *Recognition Act*, *supra* note 1, ss 7(6), 7(7), 7(8).

<sup>49</sup> Homelands were separate areas set up for Africans within the territory of South Africa. The idea was that every African had to become a citizen of one of these homelands, which had different self-governing powers. The homelands were reintegrated into South Africa in 1994 and the whole idea of separate development ceased to exist.

<sup>50</sup> See e.g. *Marriage Act, 1978*, (Transkei, S Afr), No 21 of 1978; *Bophuthatswana Registration of Customary Unions Act*, (Bophuthatswana, S Afr), No 8 of 1977; *KwaZulu Act on the Code of Zulu Law*, (Kwazulu, S Afr), No 16 of 1985; *Natal Code of Zulu Law*, (Kwazulu, S Afr), Proclamation No R151 of 1987. The codes were repealed by the *KwaZulu-Natal Traditional Leadership and Governance Act, 2005* ((S Afr), No 5 of 2005, s 53), but the repeal has not yet been put into operation.

<sup>51</sup> See e.g. *Tshatela v Qendwana* (17 August 2000), [2001] JOL 7672, (Transkei HC); *Mayelane v Ngwenyama* [2010] 4 All SA 211, (Transv Prov Div); *Kwitshane v Magalela* [1999] 4 S Afr LR 610, (Transkei HC); *Makholiso v Makholiso* (1996) [1997] 4 S Afr LR

responsibility on spouses to have their marriage registered, but failure to register does not affect the validity of the marriage.<sup>52</sup> Given that a certificate of registration constitutes prima facie proof of the existence of the customary marriage, it would be foolish not to have a marriage registered.<sup>53</sup>

The *Recognition Act* recognizes existing and future monogamous and polygynous customary marriages.<sup>54</sup> It even allows for conversion from a customary marriage to a civil marriage,<sup>55</sup> but does not allow spouses to convert a civil marriage to a customary marriage.<sup>56</sup>

### ***B. Civil Marriages or Unions between Africans***

Historically Africans could conclude a type of marriage comparable to the Western civil marriage but this “civil marriage” was anything but equal to the Western civil marriage. The African civil marriages were initially regulated by the partly repealed *Black Administration Act*,<sup>57</sup> whilst Western civil marriages were (and still are) regulated by the *Marriage Act, 1961*. All civil marriages concluded by Africans were automatically out of community of property, while all other civil marriages concluded in the country were (and still are) regarded as being in community of property, except where the parties had concluded an antenuptial contract.<sup>58</sup> If an African couple wanted their marriage to be in community of property, they had to make a declaration stating their intention before a commissioner one month prior to the wedding. When a man already involved in a customary marriage concluded a civil marriage with another woman, the first marriage was automatically dissolved. The children of the first marriage were, however, protected in the case of intestate succession in that the house of their mother was regarded as a house for succession purposes, even though the marriage no longer existed.<sup>59</sup> In many instances a son from this household became the next head of the family of the formally recognized marriage.

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509, (Transkei HC); *Kambule v The Master* [2007] 3 S Afr LR 403, (E Cape Div), [2007] 4 All SA 898 [*Kambule* cited to S Afr LR].

<sup>52</sup> *Recognition Act*, *supra* note 1, ss 4(1), 4(9).

<sup>53</sup> *Ibid*, s 4(8).

<sup>54</sup> *Ibid*, s 2.

<sup>55</sup> *Ibid*, s 10(1).

<sup>56</sup> *Ibid*, s 10(4).

<sup>57</sup> *Supra* note 39.

<sup>58</sup> *Ibid*, s 22(6).

<sup>59</sup> *Ibid*, s 22(7).

In communal settings polygynous marriages were accepted as a matter of life. The wives “benefited from the companionship and security which a large establishment provided.”<sup>60</sup> In a more modern setting the second wife, in many instances, may live in the city or an urban area; the two families may have little or no contact, perhaps only realizing the existence of the other when the husband dies.<sup>61</sup> The new head of the family stepping into the shoes of the deceased husband may not necessarily have the interests of both households at heart, as he would have had in a true polygynous setting.

In 1988 there was an attempt to correct potential inequalities by amending the relevant sections in the *Black Administration Act*.<sup>62</sup> The new provisions allowed spouses of a customary marriage to convert their marriage into a civil marriage<sup>63</sup> but, most importantly, it prevented spouses from entering into a consecutive civil marriage with other people while still married under customary law.<sup>64</sup> In addition, a man who wanted to enter into a civil marriage had to declare that he had dissolved all previous marriages (including customary marriages and civil marriages) and had to name all wives and children from previous marriages.<sup>65</sup> Contraventions of this rule were punished by fines or imprisonment, but legislative changes coupled with the possibility of punishment did not stop men from marrying more than one wife under different marriage regimes.<sup>66</sup> They did not always declare that they already had customary wives and that they had not dissolved the first marriages. Accordingly, in many cases the courts have held that the second marriage is void.<sup>67</sup>

Today, the *Recognition Act* also prohibits the conclusion of a civil marriage during the existence of a customary marriage.<sup>68</sup> If the spouses elect

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<sup>60</sup> Dlamini, *supra* note 36 at 77.

<sup>61</sup> Martin Chanock, “Law, State and Culture: Thinking About ‘Customary Law’ After Apartheid” in Bennett et al, *supra* note 36, 52 at 63-64.

<sup>62</sup> See the *Marriage and Matrimonial Property Law Amendment Act* ((S Afr), No 3 of 1988, s 1), which amended section 22 of the *Black Administration Act* (*supra* note 39).

<sup>63</sup> *Ibid*, s 22(1) (which is similar to *Recognition Act*, *supra* note 1, s 10(1)).

<sup>64</sup> *Black Administration Act*, *supra* note 39, s 22(2) (which is similar to *Recognition Act*, *supra* note 1, s 10(4)).

<sup>65</sup> *Black Administration Act*, *supra* note 39, s 22(3).

<sup>66</sup> *Ibid*, s 22(4).

<sup>67</sup> See e.g. *Khoza v Phago* (15 October 2010), [2010] JOL 26276 (South Gauteng HC); *Nkonki v Nkonki* (2000), [2001] 1 All SA 32 (Cape Prov Div).

<sup>68</sup> *Supra* note 1, ss 3(2), 10(1). Section 3(2) reads:

Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act No. 25 of 1961), during the subsistence of such customary marriage.

to enter into or to convert an existing customary marriage into a civil marriage, the civil marriage must comply with the provisions of the *Marriage Act* and the common law. In addition, Africans can also enter into a civil union under the *Civil Union Act*, but then they cannot enter into a customary marriage as well.<sup>69</sup>

The number of court decisions where the courts have had to decide whether a civil or customary marriage between Africans is valid indicates the uncertainty that still exists in this area of law.<sup>70</sup> When interpreting the law dealing with these marriages, courts tend to take interesting approaches to reach what are, according to the courts, fair decisions.<sup>71</sup>

## II. Addressing African Customary Marriages: Judicial Approaches

### A. *Legal Positivism*:<sup>72</sup> *The Easy Way Out*?

In a number of cases conflict arose between the widows of customary marriages concluded before and widows of marriages concluded after the commencement of the *Recognition Act*. In these instances the requirement that customary marriages be registered was used as an argument to exclude one of the widows from inheritance or from the right to bury the deceased husband.

A case in point is *MM*,<sup>73</sup> where the applicant (MM) was married to the deceased, HM, in accordance with customary law. Their marriage was

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Section 10(1) reads:

A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.

<sup>69</sup> *Supra* note 10, s 8(2).

<sup>70</sup> See also in this regard IP Maithufi & JC Bekker, "The Existence and Proof of Customary Marriages for Purposes of Road Accident Fund Claims" (2009) *Obiter* 164.

<sup>71</sup> See e.g. R-M Jansen, "Multiple Marriages, Burial Rights and the Role of *Lobolo* at the Dissolution of the Marriage" (2003) 28:1 *Journal for Juridical Science* 120.

<sup>72</sup> In general, legal positivism is the theory that the law depends for its validity on the state and that the only legitimate sources of law are (depending on the legal system of a given country) legislation, judicial decisions, common law principles, and other officially recognized sources of law. See Thomas Mautner, *The Penguin Dictionary of Philosophy*, 2d ed (London: Penguin Books, 2005) *sub verbo* "positivism"; Joel Feinberg & Jules Coleman, *Philosophy of Law*, 8th ed (Belmont, Cal: Thomson Wadsworth, 2008) ch 2; Mark Tebbit, *Philosophy of Law: An Introduction*, 2d ed (London, UK: Routledge, 2005) ch 2; David Johnson, Steve Pete & Max du Plessis, *Jurisprudence: A South African Perspective* (Durban: Butterworths, 2001) ch 3, 6.

<sup>73</sup> *Supra* note 28.

concluded in 1984 before the enactment of the *Recognition Act*, and was not registered at the office of the Department of Home Affairs. Without the applicant's knowledge, HM married a second wife (the first respondent, MN) in 2008, also according to customary law. The second marriage was confirmed by the headman of MN's village<sup>74</sup> but did not comply with section 7(6) of the *Recognition Act* requiring court approval of a written contract regulating the matrimonial property system.<sup>75</sup> The second marriage was also not registered. After HM's death, the applicant attempted to have her marriage registered but was informed that the first respondent also claimed to have been married to the deceased. As a result, the Department of Home Affairs refused her application for registration. The applicant approached the High Court for an order declaring the second marriage null and void. The first respondent, however, argued that her marriage was "properly and publicly performed, in accordance with customary law"<sup>76</sup> and that it was, therefore, legally valid.

The court analyzed the wording of the *Recognition Act* and stated that the act's purpose was to place marriages concluded before and after its enactment "on an equal footing."<sup>77</sup> It referred to section 6, which gives wives in customary marriages equal status,<sup>78</sup> and to the fact that the act allows someone to register a marriage that was concluded prior to enactment of the act.<sup>79</sup> The court also indicated that the purpose of section 7 was to protect existing and future wives of the husband, noting:

Both the existing spouse and the intending further spouse have a vital interest in having their relative proprietary positions safeguarded by the procedure that is laid down in [section 7]. Most customary marriages are concluded by persons whose access to worldly

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<sup>74</sup> *Ibid* at 287. See also *Recognition Act* (*supra* note 1, s 4), which allows not only any spouse to apply for registration, but also anyone who can show that he or she has sufficient interest in the matter.

<sup>75</sup> *Ibid*, s 7(6), which reads:

A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.

<sup>76</sup> *MM*, *supra* note 28 at para 288.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Recognition Act*, *supra* note 1. Section 6 reads:

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

<sup>79</sup> See *MM*, *supra* note 28 at 288.

goods is limited and whose financial security may be severely prejudiced by an earlier, or the conclusion of another, marriage if such fact is not disclosed to the spouses and dealt with by the contract and the court's approval.<sup>80</sup>

The court, first, interpreted the legislative provisions dealing with the proprietary consequences of a customary marriage as set out in section 7(6) of the *Recognition Act*.<sup>81</sup> This provision provides that a husband who is already a party to a customary marriage must obtain the court's approval of a written marriage contract before concluding a second customary marriage. In light of the "peremptory language" of section 7(6), in conjunction with the wording of section 7(7)(b)(iii), the court concluded that noncompliance therewith would lead to the invalidity of the second customary marriage.<sup>82</sup>

Second, the court opined that allowing the husband to marry another woman "without [the] knowledge and acquiescence" of the first wife/wives would be regarded as a "gross infringement" of the first or earlier spouses' fundamental rights.<sup>83</sup> The court then referred cursorily to the fundamental rights of the wives, including, among others: the right to dignity and to physical and emotional integrity; the right to protection from abuse (emotional and material); the right to be treated equally, as stated in the *Recognition Act*; and the right to receive support from the husband. The court also held that the future wife's expectation to be informed about previous marriages should be respected.<sup>84</sup> Seeing that the *Recognition Act* itself is silent on whether former wives must consent to subsequent marriages, and whether the customary law should prevail in this regard, the court did not decide the matter; rather, it indicated that the courts in future might have to decide the issue of consent.<sup>85</sup>

Third, the court pointed to the possibility that the rights of children of previous customary marriages might be harmed by noncompliance with section 7(2).<sup>86</sup> The court briefly referred to section 28(2) of the constitution, stating that the court should always consider the best interests of the children, without exploring this argument any further.

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<sup>80</sup> *Ibid* at 290.

<sup>81</sup> A court may "refuse the application [for approval of the marriage contract] if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract" (*Recognition Act*, *supra* note 1, s 7(b)(iii)).

<sup>82</sup> *MM*, *supra* note 28 at 290-91.

<sup>83</sup> *Ibid* at 291.

<sup>84</sup> *Ibid* at 291-92.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Recognition Act*, *supra* note 1.

The court raised a fourth argument with regard to noncompliance with section 7(6), namely, that “failure to comply with the mandatory provisions of this subsection cannot but lead to the invalidity of a subsequent customary marriage, even though the Act does not contain an express provision to that effect.”<sup>87</sup> In this it followed the positivistic approach expressed by some family law lawyers,<sup>88</sup> rather than adopting the view of Bennett, an African customary law scholar who proposes that the marriage should be voidable rather than void. According to Bennett, in cases where parties to a consecutive customary marriage have not approached the court for approval of the marriage contract, this should be interpreted to constitute contempt of court; this interpretation could, on the one hand, lead to the nullity of the marriage or, on the other hand, to it merely being voidable.<sup>89</sup> Bennett prefers the latter outcome because, in his opinion, the section 7(2) procedure was instituted to protect the long-term interests of customary wives.<sup>90</sup> It would thus be in their best interests to treat “the relationship with the husband as a valid marriage”<sup>91</sup> rather than a void one. The court rejected Bennett’s argument and concluded that it was the intention of the legislature to provide protection to existing wives in section 7(2) and not to create uncertainty.<sup>92</sup> According to the court, the first wife might be prejudiced by a marriage contract concluded by new spouses if the subsequent marriage is held to be merely voidable.<sup>93</sup> The court also considered the position of a subsequent wife who had no knowledge of previous marriages and stated that women should be educated about their rights and the workings of the *Recognition Act*. Furthermore, if the subsequent marriage is void for noncompliance with the *Recognition Act*, common law remedies are available to the unrecognized “wife”. She could, for example, institute a delictual claim against the man’s estate, especially if she was duped into believing she could marry him. If any children

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<sup>87</sup> *MM*, supra note 28 at 290.

<sup>88</sup> Cronjé & Heaton (*supra* note 5 at 212 [footnotes omitted]) declare as follows:

[T]he absence of such a contract renders the subsequent customary marriage void, for an interpretation which does not make the husband’s capacity to enter into a further customary marriage dependent on the court’s approval of his proposed matrimonial property contract would imply that court approval is unnecessary (and a waste of time and money), and would leave the interests of the existing customary wives and their family groups unprotected.

<sup>89</sup> Bennett, *Customary Law*, supra note 35 at 247-48.

<sup>90</sup> *Ibid* at 248.

<sup>91</sup> *MM*, supra note 28 at 292 (citing Bennett, *Customary Law*, supra note 35).

<sup>92</sup> The court declared: “With respect to the learned author this argument cannot be upheld in the light of the legislature’s clear intention to accord existing wives the full protection of the Bill of Rights in the context of customary marriages” (*MM*, supra note 28 at 292).

<sup>93</sup> *Ibid*.



were born from this “void” marriage, the marriage would be regarded as a putative marriage; the children would thus be acknowledged as the legitimate children of the deceased, and might claim maintenance from their father’s estate.<sup>94</sup> As no children had been born from the subsequent marriage in this case, the court found that it did not have to elaborate further on the matter.<sup>95</sup>

The following quotation clearly illustrates that the court overwhelmingly favoured the first wife in the context of conflict between numerous wives:

An existing wife may very often be entirely dependent upon her husband together with her children, may be unaware of her rights, may be illiterate or too timid or impecunious to seek legal advice, and may suffer the economic and emotional deprivation brought about by a subsequent marriage long before a separation as a result of death or divorce. To rely on an absence of protest by a wife who may live in fear of rejection—not to mention the children born of an earlier union—would be to consign the issue of voidability to a most uncertain and indeed arbitrary test.<sup>96</sup>

The contrary, however, is also true. A consecutive wife might also have been ignorant of the section 7 procedure in the *Recognition Act*, as well as ignorant of the fact that her husband was a partner in a previous marriage and that a void marriage could leave them destitute. The court did not consider the time, effort, and cost it would take a subsequent wife to institute court proceedings where necessary.<sup>97</sup> It also did not consider that she may not have the means or knowledge to institute delictual proceedings. One wonders whether the court might have taken a different approach if there were children born from the second marriage.

Another point of concern is the court’s approach in reaching its final conclusion. The court relied on the positivist-cum-literal approach as set out in *Minister of Environmental Affairs and Tourism v. Pepper Bay Fishing (Pty) Ltd*; *Minister of Environmental Affairs and Tourism v. Smith*.<sup>98</sup> In this case the court referred to the general principle of interpretation, namely that “language of a predominantly imperative nature such as ‘must’ is to be construed as peremptory rather than directory unless there

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<sup>94</sup> *Ibid* at 293.

<sup>95</sup> *Ibid* at 292-93.

<sup>96</sup> *Ibid* at 292.

<sup>97</sup> See IP Maithufi & JC Bekker, “*Baadjies v Matubela* 2002 3 SA 427 (W)” [2003] Journal of South African Law 753 at 760 [Maithufi & Bekker, “*Baadjies*”] (expressing concern over litigation costs).

<sup>98</sup> (2003), [2004] 1 S Afr LR 308, (S Afr SC), [2003] 4 All SA 1 [*Pepper Bay Fishing* cited to S Afr LR].

are other circumstances which negate this construction.”<sup>99</sup> Although such a viewpoint is in accordance with the general rules of statutory interpretation,<sup>100</sup> it is important to bear in mind that *Pepper Bay Fishing* deals with rejected applications for fishing rights and not with the validity of customary marriages. In *Pepper Bay Fishing* the applicants did not comply with the prescribed requirements of a general notice (an invitation to submit applications) and its procedural guidelines issued in terms of the *Marine Living Resources Act, 1998*.<sup>101</sup> The court stated:

As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so.<sup>102</sup>

The court also found that the chief director had no discretion to condone defects in the applications.<sup>103</sup> Another important difference between the two cases is the fact that the decision maker in *MM* was a court that had to decide whether or not the marriage contract ought to have been approved (section 7 procedure), while the administrative body in the *Pepper Bay Fishing* case had to make a final decision. In addition, the facts of the two cases were totally different. *Pepper Bay Fishing* addressed an application for fishing rights where “thousands of applications across the 22 sectors were anticipated”<sup>104</sup> whilst the *MM* case dealt with the law of marriage, where more than one person’s life and livelihood was affected on a long-term basis.

There can be no doubt that a positivistic approach to the text of an act provides an easy way out of a sticky situation. The facts of *MM* clearly illustrate how courts are often faced with a dilemma whereby a decision in favour of one party will inevitably prejudice another. Even in a literal approach to the law, however, there are certain guidelines the court in *MM* could have followed.<sup>105</sup> For example, if the relevant provision is framed positively and no sanction is imposed, it may be concluded that the provision is directory. Occasionally it is also necessary to regard the history of

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<sup>99</sup> *Ibid* at 321 [emphasis added].

<sup>100</sup> See Christo Botha, *Statutory Interpretation: An Introduction for Students*, 4th ed (Cape Town: Juta, 2005) at 111.

<sup>101</sup> (S Afr), No 18 of 1998. See also Department of Environmental Affairs and Tourism, *General Notice 1771 of 2001*, Government Gazette No 22517 (27 July 2001).

<sup>102</sup> *Pepper Bay Fishing*, *supra* note 98 at 320.

<sup>103</sup> *Ibid* at 322.

<sup>104</sup> *Ibid* at 314.

<sup>105</sup> See in this regard Botha, *supra* note 100 at 111-113; Lourens du Plessis, *Re-Interpretation of Statutes* (Durban: Butterworths, 2002) at 113-15.

the specific legislation.<sup>106</sup> Where a right, privilege, or exemption is granted, the rule will be peremptory if the requirements are not met. If the strict application of section 7 could lead to injustice, it could be regarded as directory. In this regard, du Plessis states:

In deciding whether, in exceptional cases, a generally assumed nullity must give way to an intended validity, the scope and purpose of the enactment, public policy and equity considerations carry considerable weight.<sup>107</sup>

In deciding the validity of a particular provision, the possible injustice toward others should also be taken into account. In this case the (possible) injustice caused to the second wife should also have been considered.

The meaning of a legislative provision is often said to be determinable by the context in which it appears.<sup>108</sup> According to du Plessis, the context “does not merely denote the *language* of the rest of the statute but includes its matter, its apparent purpose and scope and, within limits, its background.”<sup>109</sup> Section 7 of the *Recognition Act* deals with the consequences of marriages while section 2 specifies the requirements for valid customary marriages. Section 2 does not refer to section 7, and section 7 does not refer to section 2. In *Kambule*, the court indicated that the registration of a customary marriage is not mentioned as a requirement under section 2 and that it could therefore not be regarded as such; the only additional requirement to age and consent was that the “marriage should have been concluded in accordance with the customs and usages traditionally observed among the indigenous African peoples of South Africa.”<sup>110</sup>

The *Recognition Act* allows a court to refuse an application if “in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.”<sup>111</sup> What section 7 does not say, however, is what happens when a court rejects the application: the section does not state that the subsequent marriage may not take place. The act thus does not address failure to comply with the provisions of section 7. If the general rule, as expressed in *Pepper Bay Fishing*, is to be applied, the phrase “unless there are other circumstances which negate

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<sup>106</sup> *Ibid* at 114-15.

<sup>107</sup> *Ibid* at 252.

<sup>108</sup> *Ibid* at 111-12.

<sup>109</sup> *Ibid* at 113.

<sup>110</sup> *Supra* note 51 at 412.

<sup>111</sup> *Supra* note 1, s 7(7)(b)(iii). See also ss 7(7)(b)(i) and (ii), which empower the court to allow amendments to the contract or to grant the order subject to any condition it may deem fit.

this construction” could have assisted the court in reaching another decision. The *Recognition Act* specifically orders a court to take the circumstances of the families into account, which already indicates some discretion on its part.<sup>112</sup> A similar discretion was not available in *Pepper Bay Fishing*.

Another principle that could have been applied in *MM* is the so-called “mischief rule”, or the historical context of the *Recognition Act* in general and section 7 in particular.<sup>113</sup> Botha states that certain questions need to be answered. For example: “What was the legal position before the legislation was adopted?” What was the problem (“mischief”) that had to be corrected? What was the solution the legislature had in mind to solve the problem, and what was the real reason for the solution?<sup>114</sup> The mischief rule can be applied only if the language of section 7(6) is not clear.<sup>115</sup> Although the *Recognition Act* clearly states that a contract must be registered by a court, it does not indicate what will happen if the parties conclude a marriage without doing so. This necessitates an investigation into the background, the problem, and the mischief that needs to be corrected. Customary marriages link families and individuals, as indicated above. The celebration of the marriage gives public notice thereof; as such, many customary marriages were concluded in the past without any regard for additional legislative requirements. The historical nonrecognition of customary marriages in South Africa illustrates the injustices women from these marriages suffered.<sup>116</sup> It is clear that the *Recognition Act* attempts to ameliorate these injustices. In the past, some husbands did not comply with all the formalities of the *Marriage and Matrimonial Property Law Amendment Act*<sup>117</sup> when they concluded consecutive civil marriages without first dissolving the customary marriages. In this regard the courts have held the customary marriages to be automatically dissolved.<sup>118</sup> The

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<sup>112</sup> *Ibid*, s 7(7)(a)(iii).

<sup>113</sup> Botha, *supra* note 100 at 84; du Plessis, *supra* note 105 at 117-18; GE Devenish, *Interpretation of Statutes* (Cape Town: Juta, 1992) at 28.

<sup>114</sup> Botha, *supra* note 100 at 84.

<sup>115</sup> du Plessis, *supra* note 105 at 118.

<sup>116</sup> See Felicity Kaganas & Christina Murray, “Law, Women and the Family: The Question of Polygyny in a New South Africa” in Bennett et al, *supra* note 36, 116.

<sup>117</sup> *Supra* note 62.

<sup>118</sup> See Kaganas & Murray, *supra* note 116 at 121-25. In the past the courts regarded marriages that did not comply with the requirements to be voidable in order to ensure at least some protection to the families of the different marriages. In the case of registration, for example, the courts regarded registration as *prima facie* evidence of the existence of a marriage rather than as a requirement for the marriage. See e.g. *Wormald v Kambule* (2005), [2006] 3 S Afr LR 562, (S Afr SC), [2005] 4 All SA 629; *Baadjes v*

courts' effort to uphold civil law marriages at the cost of customary marriages led to the suffering of the children and wife of the customary marriage. In *MM*, for example, the court used the literal interpretation method to protect the first wife and her child, albeit within the context of a customary marriage, but in the process the court overrode the interests of the second wife.<sup>119</sup> Both of these women were customary wives. In a customary marriage this problem would not have arisen as both wives would have been recognized as wives. However, applying common law concepts embedded in legislation to an African marriage without taking the context into account creates a new form of voidable marriage not previously anticipated. Taking into account that the drafters of the *Recognition Act* must have realized that the registration of customary marriages, if made a requirement, could result in void marriages, section 4(9) of the act specifies that "[f]ailure to register a customary marriage does not affect the validity of that marriage." However, when section 7 was drafted, the legislature could not foresee that a new voidable marriage might be created, and it seems as if history is repeating itself. Instead of promoting the recognition of customary marriages, new reasons are developed for not recognizing them.

In *Re Former Highlands Residents: Sonny v. Department of Land Affairs*, the court stated:

Where the language of a statute leaves a gap to be filled, the Court must fill that gap. In doing so, it must reconstruct the thinking contained in the statute, consider the practical implications and come up with a solution which conforms with the purpose of the statute and with the spirit, purport and objects of the Bill of Rights, while also serving the requirements of justice and equity.<sup>120</sup>

It is our contention that the literal approach followed in *MM* only partially serves the requirements of justice and equity by safeguarding the interests of one wife. By denying the second wife protection, the court failed in its attempt to achieve ultimate justice. The question remains as to

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*Matubela* (2001), [2002] 3 S Afr LR 427, (Wit Local Div), [2002] 2 All SA 623. See also Maithufi & Bekker, "*Baadjes*", *supra* note 97.

<sup>119</sup> It is possible that the outcome of the case would have been the same had the court considered the circumstances of the second wife (there is no indication that the court did indeed do so). The more the legislature tries to interfere, the more women's and children's rights may be harmed. For the potential implications, see e.g. Dlamini, *supra* note 36 at 75-78; Sandra Burman, "Illegitimacy and the African Family in a Changing South Africa" in Bennett et al, eds, *supra* note 36, 36 at 37.

<sup>120</sup> (1999), [2000] 2 S Afr LR 351 at 355-56, (S Afr Land Claims Ct), [2001] 1 All SA 157 [footnotes omitted].

whether the court should not perhaps have “act[ed] in a creative and just way, establish[ed] precedents, and develop[ed] the law.”<sup>121</sup> In light of the historical developments in the recognition of customary and civil marriages in South Africa, we propose that courts regard marriages that do not comply with section 7 as voidable and allow time for corrective action. It is all very well to leave it to the spouses to determine their new marriage regime, but what happens if the couples are not informed or are ill-informed about the fact that they must seek approval from the court? The legislature may have to amend the *Recognition Act* to provide a default matrimonial property regime, should the parties fail to obtain a court order beforehand. The *Recognition Act*, with its civil law features, may provide customary marriages the recognition they deserve, but the application of this regime is not always as just as one would expect. In the meantime the courts will have to find innovative ways to reconcile customary marriages and the common law to ensure a just outcome for all parties.

### ***B. Common Law Principles: “Potjiekos” Mix?***<sup>122</sup>

The inclination of the courts to apply common law principles in cases where they regard the rules of customary law as either unjust or unclear has been criticized on a number of occasions.<sup>123</sup> Since customary law has received its rightful place in the South African legal system there is no more doubt that customary law principles should not, without good reason, be replaced by common law principles. In *Alexkor Ltd v. Richtersveld Community* the Court stated:

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.<sup>124</sup>

Nevertheless, it remains a difficult task to keep a clear divide between common law and customary law principles, and more often than not the courts either mix the principles of the two legal systems or prefer the one to the other. For example, in *Maluleke*, the court applied principles of the

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<sup>121</sup> Devenish, *supra* note 113 at 228.

<sup>122</sup> Rautenbach refers to this unique blend of common and customary law as a “pot food” mix (“Potjiekos”, *supra* note 1 at 238-40). This is a traditional South African dish where the food is layered in a big black pot and then slowly cooked to mix all the layers.

<sup>123</sup> See e.g. the interpretation of communal land tenure in Willemien du Plessis & Juanita M Pienaar, “The More Things Change, the More They Stay the Same: The Story of Communal Land Tenure in South Africa” (2010) 16:1 *Fundamina* 73.

<sup>124</sup> *Alexkor Ltd v Richtersveld Community*, [2003] 12 B Const LR 1301 at para 51, (S Afr Const Ct).

common law of contract to prove the existence of a customary marriage.<sup>125</sup> In this case, the family of a deceased person applied to the court for an order to cancel the registration of a customary marriage between the deceased and one of the defendants. According to the plaintiffs (consisting, amongst others, of children from the deceased's previous marriages), no marriage existed between the deceased and his registered wife (the second defendant) as the requirements of a customary marriage had not been fulfilled. Although the *lobolo* negotiations were concluded, the *invume*,<sup>126</sup> namely the celebration of the marriage or transfer of the bride, did not take place before the deceased's death.<sup>127</sup> Prior to his death, the deceased and the second defendant were nevertheless already living together as man and wife.<sup>128</sup> The Department of Home Affairs registered the marriage date as the date of the last payment of the *lobolo* and issued a marriage certificate.<sup>129</sup>

To determine whether a customary marriage had, in fact, been concluded, the court interpreted the words "entered into or celebrated", part of the customary marriage requirements specified by the *Recognition Act*.<sup>130</sup> The court looked at the dictionary meaning of "celebrated" and found that the marriage had not been celebrated as no festivities were held.<sup>131</sup> In order to determine the meaning of "entered into" the court resorted to the common law of contract. It indicated that an agreement may be concluded expressly or tacitly. Considering all the factors—namely, that the negotiations for the *lobolo* had been concluded; that the date for the *invume* had been fixed; and that the parties were already living as husband and wife and were regarded as married by their respective families—the court held that the circumstances "satisfied the requirement of the Act that the customary marriage be 'entered into'."<sup>132</sup> Accordingly, the court refused to deregister the customary marriage.<sup>133</sup>

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<sup>125</sup> *Supra* note 30.

<sup>126</sup> The *invume* is a form of integration of the bride into the bridegroom's family.

<sup>127</sup> *Maluleke, supra* note 29 at paras 3-4.

<sup>128</sup> *Ibid* at para 14.

<sup>129</sup> *Ibid* at paras 4-5.

<sup>130</sup> *Supra* note 1, s 3(1)(b) ("the marriage must be negotiated and *entered into or celebrated* in accordance with customary law" [emphasis added]).

<sup>131</sup> *Maluleke, supra* note 29 at para 8.

<sup>132</sup> *Ibid* at para 16.

<sup>133</sup> *Ibid* at paras 16-17. In earlier decisions the courts considered the fact that the families allowed the parties to live together as complying with the requirement of handing over the girl: see in this regard Joubert, Faris & Church *supra* note 36 at 94-95.

The judicial reasoning in this case seems to contradict the many court decisions where compliance with traditional customs must have occurred before a valid marriage comes into being. These requirements include the payment of *lobolo*, the celebration of certain ceremonies, and the transfer of the bride.<sup>134</sup> In *Manona*, the court applied customary law, holding that no marriage existed as

there was no final agreement about what ilobolo would be paid to the deceased's family. It can be said that ilobolo was not at all negotiated. There was no handing over of the deceased to the family of the second respondent by the family of the deceased. It is more probable that R1 000,00 was paid for as customary damages. The answer to this question is therefore that there was no valid customary marriage between the deceased and the second respondent.<sup>135</sup>

Similar logic was followed in cases dealing with customary law divorces. For example, in *Thembisile v. Thembisile* the court held that a subsequent civil marriage was null and void on the basis that there was not enough evidence indicating that the deceased had divorced his first customary law wife in terms of customary rules.<sup>136</sup>

These decisions hampered judicial activism and, as the common law was seen as being superior to customary law, common law continued to be used to resolve matters between litigants married under the customary law regime. Bearing in mind that customary law now has its rightful place in the South African legal order, courts should be mindful of the fact that they have the power to develop customary law where it should be developed, rather than having to replace it with common law principles that may be regarded as foreign and hostile to African litigants.<sup>137</sup>

In several cases, the courts have already applied their power to develop customary law. For instance, in *Fanti* the court recognized the adaptive nature of customary law in *lobolo* proceedings by allowing the mother to negotiate and receive *lobolo*.<sup>138</sup> In doing so the court recognized the role that women play, or should play in society and declared:

[I]f courts do not recognise the role played or to be played by women in society, then that would indicate failure and/or reluctance on their part to participate in the development of the customary law, which

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<sup>134</sup> See *Manona v Alice Funeral Parlour* (2002), [2002] JOL 9717, (E Cape Div) [*Manona*]; *Fanti v Boto* (2007), [2008] 5 S Afr LR 405 at 413-14, (Cape Prov Div), [2008] 2 All SA 533 [*Fanti*].

<sup>135</sup> *Manona*, *supra* note 134 at para 5.

<sup>136</sup> (2001), [2002] 2 S Afr LR 209 at 214-15 (Transv Prov Div).

<sup>137</sup> See *Constitution*, *supra* note 1, ss 39, 173 (regarding the power of the courts to develop the law).

<sup>138</sup> *Supra* note 134 at 414.



development is clearly in accordance with the “spirit, purport and objects” of our Constitution.<sup>139</sup>

Courts open themselves to criticism when they simply replace customary law principles with common law principles, or when they adapt customary law principles to common law ones. The latter occurred in *Maluleke*,<sup>140</sup> where the court used the common law interpretation of contracts to provide meaning to a customary practice of a marriage being “entered into”. In order to ensure a just result (in the mind of the judge), the court fused two legal systems, even though similar results could have been obtained using constitutional principles.<sup>141</sup>

### *C. Transformative Constitutionalism: Knight in Shining Armour?*

The South African constitution has been described as a “transformative document” and the process of transformation, as envisaged by the constitution, as “transformative constitutionalism”.<sup>142</sup> Transformative constitutionalism and everything it entails has been enthusiastically embraced by the South African judiciary. In general terms it refers to the mammoth task placed on the shoulders of the constitution to effect transformation from the old, and everything bad associated with it, to the new and idealistically good. As pointed out by Justice Madala in *S. v. Makwanyane*:

We, as Judges, are oath-bound to defend the Constitution. This obligation, in turn, requires that any enactment of Parliament should be judged by standards laid down by the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. ... When it appears that an Act of Parliament conflicts with the provisions of the Constitution, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less.<sup>143</sup>

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<sup>139</sup> *Ibid.*

<sup>140</sup> *Supra* note 29.

<sup>141</sup> See the discussion of transformative constitutionalism in subsection II.C, below.

<sup>142</sup> The concept was introduced to the South African legal literature by Karl E Klare, “Legal Culture and Transformative Constitutionalism” (1998) 14 SAJHR 146. Since then, a number of cases have referred to it: see e.g. *Minister of Health v New Clicks South Africa (Pty) Ltd* (2005) [2006] 2 S Afr LR 311 at 400 (S Afr Const Ct); *S v Mhlungu* [1995] 3 S Afr LR 867 at 874 (S Afr Const Ct); *Hassam, supra* note 38 at 584; *Road Accident Fund v Mdeyide* (2010) [2011] 1 B Const LR 1 at para 125 (S Afr Const Ct).

<sup>143</sup> *S v Makwanyane*, [1995] 3 S Afr LR 391 at 486-87 (S Afr Const Ct) [*Makwanyane*]. Justice Madala delivered a separate but concurring judgment. The Court abolished the death sentence in South Africa. This is regarded as the Constitutional Court’s inaugural decision.

The role of the judiciary in safeguarding an individual's rights has been made easier by the interpretation clause, enabling judges to use interpretation to achieve transformation.<sup>144</sup> For example, in dealing with the question of whether or not the wives of polygynous Muslim unions should be included as spouses under the *Intestate Succession Act*,<sup>145</sup> Justice Nkabinde in *Hassam*<sup>146</sup> referred to this role as follows:

The interpretive approach enunciated by this court will ensure the achievement of the progressive realisation of our “transformative constitutionalism”. This approach resonates with the founding values now informing the assessment of the prevailing *boni mores* of our society and thus affords the necessary protection to those adversely affected by the exclusion under the Act.<sup>147</sup>

Similar sentiments were echoed by Justice Mokgoro in *Makwanyane*. She confirmed that the interpretative function of the courts has evolved from one that gives effect to clear and unambiguous legal texts, irrespec-

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<sup>144</sup> See *Constitution*, *supra* note 1, s 39, which reads:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum—
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) 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.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are

recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

<sup>145</sup> *Intestate Succession Act*, (S Afr), No 81 of 1987. Section (1)(a) reads: “If after the commencement of this Act a person ... dies intestate, either wholly or in part, and ... is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate.”

<sup>146</sup> *Supra* note 38. The Court concluded that the exclusion of widows in a polygynous Muslim union from protection under the *Intestate Succession Act* was inconsistent with the equality provision (section 9) of the constitution and was thus invalid to the extent that it did not protect more than one spouse in a polygynous Muslim marriage. As a result, the Court amended the *Intestate Succession Act* to include all the wives of a Muslim husband, thus transforming the law by means of the constitution to reflect “the new ethos of tolerance, pluralism and religious freedom” described by Chief Justice Mahomed in *Amod v Multilateral Motor Vehicle Accidents Fund*, [1999] 4 S Afr LR 1319 at 1328, (S Afr SC), [1999] 4 All SA 421.

<sup>147</sup> *Hassam*, *supra* note 38 at 584 [footnotes omitted].

tive of the unjust effects of their application (the positivistic approach),<sup>148</sup> to one that involves “making constitutional choices by balancing competing fundamental rights and freedoms,” which can “often only be done by reference to a system of values extraneous to the constitutional text itself, where these principles constitute the historical context in which the text was adopted and which help to explain the meaning of the text.”<sup>149</sup>

In *Gumede*, though not in so many words, the judiciary (both in the court *a quo* and in the Constitutional Court) applied the principles of transformative constitutionalism to determine the constitutionality of some of the provisions of the *Recognition Act* and the KwaZulu-Natal codes.<sup>150</sup> In this case, the applicant Elizabeth Gumede entered into a customary marriage with Amos Gumede (the fifth respondent) on 29 May 1968 in the KwaZulu-Natal province. In 2003, Amos Gumede instituted divorce proceedings in the divorce court. Before he could continue with the divorce action, Elizabeth Gumede applied for an order in the High Court<sup>151</sup> to declare certain provisions of the KwaZulu-Natal codes<sup>152</sup> and the *Recognition Act*<sup>153</sup> unconstitutional because they unfairly discriminat-

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<sup>148</sup> This approach by courts is contrary to the one previously followed. For example, in *Bongopi v. Chairman of the Council of State, Ciskei* ([1992] 3 S Afr LR 250 at 265, (Ciskei HC)), the court held as follows: “This Court has always stated openly that it is not the maker of laws. It will enforce the law as it finds it. To attempt to promote policies that are not to be found in the law itself or to prescribe what it believes to be the correct public attitudes or standards in regard to those policies is not its function.” See also the discussion of positivism in subsection II.A, above.

<sup>149</sup> *Makwanyane*, *supra* note 143 at 498. This viewpoint is contrary to the positivist approach followed in *MM*, *supra* note 28. See the discussion in subsection II.A, above.

<sup>150</sup> *Supra* note 27. For a discussion of the case, see Jan Bekker & Gardiol van Niekerk “*Gumede v President of the Republic of South Africa: Harmonisation, or the Creation of New Marriage Laws in South Africa?*” (2009) 24 SA Publiekrek/SA Public Law 206 [Bekker & van Niekerk, “*Gumede*”].

The customary law applicable in the province of KwaZulu-Natal is codified in the *KwaZulu Act on the Code of Zulu Law* (*supra* note 50) and the *Natal Code of Zulu Law* (*supra* note 50) [KwaZulu-Natal codes]. Both pieces of legislation have been repealed by the *KwaZulu-Natal Traditional Leadership and Governance Act, 2005* (*supra* note 50), but the repeal has yet to come into effect and the two codes are for all practical purposes still in effect.

<sup>151</sup> *Gumede* 2008, *supra* note 44.

<sup>152</sup> Under section 20 of the KwaZulu-Natal codes (*supra* note 150), the husband as the family head is the “owner of all family property in his family home” and has custody and control of house property. This resulted in the exclusion of Elizabeth Gumede from the family property or, as she put it: “I will be the owner of none of the property, and will remain property-less” (*Gumede* 2008, *supra* note 44 at para 5).

<sup>153</sup> The applicant’s contention was that the *Recognition Act* (*supra* note 1, s 7) distinguished between customary marriages before and after the *Recognition Act* came into force. The property regime for marriages concluded before 15 November 2000 posited that such marriages were governed by customary law, whilst those concluded on or af-

ed<sup>154</sup> against her on the grounds of gender and race.<sup>155</sup> In short, she argued that the KwaZulu-Natal codes, reflecting the customary law position, excluded her from owning family property either during or upon dissolution of her marriage. Second, she claimed that the *Recognition Act* distinguished between customary marriages entered into before and those entered into after the statute's enactment, resulting in the unequal treatment of customary wives in general. The respondents tried to argue, amongst other things, that "the differentiation served a legitimate purpose" because it gave "effect to indigenous culture," but the court was not convinced that indigenous culture was strong enough cause the pendulum to swing in favour of customary law.<sup>156</sup> The High Court noted:

It is not the Recognition Act which creates that discrimination—it is customary law in its various manifestations which does so. The complaint against the Recognition Act is that it is under-inclusive in remedying that discrimination against African women.<sup>157</sup>

Judge Theron, who found in favour of Elizabeth Gumede, declared the offending provisions inconsistent with the constitution and therefore invalid. She referred the court order to the Constitutional Court for confirmation in terms of section 172(2)(a) of the constitution.<sup>158</sup> In *Gumede*, the Constitutional Court agreed in principle with the findings of the High Court, and confirmed the latter's holding of constitutional invalidity with regard to monogamous customary marriages concluded before commencement of the *Recognition Act*.<sup>159</sup> On the one hand, Deputy Chief Jus-

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ter 15 November 2000 were in community of property, except where the spouses had concluded an antenuptial contract. As explained above, the customary law in the KwaZulu-Natal Province is codified in the KwaZulu-Natal codes (*supra* note 150), which do not afford the wives of the head of a family any rights in the family property.

<sup>154</sup> See *Constitution*, *supra* note 1, s 9(3) (the so-called equality provision, which prohibits unfair discrimination by the state on various grounds).

<sup>155</sup> The *Constitution* (*supra* note 1, s 36) allows for the limitation of rights if it can be shown "that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom," which the respondents were unable to show (see *Gumede* 2008, *supra* note 44 at para 16).

<sup>156</sup> *Ibid* at para 13.

<sup>157</sup> *Ibid* at para 16.

<sup>158</sup> See *Constitution*, *supra* note 1, s 172(2)(a), which reads:

The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

<sup>159</sup> The Court left the position of polygynous customary marriages unchanged and added that "the proprietary consequences of polygamous relationships *will be regulated by customary law* until parliament intervenes" (*Gumede*, *supra* note 27 at 176 [emphasis added]).

tice Moseneke was highly critical of legislative encroachments on customary law over the years. In line with existing sentiments, he also blamed the current state of affairs on colonialism and expressed the hope that democratic rule would save the day, declaring:

During colonial times the great difficulty resided in the fact that customary law was entirely prevented from evolving and adapting as the changing circumstances of the communities required. It was recorded and enforced by those who neither practised it nor were bound by it. Those who were bound by customary law had no power to adapt it. Even when notions of spousal equality and equity and the abolition of the marital power of husbands over wives were introduced in this country to reform the common law, "official" customary law was left unreformed and stonewalled by static rules and judicial precedent, which had little or nothing to do with the lived experience of spouses and children within customary marriages. With the advent of democratic rule much had to give way.<sup>160</sup>

On the other hand, it is clear from Deputy Chief Justice Moseneke's reasoning that he viewed the *Recognition Act* as being in a totally different category than the preconstitutional legislation dealing with customary marriages.<sup>161</sup> According to Deputy Chief Justice Moseneke, the *Recognition Act* establishes a normative value system and is inspired by the dignity and equality rights entrenched in the constitution.<sup>162</sup> He hails the *Recognition Act* as

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.<sup>163</sup>

Ironically, the wording of the *Recognition Act* in combination with the final order of the court results in a customary rule (the control of the head of a family over the family property) being abolished. But because this result is achieved in terms of the *Recognition Act*, an act promulgated within the contours of a respected constitution, and by an order of a Court that has the power to develop customary law in line with constitutional values,<sup>164</sup> the outcome is (perhaps) more acceptable.<sup>165</sup>

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<sup>160</sup> *Ibid* at 161-62 [footnotes omitted].

<sup>161</sup> For example, the KwaZulu-Natal codes (*supra* note 150) and the notorious *Black Administration Act* (*supra* note 39).

<sup>162</sup> *Gumede*, *supra* note 27 at 162.

<sup>163</sup> *Ibid* at 160.

<sup>164</sup> The *Constitution* (*supra* note 1, s 39(2)) compels courts to develop the common and customary law in line with "the spirit, purport and objects of the Bill of Rights."

An intriguing point, raised by Deputy Chief Justice Moseneke, is the purpose of the *Recognition Act* to unify customary marriage laws in South Africa. To say that the *Recognition Act* would introduce “certainty and uniformity to the legal validity of customary marriages throughout the country” is, to say the least, quite optimistic.<sup>166</sup> It is trite that customary law is an umbrella term for the vast array of indigenous laws, mostly uncodified, of the various traditional communities in South Africa. The *Recognition Act* in itself recognizes this fact by defining a customary marriage as a “marriage concluded in accordance with customary law.”<sup>167</sup> In addition, section 2(1) of the *Recognition Act* recognizes a customary marriage entered into before its commencement as a valid marriage, without prescribing additional requirements. Thus, in order to determine the validity of such a marriage, one must establish what the customary law requirements for that particular marriage are. It will be a long and winding road before all customary marriages concluded before the commencement of the *Recognition Act* are no longer in existence and some level of legal certainty is achieved.

A notable outcome of *Gumede* is that only monogamous customary marriages entered into before the commencement of the *Recognition Act* are now in community of property, thus excluding polygynous customary marriages. Bekker and van Niekerk rightly point out that this is due to the apparent incompatibility between the community of property system and the proprietary consequences of polygynous marriages.<sup>168</sup> The Court recognized that this distinction perpetuates the existing inequality between women involved in monogamous relationships and those involved in polygynous relationships, but left the matter to be resolved by parliament.<sup>169</sup> One can only hope that this will happen in the near future.

As suggested earlier, the judicial method applied by the Constitutional Court to reach its outcome is in line with the principles of transformative constitutionalism. Deputy Chief Justice Moseneke pointed out that “courts have a constitutional obligation to develop customary law in order

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<sup>165</sup> Bekker & van Niekerk (“*Gumede*”, *supra* note 150 at 207) are highly critical of the outcome of the case. They say: “the *Gumede* decision further deepens the divide that is evolving between the unwritten, living customary law and the official customary law entrenched in legislation and judicial decisions. In fact, it rids official customary law of some of the last substantial vestiges of African customary marriage and so, in effect, brings the piecemeal legislative and judicial obliteration of the official African customary marriage to a conclusion.”

<sup>166</sup> *Gumede*, *supra* note 27 at 164.

<sup>167</sup> *Supra* note 1, s 1(iii).

<sup>168</sup> Bekker & van Niekerk, “*Gumede*”, *supra* note 150 at 209.

<sup>169</sup> *Gumede*, *supra* note 27 at 175-76.

to align it with constitutional dictates.”<sup>170</sup> What comes next, however, is somewhat confusing. In spite of the Court’s obligation to develop customary law in line with the constitution, Deputy Chief Justice Moseneke was of the opinion that the question of developing customary law did not arise in this particular case.<sup>171</sup> At first glance, he appears to refer to the development (or transformation) of customary law as practised as opposed to official customary law as codified in the KwaZulu-Natal codes. If we understand him correctly, he says that a court’s power in relation to legislation is merely to interpret the legislation in a manner that is consistent with the constitution and, if it is not, to declare it invalid.<sup>172</sup> Conversely, a court’s power in relation to customary law as practised is to develop it in accordance with the “spirit, purport, and objects of the Bill of Rights.”<sup>173</sup>

The Court concluded, however, that it was not necessary to develop the customary law because the *Recognition Act* made a “legislative choice” that all customary marriages since 15 November 2000 must be in community of property, which is “in harmony with the communal ethos that underpins customary law.”<sup>174</sup> The Court also indicated that if it was to declare the offending provisions in the *Recognition Act* unconstitutional, customary marriages before 15 November 2000 would also be in community of property; customary law would thus “become consistent with the Constitution and it follow[ed], therefore, that it would be unnecessary to develop it.”<sup>175</sup>

The Court’s reasoning seems contradictory. On the one hand, the Court held that customary law need not be developed. On the other hand, the Court conceded that a declaration of invalidity of sections 7(1) and (2) of the *Recognition Act* would bring customary law within the realm of the constitution. It is difficult not to see this process as a development or

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<sup>170</sup> *Ibid* at 166.

<sup>171</sup> *Ibid*.

<sup>172</sup> Thus the court confirmed the holding of constitutional invalidity made by the High Court; namely, the invalidity of ss 7(1) and (2) of the *Recognition Act* (*supra* note 1), and the relevant sections of the KwaZulu-Natal codes (*supra* note 150).

<sup>173</sup> Deputy Chief Justice Moseneke declared:

However, the question of developing customary law in this particular instance does not arise. Firstly, the *version of customary law we are faced with is codified by legislation* and applies only to the province of KwaZulu-Natal. A competent court may develop customary law but its power in relation to legislation is not to develop the legislation but to interpret it in a manner that promotes the objects of the Constitution or to hold, where appropriate, that it is inconsistent with the Constitution and for that reason invalid (*Gumede, supra* note 27 at 166 [emphasis added]).

<sup>174</sup> *Ibid*.

<sup>175</sup> *Ibid* at 167.

transformation of customary law from a system that disallows wives from having property rights to one that affords them equal property rights.

Be that as it may, the Court eventually subjected the impugned provisions of the *Recognition Act* and the KwaZulu-Natal codes to constitutional scrutiny, concluding that they subjected women living under a system of customary law to unfair discrimination, and that they should be declared invalid.<sup>176</sup> It is important to note that the Court was cautious not to create the impression that it was merely replacing customary law rules with common law rules by expressly stating that “customary marriages should not be seen through the prism of the marital proprietary regimes under the common law or divorce legislation that regulates civil marriages.”<sup>177</sup> Recognizing that the matrimonial property system of customary law, as codified in the KwaZulu-Natal codes, infringes women’s equality and dignity rights by providing that the head of the family is the owner of the family property and has total control over it, the Court concluded: “This patriarchal domination over, and the complete exclusion of, the wife in the owning or dealing with family property unashamedly demeans and makes vulnerable the wife concerned and is thus discriminatory and unfair.”<sup>178</sup>

It is true that the provisions of the KwaZulu-Natal codes endorse and sustain patriarchy within the traditional communities, that they are regarded as entrenching a colonial perception of Zulu law, and that there is little reason for their continued existence. Nevertheless, as pointed out by Bekker and van Niekerk, the KwaZulu-Natal codes have been in existence for more than 130 years—communities and the courts alike are used to them.<sup>179</sup> A body of case law that has evolved over the years continues to be interpreted and applied by the courts and traditional authorities, and a decision to repeal the KwaZulu-Natal codes should not be taken lightly. Besides, the codes have been in operation for so long that it would be difficult, if not impossible, to distinguish between distorted and true versions of customary law.

### Conclusion: Is There Method in the Madness?

To attain the utopia described by Deputy Chief Justice Moseneke in *Gumede*, namely, “to have a flourishing and constitutionally compliant

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<sup>176</sup> The marital property system contemplated by the KwaZulu-Natal codes “renders women extremely vulnerable” and infringes their dignity (*Gumede*, *supra* note 27 at 168).

<sup>177</sup> *Ibid* at 171.

<sup>178</sup> *Ibid* at 173.

<sup>179</sup> Bekker & van Niekerk, “*Gumede*”, *supra* note 150 at 210.



customary law that lives side by side with the common law and legislation,” is no easy matter.<sup>180</sup> As has been shown, invalidating a customary rule for want of its compliance with constitutional dictates is an extremely sensitive and difficult matter. The question remains, what replaces that which was invalidated? The South African judiciary is understandably in a precarious situation. Judges generally receive adequate schooling in the common law of South Africa, while the customary law is often taught only at an introductory level in universities. The logical step for the judges is to develop a “nonconstitutional” customary law rule by replacing it with a common law rule that is readily available and known to them.

On a number of occasions it has been said that common law and customary law are two equal legal systems, and that the latter should not be scrutinized through a common law lens but through a constitutional lens.<sup>181</sup> Put differently, the instruction is that customary law should be developed (or transformed) within the framework of the constitution. Such an approach would ensure, as pointed out by Deputy Chief Justice Moseneke in *Gumede*, that customary law is brought into harmony with the constitution, as well as with the standards of international human rights.<sup>182</sup> Further, in recognizing the supremacy of the constitution, customary law will rid itself of its “stunted and deprived past” and, finally, reaffirm the pluralistic character of the South African legal system.<sup>183</sup>

In a mixed legal system there will always be a certain measure of confusion regarding which laws are applicable to a given situation, and there will always be some degree of mixing of the rules of the two legal systems. These two attributes of a mixed legal system are not necessarily detrimental to an effective legal system, but are indicative of a system promoting and protecting diversity. Besides, if a unified legal system has not been possible since the inception of colonial domination of South Africa, what makes us think that it will ever happen? It is perhaps time to accept the inevitable: the South African legal system is a mixed legal system because its society consists of a mix of cultural and religious communities that adhere to laws in which they trust. Ultimately, those rules must conform to the dictates of a supreme constitution, thus ensuring that one legal system is not regarded as superior to another and that all systems comply with constitutional principles.

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<sup>180</sup> *Gumede*, *supra* note 27 at 163.

<sup>181</sup> See section 1, above.

<sup>182</sup> *Gumede*, *supra* note 27 at 163.

<sup>183</sup> *Gumede*, *supra* note 27 at 162. The past that the Court refers to here, is of course pre-1994; first, when South Africa was still under colonial rule and second, when South Africa was ruled by a white minority.