When Is the Past Not the Past? Reflections on Customary Law under South Africa’s Constitutional Dispensation

Sanele Sibanda

Follow this and additional works at: http://digitalcommons.wcl.american.edu/hrbrief

Part of the Human Rights Law Commons, and the International Law Commons

Recommended Citation
INTRODUCTION

The democratic dispensation in South Africa brought hope and expectations to African communities that had been marginalized from the mainstream of the country’s dual legal system. Although officially dubbed a “dual system,”1 African customary law was subordinated to the position of the tolerated but unloved stepchild. The transformation of South Africa from a racist, colonial, and subsequently apartheid state2 to an inclusive, democratic, and constitutional state ushered in a new era of possibilities widely perceived as breathing new life into customary law. The Constitution recognizes customary law as one of the “foundation[s] of the South African legal system” by placing it on par with the common law.3

During the fifteen years since commencement of the democratic dispensation, much has been done in the name of reforming and integrating customary law in order to make it comport with South Africa’s constitutional project. Without a precise prescription as to what form a constitutionally compliant customary law regime would take, scholars have portrayed the process of incorporation and reform as a delicate balancing act, seeking to promote customary law’s cultural uniqueness as an indigenous African enterprise, whilst vigorously protecting and promoting women’s right to equality in order to blunt the impact of a seemingly endemic patriarchy.4 How effectively, or even whether, this has been achieved remains an open question.

This paper argues that over the last fifteen years, instead of producing a reformed, democratic, and culturally attuned system of customary law as envisaged at the time of its constitutional incorporation, reformers have reproduced the colonial legacy that again relegates customary law to a second-tier legal system and an instrument of rule and administration. In support of this argument, the paper refers to Professor Mahmood Mamdani’s thesis of decentralized despotism and its importance as an analytical tool for assessing how customary law is developing in a democratic South Africa.

This paper argues that similar to other post-independence states, South Africa has engaged in extensive judicial and legislative customary law reforms that replicate colonial relations and structures. To do this, the paper is divided into five sections. Section 1 establishes the historical context of customary law within the mainstream South African legal system, briefly discussing the relevant legislation and its overarching purpose. In section 2, the paper moves on to look at the provisions of the Constitution that relate to customary law and, more generally, the importance of the right to culture as the constitutional premise of inclusion of customary law. Section 3 discusses Mamdani’s thesis of decentralized despotism and its importance as an analytical tool for assessing how customary law is developing in a democratic South Africa.

In section 4, the paper reflects upon some of the substantive and institutional developments in customary law in the current dispensation, and argues that recent reforms to customary law are not encouraging. Referring to specific examples, the paper illustrates two ways in which the state has failed to reform customary law: firstly, in a way that promotes the right to culture upon which it is based; and secondly, in a way that democratizes traditional institutions such as the courts to ensure that they protect and promote the interests of the communities they serve. The final section concludes by raising concerns about the potential for current reforms to leave people living under customary law to be treated as subjects and not citizens.

HISTORY OF CUSTOMARY LAW UNDER THE BLACK ADMINISTRATION ACT

The year 1927 marked a notorious milestone in the history of customary law in South Africa; it was the year the Black Administration Act (BAA) came into operation.5 The dual system of law created under the BAA established a separate and inferior system of justice for Africans and left the common law system of justice for all other South Africans. The BAA was designed to be comprehensive in reach, regulating administrative, judicial, and substantive matters such as the appointment...
of chiefs; the establishment of courts and their jurisdiction; and the determination of legal status, land registration and tenure, marriage, and succession. More generally, the BAA was the primary instrument for entrenching a uniform system of indirect rule in South Africa whereby traditional leaders became state agents in administering the affairs of those over whom they were appointed to rule.7

The BAA was an effective piece of legislation insofar as achieving its purpose to entrench the divide between black and white in South Africa. The BAA empowered native commissioners and traditional leaders to act with few limits, leaving little room to doubt that customary law was indeed an inferior system of law that took more than it gave to those subject to its jurisdiction.8 The egregiousness of the BAA ultimately undermined and brought into question the very legitimacy of traditional authority and customary law.

Rebirth of Customary Law under the Constitutional Dispensation

Due to customary law’s tainted colonial history, at the time of post-apartheid constitutional negotiations, it was far from a foregone conclusion that customary law would become South Africa’s constitutionally-ordained “other” system of law. Many were skeptical of the constitutional appropriateness of maintaining a dual legal system, especially as customary law was primarily applicable to one racial grouping. Moreover, skeptics criticized the traditional structures that were an integral part of its operation as undemocratic.9 Despite prevailing concerns and misgivings, it was decided that there were ample justifications to continue recognizing customary law and even grant it new elevated status. Firstly, there was the need to incorporate on an equal basis a legal system rooted in African cultural traditions. Secondly, a majority of South Africans identified and conducted their lives in accordance with customary law. Thirdly, there was already a functioning customary legal system that could become part of the state’s justice and administrative infrastructure.10

These justifications display a profound appreciation for the cultural significance of customary law. In particular, supporters of customary law’s incorporation into the Constitution perceived its potential to contribute to the mainstreaming of African culture and values into South Africa’s legal system. Professor Bennett, a leading customary law scholar, has asserted that from culture and values into South Africa’s legal system. Professor Bennett, a leading customary law scholar, has asserted that from culture and values into South Africa’s legal system. Professor Bennett, a leading customary law scholar, has asserted that from culture and values into South Africa’s legal system. Professor Bennett, a leading customary law scholar, has asserted that from culture and values into South Africa’s legal system. Professor Bennett, a leading customary law scholar, has asserted that from culture and values into South Africa’s legal system. Bennett has asserted that from culture and values into South Africa’s legal system. Bennett has asserted that from culture and values into South Africa’s legal system. Bennett has asserted that from culture and values into South Africa’s legal system. Bennett has asserted that from culture and values into South Africa’s legal system. Bennett has asserted that from culture and values into South Africa’s legal system. Bennett has asserted that from culture and values into South Africa’s legal system.

When applicable, “subject to the Constitution and any legislation that specifically deals with customary law.”

These constitutional provisions are collectively read as having sewn the roots for the rebirth of African customary law and making it an integral and coequal part of the South African legal system. It has thus been on this constitutional platform that developments and reforms in customary law have taken place. Before considering these reforms and developments, the paper briefly discusses Professor Mamdani’s thesis of how decentralized despotism, as one of the main defining features of colonial rule relative to customary law, has shaped the post-independence reform to this body of law.

Decentralized Despotism, Then and Now

In his highly regarded and equally provocative book, Citizen and Subject, Mamdani focuses on the role, function, and structure of native authorities and customary law within the colonial state.13 He calls the state form that colonial powers established for dealing with the native question a “decentralized despotism.” According to Mamdani, the colonial state was bifurcated:14 on the one hand, a centrally organized polity with rights and liberties, ruled directly by an appointed or elected governor almost invariably for white settlers;15 on the other, a decentralized native state inhabited by indigenous Africans or natives with few or no rights and liberties, ruled indirectly via chiefs appointed and maintained by the colonial administration.16

The core concept underlying the decentralized despotic state was the establishment of a second-tier legal and administrative order focused on asserting power over and control of the African population.17 To create this state form, the colonial power needed to establish institutional and political control over traditional authorities by developing a system of indirect rule that “created a dependent but autonomous state system of rule, one that combined accountability to superiors with a flexible response to the subject population, a capacity to implement central directives with one to absorb local shocks.”18 Second, the colonial power needed a second-tier legal and administrative order to maintain social control. Mamdani explains that “[c]ustomary law was not about guaranteeing rights, it was about enforcing custom. Its point was not to limit power, but to enable it.”19

Mamdani points out that, although the colonial powers realized the potential for certain customs to interfere with the colonial enterprise, the colonial state did not concern itself with determining the actual content of customary law. Instead, the colonialists co-opted and controlled traditional authorities in whom they conferred powers to decide the content of customary law.20 Despite having lost their original autonomy and power base, the traditional authorities were able to focus on dispensing customary justice with full knowledge that any challenge to their powers would be met with the might of the colonial state.21

Therefore, according to Mamdani, this particular legacy of colonialism — decentralized despotism — informed how the post-independence state developed its urban-rural/common law customary law divide. This divide goes way beyond the geographical or spatial; in many ways, it can represent the politics of inclusion and exclusion within a particular polity, much like
while the form as its preferred mode of governance.

REFLECTION ON MAJOR DEVELOPMENTS IN CUSTOMARY LAW

The primary aim of this section is to reflect upon both substantive and institutional developments in the area of customary law since its incorporation into the current constitutional state.

SUBSTANTIVE DEVELOPMENTS AND THE ENDURING PRIMACY OF THE COMMON LAW

At the start of the current democratic dispensation, the customary laws of marriage and succession were ripe for reform, since they were perceived as contributing to the subjugation and subordination of women. The result was to enact the Recognition of the Customary Marriages Act 120 of 1998 (RCMA) and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (RSCA) as read with the Intestate Succession Act 81 of 1987. The RCMA provided for the official recognition of customary marriages, both monogamous and polygamous, and affected marriages entered into before and after RCMA’s entry into force. Moreover, it established and formalized the requirements for a valid customary marriage, including the formalities of registration. In addition, in the context of the customary marriage, it declared that women were equal to their husbands for all purposes where previously they were regarded as perpetual minors. The statute also made all customary marriages automatically in community of property, with the exception of marriages entered into before RCMA’s commencement. Finally, the RCMA rendered the dissolution of a customary marriage actionable only via high court proceedings.

The reform of the customary law of succession was necessitated by the Constitutional Court case Bhe v Magistrate, Khayelitsha and Others, which declared unconstitutional the customary law principle of male primogeniture. Under the customary principle, the eldest male descendant of the deceased always stood to inherit to the exclusion of all females (including the wife) and younger surviving males. After Bhe and the RSCA, the surviving wife and all the deceased’s children are entitled to inherit their share as determined by the Intestate Succession Act 81 of 1987. The RSCA, amongst other things, stipulates who may inherit after an intestate death by departing from the concept of dependents who may inherit in the traditional African family structure.

Beyond legally reforming customary law, these statutes have gone a long way towards changing the substance of the respective customary laws to now closely mirror their common law counterparts. Apart from some idiosyncratic tinkering to accommodate polygyny and defining customary law in the widest of terms, there is now little substantive or procedural difference from the common law when it comes to customary marriage and succession.

The purpose of this paper is not to take umbrage with the common law or with the act of reformation. Rather, it is concerned with what reforms such as the ones described above do to further ossify perceptions of the inferiority of customary law vis-à-vis the common law, especially when one considers that the Constitution ostensibly creates a dual legal system. What is objectionable is not the idea of reform but that this type of substitution is termed a reform of customary law.

If one accepts that the continuing relevance of customary law is rooted in the constitutional rights to culture, as discussed above, then how can these reforms be justified if at heart they substitute common law, arguably with its own cultural orientation, for customary law? A knee-jerk response may be the so-called “reforms promote the right to equality.” This misses the point, however, for the right to equality derives from the Constitution and not the common law, and the Constitution envisages that customary law will be subject to its terms and not those of common law.

Chuma Himonga and Craig Bosch, in a paper that sought to encourage debate on the application of customary law, raise an important question that resonates with the concerns discussed in this paper. Concurring with the viewpoint that constitutional recognition of customary law is premised on the right to culture, the authors ask, “What customary law or version of customary law was envisaged by the Constitution?” Was it the living/unofficial or the state/official version of customary law? The
If customary law is rightly conceptualized in cultural terms, then there is a need to democratize the way it is reformed so that those closest to it have the ways and means to determine its content and its relevance to their lives, or equally to reject it where it no longer resonates with their sense of self.

Institutional Developments: Problems with Traditional Courts

Fifteen years after the commencement of the democratic era, the BAA has still not been repealed in full, although not for want of trying. Commencing in 2005, five repeal acts have sought to do this but failed. The main barrier is that Parliament has failed to deliver legislation on traditional courts, despite the fact that the South African Law Commission started this project in 1996 and produced a draft bill for Parliament to consider as far back as 2003.

In 2008, Parliament did introduce a Traditional Courts Bill, however in spite of vocal support from the numerous bodies representing traditional leaders and the Department of Justice and Constitutional Development, the bill failed to garner the necessary votes in Parliament. The bill’s problems were numerous, including that it envisioned a return to the primacy of traditional authorities strongly reminiscent of colonial times, and that it further marginalized rural women by leaving representation on the courts comprised mainly of hereditary male traditional leaders.

More generally, the extent to which the Traditional Courts Bill sought to accommodate the interests of traditional authorities and grant them sweeping powers is concerning. As crafted, the bill seemed to be centrally concerned with conferring power on traditional authorities and enhancing their status, thus leading one to conclude that powerful political considerations were driving the reforms at the expense of democratic principles and equal citizenship. The bill’s failure to place the community at the center of the scheme reconstituting traditional courts is most troubling. If the traditional courts are to be reconstituted in a manner that truly seeks to uphold democracy, then any future bill must be organized in a way that clearly regards community participation and interests as paramount. It would not be too far-fetched to say that the bill in the format published placed traditional authority within the mold of a reformulated, decentralized despotic state — only this time functioning within a non-racial, inclusive democratic state.

Conclusion

Political observers must take care not to make categorical declarations of failure or success so early in South Africa’s democratic project. This caveat, however, should not prevent us from evaluating how far South African society has come and where it appears to be going. The sound way forward is to seek guidance from others who have traversed a similar path, such as other former colonies, if only to learn from their mistakes.

Where customary law is concerned, there is a need to promote constitutional imperatives. There is also a need, however, to ensure that the changes are not delivered in a non-inclusive, top-down fashion that treats customary law and its institutions as outsiders and allows mechanisms of administration and control to be used by whomsoever is in power. Much care must be taken to ensure that in reforming customary law, we are not reproducing the bifurcated state form and decentralized despotism characteristic of a bygone era.

If customary law is rightly conceptualized in cultural terms, then there is a need to democratize the way it is reformed so that those closest to it have the means to determine its content and its relevance to their lives, or equally to reject it where it no longer resonates with their sense of self. Failing this, customary law...
may continue to be an incredible edifice rooted in its colonial legacy that perpetuates marginalization and exclusion of some confined to its strictures who remain subjects and sometime citi-
zens. Such a system that forces some members of the population to remain prisoners of an oppressive past should not be allowed to prevail unquestioned.

ENDNOTES: When Is the Past Not the Past? Reflections on Customary Law under South Africa’s Constitutional Dispensation

1. A dual legal system is one in which the state officially recognizes two different systems of law as applying within its territory at the same time. During the colonial period, these systems were the common law that applied to whites and African customary law that applied to blacks. According to van Niekerk, these “two officially recognized systems run parallel and interact in limited prescribed circumstances.” See G.J. van Niekerk, Legal Pluralism, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 5, 6 (J.C. Bekker, C. Rautenbach and N.M.I. Goolam, eds., 2nd ed. 2006). For a different conception see also Lesala L. Mofokeng, LEGAL PLURALISM IN SOUTH AFRICA: ASPECTS OF CUSTOMARY, MUSLIM AND HINDU FAMILY LAW (Hatfield, Pretoria: Vanshaik, 2009).

2. Although there is a general tendency in academic literature to differentiate between colonialism and apartheid, this paper uses the term colonialism to include apartheid because much of what commenced under colonialism with respect to customary law was simply continued or modified under apartheid. See also Maimood Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism 27-29 (Princeton Univ. Press 1996).

3. See T.W. Bennett, Customary Law in South Africa 77 (Juta 2003). Section 211 (3) of the Constitution Act 108 of 1996 provides that “the Courts must apply customary law when that law is applicable, subject to the Constitution and any other legislation that specifically deals with customary law.”


5. See Mamdani, supra note 2.


7. In section one of the BAA, the State President was appointed as Supreme Chief, in which capacity he or she had the right to recognize, appoint, and dismiss all other chiefs within the territory of South Africa. The major effect was that the traditional chiefs no longer required their subjects’ recognition and acceptance to enjoy legitimacy. Instead, they only required state recognition to be legitimate.


9. Id. at 109.

10. See Kaganas & Murray, supra note 4.

11. T.W. Bennett, supra note 3, at 78.

12. Id. These rights are subject to the important proviso that the rights may not be exercised in a manner inconsistent with the Bill of Rights.


15. Id. at 109.

16. Id.

17. Id. at 109-10.

18. Mamdani, supra note 2, at 60.

19. Id. at 110 (emphasis added).

20. Id. at 115-17.

21. Id. at 122-23.

22. Id. at 61. (“To stretch reality, but without stepping outside of the bounds of the real, the Africa of free peasants is trapped in a non-racial version of apartheid. What we have before us is a bifurcated world, no longer simply racially organized, but a world in which the dividing line between those human and those less human is a line between those who labor on the land and those who do not. This divided world is inhabited by subjects on the one side and citizens on the other; their life is regulated by customary law on one side and modern law on the other; their beliefs are dismissed as pagan on this side but bear the status of religion on the other; the stylized moments in their day-to-day lives are considered ritual on this side and culture on the other; their creative activity is considered crafts on this side and glorified as arts on the other; their verbal communication is demeaned as vernacular chatter on this side, but elevated as linguistic discourse on the other; in sum the world of the ‘savages’ barricaded, in deed as in word, from the world of the ‘civilized.’”).


25. Id. §§ 3, 4.

26. Id. § 6.

27. “In community of property” means that both spouse’s separate assets and liabilities from before the marriage become part of the joint marital estate, of which both spouses are joint owners with equal rights.

28. RCMA, supra note 24, § 7. The effect of this was that women married in terms of customary law did not enjoy the benefit of being equal to their spouses as far as matrimonial property was concerned. For all intents and purposes, as far as matrimonial property was concerned, it was as if the RCMA had never been passed. This position has been changed recently by the Constitutional Court in Gumede v President of South Africa 2008 (23) SA (CC) (S. Afr.) wherein all monogamous customary law marriages were declared to be in community of property irrespective of when they were entered into.

29. RCMA, supra note 24, § 8.

30. 2005 (1) BCLR 1 (CC) (S. Afr.).

31. For example, the RCMA has changed the nature of customary marriage (and the dissolution thereof) from essentially a private affair between two or more families into a public one that now requires registration; whilst the requirements for a valid marriage are now the