

RE-IMAGINING AND RE-INTERPRETING AFRICAN
JURISPRUDENCE UNDER THE SOUTH AFRICAN CONSTITUTION

by

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DECLARATION

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I declare that **Re-imagining and Re-interpreting African Law under the South African Constitution** is my own work and all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

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Date: 30 November 2013

I declare that the thesis **Re-imagining and Re-interpreting African Law under the South African Constitution** is of acceptable standard and can be submitted for examination by external examiners.

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FOREWORD

Before 1994 the common law originating in the West enjoyed the status of the law of the land in South Africa while the African law, in the manner in which it was studied, administered and applied was considered inferior to it and was tolerated on the same level as foreign law and only in so far as they were not repugnant to Western values and moral standards. The advent of the new dispensation ushered in by the first democratic election of 1994, brought radical changes to this unacceptable situation through the recognition of African law as a distinct and original source of law in its own right. Theoretically, this transformation elevated the status of African law to the same level as common law. In practice, South Africa's state institutions are struggling to live up to the promise of the Constitution.

The challenge is how to get South Africa's legal interpreters to shift their mindset from the colonial culture of undermining African law to accepting the new reality that it is now an independent source of law with its own unique value system. The courts have lost the luxury of choosing to apply African law as a matter of discretion and are enjoined to enforce it through a constitutional injunction as a credible component of South African law. A series of legislative and judicial decisions that have emerged from the highest legislative and judicial institutions testify to the difficulties attendant upon the substitution of a divergent indigenous metaphysical orientation for the hegemonic jurisprudence of the common law through the process of transformation.

Naturally institutional decisions would generate a vicious cycle of scholastic debate on the best way of effecting a cultural re-orientation in South Africa. In substituting constitutional supremacy for parliamentary sovereignty, a confusing context emerges in which an elusive balance must be struck between legislative and adjudicative powers in the process of mainstreaming indigenous values. The prize would be the achievement of an African renaissance in the form of the envisioned version of African jurisprudence that reflects the most hallowed indigenous values which give direction to a thriving justice system.

SUMMARY

The substitution of the dominant Western jurisprudence for South Africa's indigenous normative values during colonial and apartheid times has resulted in a perverted conception of law that presents Western jurisprudence as synonymous with law. In the era of the constitutional recognition of African law where the application of the democratic principle demands that the newly re-enfranchised African communities deserve to be regulated by their own indigenous values, the resilience of this legal culture has become problematic. To reverse this situation legal and constitutional interpreters must rethink and reshape their contributions to the achievement of the post-apartheid version of African law envisioned by the South African Constitution.

The application of African law in a free and liberated environment must reflect its own social, political and legal cosmology in which its institutions operate within their own indigenous frame of reference. A study of the anatomy of African jurisprudence as a means of gaining insight into the indigenous worldview which was characterised by the culture of communal living and the ethos of inclusiveness to counter the prevailing hegemony of autonomous individualism, has become urgent. To achieve this such pillars of African jurisprudence as the philosophy of *ubuntu* must be exhumed in order for African law's rehabilitation under the Constitution to be undertaken on the basis of its authentic articulation uncontaminated by colonial and apartheid distortions.

The task of developing the African law of the 21st century to the extent required by the Constitution is a challenge of enormous proportions which demands an appreciation of the historical and political environment in which African law lost its primacy as the original legal system of South Africa after Roman-Dutch law was imposed on the South Africa population. The revival of African law becomes more urgent when one considers that when Africans lost control of their legal system they had not abdicated sovereignty voluntarily to the newcomers. The validity of the imposition of Western jurisprudence is vitiated by the colonial use of such imperial acts as colonisation, conquest, and annexation as the basis on which the regime of Roman-Dutch law was imposed on South Africa.

Ever since, African law has been subordinated and denigrated through colonial and apartheid policies which relegated it, via the repugnancy clause, to a sub-system of Roman-Dutch law with whose standards it was forced to comply. The repugnancy clause left African law a distorted system no longer recognisable to its own constituency. The advent of the new dispensation introduced a constitutional framework for re-capacitating South Africa's post-apartheid state institutions to re-centre African law as envisioned by the Constitution. This framework has become the basis on which legislative and judicial efforts could rehabilitate the indigenous value system in the application of African law.

The courts of the new South Africa have striven to find the synergy between indigenous values and the Bill of Rights in order to forge areas of compatibility between African culture and human rights. An analysis of this phase in the development of African law, as evidenced by the present study, reveals successes and failures on the part of the courts in their efforts to rehabilitate African law in line with both its value system and the Bill of Rights. These findings lead to the conclusion that whilst South Africa's legislative and judicial institutions have not yet achieved the envisioned version of African law, there is an adequate constitutional framework through which they could still do so.

This study, therefore, recommends that the above institutions, especially the courts, should adopt a theory of re-indigenisation that would guide them as they proceed from the indigenous version of African law which is the basis on which to apply the Bill of Rights. The application of such a theory would ensure that the distorted 'official' version of African law which was imposed by colonial and apartheid state institutions is progressively discredited and isolated from the body of South African law and gives way to the version inspired by the Constitution.

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KEY WORDS/ACRONYMS:

A:	APPEAL COURT
AD:	APPELLATE DIVISION
AJ:	ACTING JUDGE
AJA:	ACTING JUDGE OF APPEAL
ALL SA:	ALL SOUTH AFRICA LAW REPORTS
ALR:	AFRICAN LAW REVIEW
ALRAEAS:	ASSOCIATION OF LAW REFORM AGENCIES OF EASTERN AND SOUTHERN AFRICA
BAA:	BLACK ADMINISTRATION ACT
BCLR:	BUTTERWORTH CONSTITUTIONAL LAW REPORTS
C:	CAPE PROVINCIAL DIVISION
CC:	CONSTITUTIONAL COURT
CCT:	CONSTITUTIONAL COURT
CILSA:	COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA
CJ:	CHIEF JUSTICE
C&O:	CAPE AND ORANGE FREE STATE
CPD:	CAPE PROVINCIAL DIVISION
DCJ:	DEPUTY CHIEF JUSTICE
DP:	DEPUTY PRESIDENT
ED(S):	EDITORS(S)
EJCL:	ELECTRONIC JOURNAL OF COMPARATIVE LAW
ET:	AND
EX PARTE:	THE ONLY INTERESTED PARTY
IBID:	THE SAME AS IMMEDIATELY ABOVE
IDEM:	THE SAME AS ABOVE BUT ON DIFFERNT PAGE
IN RE:	IN THE MATTER OF
J:	JUDGE
JA:	JUDGE OF APPEAL
JAL:	JOURNAL OF AFRICAN LAW

JHC:	JOHANNESBURG HIGH COURT
MEC:	MEMBER OF EXECUTIVE COUNCIL
NAC:	NATIVE APPEAL COURT
NHC:	NATIVE HIGH COURT
NO:	IN AN OFFICIAL CAPACITY
OBITER:	IN PASSING
OP CIT:	IN THE WORK CITED ABOVE
PAR(S):	PARAGRAPH(S)
RSA:	REPUBLIC OF SOUTH AFRICA
SA:	SOUTH AFRICAN LAW REPORTS
SACLR:	SOUTH AFRICAN CRIMINAL LAW REPORTS
SAJH:	SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS
SALJ:	SOUTH AFRICAN LAW JOURNAL
SAPR/PL:	SUID-AFRIKAANSE PUBLIEKREG/PUBLIC LAW
SCA:	SUPREME COURT OF APPEAL
SERSAS:	SOUTHEASTERN REGIONAL SEMINAR IN AFRICAN STUDIES
STELL LR:	STELLENBOSCH LAW REVIEW
SUPRA:	ALREADY CITED MENTIONED ABOVE
T:	TRANSVAAL PROVINCIAL DIVISION
TSAR:	TYDSKRIF VAN SUID-AFRIKAANSE REG
UCLA:	UNIVERSITY OF CALIFORNIA, LOS ANGELES
V:	VERSUS
VOC:	VEREENIGDE OOST-INDISCHE COMPAGNIE
VOL:	VOLUME
ZACC:	SOUTH AFRICAN CONSTITUTIONAL COURT
ZANWHC:	SOUTH AFRICA NORTH-WEST HIGH COURT
ZAGPHC:	SOUTH AFRICA GAUTENG PROVINCE HIGH COURT

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CHAPTER 1

BACKGROUND

1 Introduction

This thesis aims to offer a comprehensive and systematic study into how we may re-imagine and re-interpret African jurisprudence in South Africa's constitutional democracy against the backdrop of a dominant European legal superstructure, imposed upon the indigenous legal system after having been transplanted¹ to South Africa during the colonial period.² Questions about the persistence of Euro-Western dominance in directing legal developments in South Africa today, remain relevant in that the common law and African law spring from mutually alienated sources of civilisation – each founded on completely differing cultural and religious underpinnings.³

The pre-colonial peoples of South Africa were regulated by the indigenous normative order which derived its values from a uniquely African ontological metaphysics underpinned by an African frame of reference⁴ which generated an epistemologically

¹ The word “transplanted” generally refers to the introduction of a foreign legal system at a place where there was no legal system. Although indigenous law was already in place when the colonists implemented their law, the term is used advisedly in this context to expose the colonial arrogance of regarding the im position of Roman-Dutch law as a transplantation by treating it as the first legal system in South Africa.

² Van Niekerk GJ “Legal pluralism” in Bekker JC, Rautenbach C, and Goolam NMI (eds) Introduction to legal pluralism in South Africa (2006) 3 at 6. See also Rautenbach C “South African common and customary law of intestate succession: A question of harmonisation, integration or abolition” (2008) 12/1 *EJC L* 1 at 1, where she writes: “In spite of customary law being the law of the original inhabitants of this country, there has never been parity between the transplanted laws and the indigenous laws”.

³ Okafor FU “A philosophic reflection on African native laws” (1988) 22/1 *Journal of Value Inquiry* 39 at 41.

⁴ Juma L “From ‘Repugnancy to Bill of Rights’; African customary law and human rights in Lesotho and South Africa” (2007) 21/1 *Speculum Juris* 88 at 88 n 1, defines African law thus: “The term ‘African law’ is used interchangeably with ‘African customary law’. Both encompass the regimes of law variously described as ‘indigenous law’, ‘African customary law’, ‘tribal law’, ‘local law’, ‘native law’, ‘primitive law’, and ‘folk law’. In *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) (hereafter *Richtersveld Community*), the Constitutional Court uses the term “indigenous law”, however, in *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC) (hereafter *Shilubana 2*) it uses “customary law”. In *Bhe v The Magistrate Khayelitsha; Shibi v Sithole; Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC) (hereafter *Bhe-Shibi*) Langa DCJ uses the term “customary law”, whilst in the same case Ngcobo J uses “indigenous law”. In *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) Hlophe JP referred to this system as “African customary law”. In this thesis “African law” is preferred but is used interchangeably with “customary law” and “indigenous law”.

distinct life-world. The ensuing worldview moulded itself into the African tradition characterised by a shared communal life, a sense of common belonging, collective ownership of assets, and group solidarity – all of which combined to foster a distinctly African concept of justice, law and human rights.⁵

In the indigenous cosmic order, law and politics operated within a social system founded on a sense of justice that filtered state authority through the lenses of culture and religion which informed the propriety and acceptability of human conduct. Consequently, African culture, including African law, came to instil in each individual the consciousness of mutual dependence in a world which situated the value of “humaneness” or “being human” at its apex.

Colonisation brought this to an abrupt end by replacing African law with Roman-Dutch common law which evinced a profoundly different orientation. The colonists came as conquerors, and imposed their values on the conquered “natives” who were compelled to conform to these values in order to be counted among “civilised” people.⁶ This was a tall order for Africans, as no continent could pass a normative test set by the moral standards of another continent; especially when their respective norms represent two parallel worlds.⁷

This notwithstanding common law became the law of the land, while African law became its sub-system. Consequently, African law – whose values, rules, principles, concepts, and doctrines were based on the ethos of inclusivity – was distorted when forced to fit into the common law culture of exclusivity. African law distortions were encouraged through the infamous repugnancy legislative policy which ignored the inherent differences between these two civilisations by demanding compliance with common law values only.⁸

⁵ Ade Ajayi JF “Social justice in traditional African societies” in Falola T (ed) *Tradition and change in Africa* (2002) 3 at 5.

⁶ Allott AN “What is to be done with African customary law? The experience of problems and reforms in Anglophone Africa from 1950” (1984) 28/1&2 *JAL* 56 at 59, writes: “Obviously parts of the customary laws were due for suppression, in so far as they challenged British political overrule. Other parts were unacceptable if they did not meet British standards of humanity...” .

⁷ Okafor *op cit* 41.

⁸ Section 11(1) of the Black Administration Act (BAA) 38 of 1927 reads:
Notwithstanding the provisions of any other law, it shall be in the discretion of Commissioners’ Courts in

The operation of the repugnancy clause saw most of the indigenous values struck down for not conforming to the norms of the master system, which was, in fact, their competitor.⁹ The conformity requirement entailed consistency with the conqueror's sense of justice, regardless of its incongruity with its indigenous counterpart. Before the formation of the Union of South Africa in 1910, the constituent territories pursued varying repugnancy policies independently. This resulted in uneven levels of survival of African law content from region to region. Even after the Union was formed, black people were still not represented in state institutions. The whites-only legislature enacted legislation governing "native" administration that consolidated the repugnancy regime for the whole of South Africa.¹⁰

The Native Administration Act¹¹ (later renamed the Bantu Administration Act, and later still, the Black Administration Act) placed the African population of South Africa under a separate system of inferior justice that was dispensed by ill-prepared special courts manned by Native Commissioners. Each of these commissioners had statutory authority to strike down from African law, any rule, principle, concept or doctrine that appeared to him to be inconsistent with Western moral standards, save for the custom of *lobolobogadi*.¹²

The resulting "improved" version of African law was referred to as "official" law, as opposed to the "living" version which continued to be used by the adherents to the African system in their daily transactions. The former version enjoyed the force of law, yet it was neither African nor Western as the indigenous features that defined African

all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decided such questions according to the Black law applying to such customs except in so far it shall have been repealed or modified: provided that such Black law shall not be opposed to the principles of public policy or natural justice: provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles.

⁹ Bennett TW *Customary law in South Africa* (2004) 68 is of the opinion that the repugnancy clause was applied with restraint by the courts, and customary law was declared repugnant in only a handful of cases concerned with matters of "personal liberty, sexual immorality, succession by illegitimate children or sometimes plain injustice". The reality is that the repugnancy clause was an interpretive provision which was followed automatically by the courts without having to be raised and contested specifically in each case. Moreover, the courts were modelled on Western legal culture in which the lawyers and judges were trained, and therefore needed no encouragement in imposing common law values on the African indigenous normative system.

¹⁰ See section 11(1) of the Native Administration Act (now Black Administration Act) 38 of 1927.

¹¹ Act 38 of 1927.

¹² See section 11(1) of Act 38 of 1927 that was superseded by section 1(1) of the Law of Evidence Amendment Act 45 of 1988.

cultural institutions had to be removed for offending the moral convictions of the presiding Western officials.¹³

The applicable customs became value-denuded, and were applied within a disorienting set of Western norms that expunged any conflicting indigenous norms from their definitions. This led to apathy which saw many Africans refusing to participate in this dehumanising experience. They elected, rather, to conduct their legal transactions through the “living” law that had survived (though only just) as a virtual underground system until it was liberated through the demise of apartheid on 27 April 1994. “Living” law retained the indigenous communal features of the indigenous African society by continuously aligning its application with changing circumstances, until the interim Constitution acknowledged it as the African equivalent of the common law within the South African legal system.¹⁴

The advent of the interim Constitution as the supreme law of South Africa closed the debate about whether “official” law or “living” law is the African law of South Africa by recognising the version of African law that embraced the normative values of its constituency – the very ground on which it had been suppressed by the defunct oppressive colonial and apartheid systems. It did this by expressly referring to African law in sections 33, 35 and 181, as well as in the Thirty- Four Principles.¹⁵

These latter principles were negotiated by the Multiparty Negotiating Parties who participated in the constitutional discussions that produced the interim Constitution. This amounted to a national compromise to bind the drafters of the final Constitution to include the principles in its text. Significantly, the interim Constitution included the concept of *ubuntu* (which underlies African jurisprudence) in its post-amble as an appeal to South Africans to choose the promise of the future as an inspiration for overcoming the effects of the strife of the past.

¹³ *Ibid.*

¹⁴ See section 181 of the interim Constitution.

¹⁵ See also Himonga C and Bosch C “The application of African customary law under the Constitution of South Africa: Problems solved or just beginning?” (2000) 117 *SALJ* 306 at 309-312.

The 1996 Constitution of the Republic of South Africa¹⁶ from which both the common law and customary law¹⁷ derive their authority is the supreme law¹⁸ of the land. These two components of South African law come from a history of an institutionalised policy of unequal treatment in which African law was the victim of non-recognition.¹⁹ This skewed background raises the fear that unequal opportunities for development that were, in the past, tilted in favour of the common law at the expense of the African law, could continue if they are not adequately safeguarded.²⁰

After the adoption of the Constitution which accords equal status to both these legal components through the recognition of African law,²¹ South Africa's state institutions are now required to develop African law, and to assist it in overcoming the neglect of the past. Past failure to do this, resulted in the parallel existence of two versions of African law, namely, the Western oriented "official" version found in official documents and applied by the courts and the state, on the one hand, and the "living" version which is lived by its adherents in social practice, on the other.²²

In other words, South Africa's legislative and judicial institutions are challenged by their

¹⁶ Act 106 of 1996 (hereafter the Constitution). Zimmerman J "Reconstitution of customary law in South Africa: Method and discourse" (2001) 17 *Harvard Black Letter Law Journal* 197 at 197 says: "The post-apartheid South African Constitution is celebrated around the world for its unprecedented incorporation of international human rights norms".

¹⁷ African law is also known as customary law, indigenous law or African customary law. All these terms are used interchangeably in this thesis as a generic term denoting the various indigenous laws of sub-Saharan Africa. See also Van Niekerk "Legal pluralism" *op cit* 5. See further Juma *op cit* 88 where he says: "The term 'African law' is used interchangeably with 'African customary law' Both encompass the regimes of law variously described as 'indigenous law', 'African customary law', 'tribal law', 'native law', 'primitive law' and 'folk law'. These regimes are distinguished from all other bodies of law which fall under the rubric of 'western or modern law'. In western legal scholarship, the distinction is often drawn between 'formal' and 'informal law', while in contemporary gender based research, the difference between African law and western law is captured by the concept of semi autonomous social field."

¹⁸ Section 2 of the Constitution reads: "This Constitution is the Supreme Law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". See also *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674; 2000 (3) BC LR 241.

¹⁹ Bennett TW "The conflict of laws" in Bekker *et al Introduction* (2006) 15 at 17 writes: "[O]nly certain lower courts were allowed to apply customary law, and then only if it was compatible with public policy and natural justice". See also Van Niekerk "Legal pluralism" *op cit* 3.

²⁰ See *Gumede v President of RSA and Others* 2009 (3) BC LR 243 par 20.

²¹ Section 211 of the Constitution.

²² See Bennett TW "Re-introducing customary law to the South African legal system" (2009) LVIII/1 *American Journal of Comparative Law* 1 at 10 and Lehnert W "The role of the courts in the conflict between African customary law and human rights" (2005) 21 *SAJHR* 241 at 246.

constitutional obligations to re-imagine the envisioned version of African law that brings this dichotomy of versions (“official” and “living”) to an end by merging them into a single version based on customary practice. Under the conditions of constitutional recognition of African law, constitutional institutions must apply one and the same version of African law that is lived by its adherents as the recognised customary lawmakers.

This means that an innovative juridical re-conceptualisation of African law that reflects the system’s pre-colonial, colonial/apartheid, and the post-1994 stages of development, is required to replace the untenable dichotomy in which state law and people’s law ran parallel. In such a new version, modelled on the “living” law, the adaptability and flexibility of indigenous norms must be able to exist in harmony with compatible Western features of South African law within the Constitution’s superstructure as an indication that African law’s renaissance has been achieved

This is because by recognising African law, the Constitution has created conditions for the advancement of the former’s normative values in line with the Bill of Rights as a demonstration of the changed legal framework for redefining the new society that South Africa is aspiring to become. Indeed, the revival of indigenous values affirms the re-enfranchisement of the adherents of African law to full citizenship in the new South Africa.²³

This reinforces the notion that “living” African law is the appropriate model for shaping the envisioned version that must be developed as the part of the legal system for the re-awakening South Africa. The “living” law is constantly regenerating itself while it continues to grapple with new conceptions of democracy and human rights in the context of prevailing social issues, whilst the “official” version is lying fossilised in state records. For the same reasons, the “living” version also gives legal effect to, and is moulded by, contemporary traditions of the customary communities themselves, as opposed to the “official” version that subjects the customs of the people to the nefarious whims of elitist state institutions.²⁴

²³ See Bennett “Re-introducing” *op cit* 9.

²⁴ Sanders AJGM “How customary is African customary law” (1987) XX *CILSA* 405 at 409 argues: “As the life-world of the people changes, so do the rules and processes of autonomic customary law ... A striking example of modern African folk law is the emerging *jus commune* of South Africa’s black

1.2 The statement of the problem

The framework of the interim and the final Constitutions contain provisions aimed at enabling South Africa's legislative and judicial institutions to transform African law so as to reflect the version envisioned by the Constitution. For instance sections 33(2), 33(3) and 35(3) of the interim Constitution are instrumental provisions for the recognition of African law. Their significance lies in listing African law alongside common law and legislation as sources of South African law. In particular, these sections acknowledge the impact of the rights conferred by customary law on an equal level with those derived from other sources. Section 33(2) of the interim Constitution provides that no law, whether a rule of the common law, customary law or legislation shall limit any right entrenched in the Bill of Rights, save as provided for in the general limitation clause²⁵ or any other provision of the interim Constitution.

Section 33 of the interim Constitution is notable for the emphasis it places on the equality of African law rights with other entrenched rights. For example, section 33(2) provides that the rights in the Bill of Rights may not be limited by customary law rights. Similarly in terms of section 33(3) the entrenchment of the rights in the Bill of Rights shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with the entrenched rights.

In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of the Bill of Rights.²⁶ At the same time, section 33(3) makes it clear that the entrenched

townships, or 'people's justice' as it is termed. During 1985-1986, it was able to express itself openly, albeit 'unlawfully', through the 'people's courts'. After the declaration of a state of emergency, the people's courts were driven underground. However short their public life was, it lasted long enough to highlight current folk values, particularly with regard to the official administration of justice. Participatory and conciliatory justice is what the people's court aimed at. They saw as their task the repair of social ties and the awakening of people to their societal duties. Rule enforcement played only a secondary role. The participatory element of people's justice strengthened its conciliatory element. Tribalism and discrimination on the grounds of sex and marital status were discouraged. Women and unmarried men (traditionally 'minors') took an active part in the proceedings of the people's courts which, it should be added, were in the nature of people's gatherings or palavers rather than courts in the European sense of the word."

²⁵ See section 33(1) of the interim Constitution.

²⁶ See section 35(3) of the interim Constitution.

rights could also not be used to deny customary law rights. Section 35(3) seals the equality requirement between customary law and common law by demanding that courts interpreting both systems have due regard to the spirit, purport and objects of the Bill of Rights.

In addition to these provisions, section 31 of the interim Constitution entrenches African law as part of the right to practise African culture. This section protects the right of everyone to use the language and to participate in the cultural life of their choice.²⁷ Beyond the Bill of Rights, chapter 11 of the interim Constitution provides for the recognition of traditional authorities and their institutions subject to indigenous law.²⁸

In terms of section 181(1) a traditional authority which observes a system of indigenous law and was recognised by law immediately before the commencement of the interim Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority. However, section 181(2) provides that indigenous law shall be subject to regulation by law which exposes an underlying acceptance at the highest level of decision making that African law remains subject to Western law despite the recognition. If African law were law one would expect it to be subject to regulation by the Constitution at the very least, but certainly not subject to regulation by law.

Chapter 11 also attempts to integrate indigenous and Western institutions of governance. For example, in terms of section 182 of the interim Constitution, a traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government shall *ex officio* be entitled to membership of that local government, provided that he or she has been identified and recognised in accordance with the guidelines prescribed by the President by proclamation in the *Government Gazette* after consultation with the Council of Traditional Leaders established in terms of section 184(1) of the interim Constitution.

²⁷ See section 30 of the Constitution.

²⁸ See section 181 of the interim Constitution.

The interim Constitution also provides that the legislature of each province in which there are traditional authorities and their communities, shall establish a House of Traditional Leaders consisting of representatives elected or nominated by such authorities in the province. The legislature is further required to draft legislation providing for the establishment, composition, election or nomination of representatives, as well as their powers and functions.²⁹

This envisaged legislation had to be introduced in the provincial legislatures not later than six months after the election of its first Premier in terms of the interim Constitution. It was to provide for the procedures applicable to the exercise and performance of the powers and functions of traditional authorities, and for any other matters incidental to the establishment and functioning of such a House.

Section 184(1) of the interim Constitution established a Council of Traditional Leaders to advise and make recommendations to national government with regard to any matter impacting on traditional authorities, indigenous law or the traditions and customs of traditional communities anywhere in the Republic. Such a council was to be elected by an electoral college constituted by the members of the Houses of Traditional Leaders established in terms of section 183 and would advise the government on any parliamentary Bill having a bearing on traditional authorities, indigenous law or the traditions and customs of traditional communities.

Of particular significance was the inclusion of traditional authorities, indigenous law, and its institutions in the Thirty-Four Constitutional Principles set out in Schedule 4 to the interim Constitution. This schedule contained negotiated principles with which the final Constitution had to comply before it could be certified by the Constitutional Court as reflecting the agreed settlement about the future of South Africa. In so far as they are relevant to the recognition and protection of African law, the Constitutional Principles read as follows:

XI

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

²⁹ See section 183 (1) of the interim Constitution.

XII

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

XIII

- 1 The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.
- 2 Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.

Most significantly, the interim Constitution contained the epilogue “National Unity and Reconciliation” which introduced the epitome of African jurisprudence, the concept of *ubuntu*, as an antidote to the strife from which the country was emerging after centuries of colonial and decades of apartheid oppression.

The epilogue, National Unity and Reconciliation, reads:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.

The above constitutional framework for the recognition of African law provided by the interim Constitution was subsequently confirmed in the Constitution of the Republic of South Africa. Section 30 protects the freedom of everyone to use their language and

to participate in their cultural life of choice, subject to the proviso that no one exercising these rights may do so in a manner inconsistent with the Bill of Rights. This provision is reinforced by section 31 which extends this protection to cultural, religious and linguistic communities. Similarly, section 211 of the Constitution recognises the institutional status of traditional leadership that forms the bedrock for the promotion of cultural norms and standards.³⁰ In terms of this section the institution status and role of traditional leadership in accordance with customary law are recognised, subject to the Constitution.

Under section 211(2) of the Constitution, a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. More importantly, section 211(3) of the Constitution provides an injunction to the courts to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.³¹ In addition to these provisions, section 235 of the Constitution recognises the right to self-determination for all communities as follows:

The right of South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the right of self-determination of any community sharing a common culture, language and heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

According to the Constitutional Court the starting point for the framework for recognising African law must be sections 30 and 31 of the Constitution which entrench respect for cultural diversity.³² These sections must be read with section 39(2) which specifically requires the courts when developing African law to promote the spirit, purport and objects of the Bill of Rights. In so doing the courts must bear in mind that in terms of section 39(3) the Bill of Rights does not deny the existence of any African law rights or freedoms which

³⁰ See section 211 of the Constitution.

³¹ *Idem* section 211(3).

³² See *Bhe v The Magistrate Khayelitsha*; *Shibi v Sithole*; *Human Rights Commission v President of Republic of South Africa* 2005 (1) BC LR 580 (CC) para 41.

are not inconsistent with the Constitution.³³ These provisions must be understood in the light of section 211(3) of the Constitution, which lays down that African law must be interpreted by the courts, as answering to the contents of the Constitution. On this basis the court believes that African law is protected by and subject to the Constitution in its own right.³⁴ In this sense African law is subjected to the Constitution by section 2 thereof, and like the rest of South African law, cannot contain any inconsistent provisions.

Notwithstanding this elaborate constitutional framework African law and its normative values remain invisible because there are no legislative policies that acknowledge the need to apply them in a way that reveals their socio-political origins as the democratic imperative demands. There are, furthermore, no jurisprudential theories to assist the values or the law to resonate with the juridical aspirations of their adherents as required by the cultural imperative.

In their decisions, neither parliament nor the courts, clearly demonstrate a realisation that African law and common law reflect differing (sometimes divergent) normative value systems. Recent statutes and judgments reveal a persistence of an overwhelming dominance of the Western worldview³⁵ at both the ontological and epistemological levels of cognition. Consequently, African law rules, principles, concepts, and doctrines are often invoked from the perspective of an alien metaphysical environment which is both hostile and unresponsive to the psycho-cultural cosmos of the indigenous constituency.³⁶

This observation reveals that the real problem lies in the fact that the Constitution introduces a legal diversity which places common law and African law on par, whilst the prevailing legal culture remains tilted towards the continued dominance of the Western tradition. Since such legal culture itself is still untransformation the legislature and the judiciary continue to struggle to treat African law and common law as equals. Despite constitutional changes, these institutions persist in their use of the common law

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ See the Recognition Act and Customary Law of Succession Act as well as *Bhe-Shibi* and *Gumede supra*.

³⁶ See Okafor "A philosophic reflection" *op cit* 41.

perspective³⁷ as the lens through which to view African law. The magnitude of the problem leads one to doubt whether, in the context of the prevailing dominance of Western legal culture, it is possible to treat the recognition of African law as a constitutional imperative.

1.3 The aims and objectives of the study

The primary focus and point of departure in this thesis is to assess the extent to which the affirmation of the indigenous value system is being implemented by South African courts and the legislature.³⁸ The secondary purpose of the study, is to identify the causes for the persistence of substantive denial of the originality, uniqueness and distinctiveness of African law, and the conspicuous absence of its value system in the shaping of the emerging jurisprudence by legislative and judicial institutions in South Africa. The study proposes to achieve this through revisiting the reasons for the continuing inferior status of African law under the Constitution by raising the following questions:

- Why do African values continue to be treated as a “stepchild” of the common law system despite African law’s recognition in section 211 of the Constitution?
- Are the legislature and the courts doing enough to assert the African normative values when developing African law as mandated by section 39(2) of the Constitution?
- Are the legislature and the courts enforcing the cultural imperative to ensure the protection of cultural diversity in terms of sections 30 and 31 of the Constitution?

The objectives of the study are to:

- determine the extent of legislative and judicial commitment to the African value system as the appropriate frame of reference from which to interpret African law;

³⁷ See the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009; Recognition of Customary Marriages Act 120 of 1998.

³⁸ 2005 (1) BC LR 1 (C C).

- evaluate the level of institutional enthusiasm to project the indigenous legal postulates as the legitimate lenses for viewing African law in the legislative and judicial efforts to reverse the historical effects of cultural imperialism in South Africa;
- assess the extent to which legislative and judicial institutions have contributed in imprinting on the psyche of legal interpreters, the weight allocated to African law as an equal component in South Africa's legal space.

These objectives are essential in giving direction to the study of the ways in which the African value system can reclaim its rightful space by retrieving its best norms from the pre-colonial past as building blocks on which contemporary juridical transactions can be shaped under the Constitution.³⁹

1.4 Literature review

1.4(a) General

Before considering the debate among the various scholars on the role of African law in a transformed South African legal system, it is necessary to state clearly that the context is the tense power relations engendered by the colonial/apartheid history of projecting Western standards as a yardstick for measuring African values. The attainment of freedom in 1994, created the expectation that the African value system would have a chance of contributing to the development of South African law. Once so transformed, the legal system would be a platform on which to harmonise these two normative components to forge the version envisioned by the Constitution, without sacrificing the essence of either system.

This tension gained impetus with the promulgation of the 1993 interim Constitution which simultaneously recognised (Western-oriented) human rights and African law.⁴⁰ Meanwhile, the demise of apartheid pressurised those who favoured the Westernisation of African law through the discredited weapon of the repugnancy clause, to attempt to adjust their tactics towards reflecting the growing human rights crusade. At the same

³⁹ See Sanders *op cit* 409.

⁴⁰ See Himonga and Bosch *op cit* 310.

time, the lobby for the affirmation of African law and its so-called patriarchal tendencies spurred traditional leaders and their communities to launch a two-pronged campaign to discredit the interim Constitution as a Western document foreign to African culture,⁴¹ and to seek African law's exemption from the inevitable constitutional review process.⁴² On their failure to achieve any of these objectives, the traditionalists vowed to secure a guarantee that African law would be applied in the courts of the democratic South Africa. Therefore articles XI-XIII were negotiated to form part of the Thirty-Four Constitutional Principles in Schedule 4 of the interim Constitution, so as to entrench the position of African law in the final Constitution. These principles were negotiated as guidelines to the Constitutional Court when deciding on the authenticity of the final Constitution during the certification proceedings that would precede its approval.⁴³

1.4(b) *The application of African law in its indigenous setting*

In this literature review authors are broadly divided according to their perspectives on the African value system and its role in South Africa's constitutional democracy.⁴⁴ Firstly scholars such as Mqhayi,⁴⁵ Soga,⁴⁶ Setiloane,⁴⁷ Solilo⁴⁸ and Jolobe,⁴⁹ provide an insight

⁴¹ See Lehnert *op cit* 241.

⁴² See Bennett "Re-introducing" *op cit* 1.

⁴³ See Himonga and Bosch *op cit* 312.

⁴⁴ See Lehnert *op cit* 241; Bennett "Customary law" *op cit* 1; Himonga and Bosch *op cit* 306; Herbst M and Du Plessis W "Customary law v common law marriages: A hybrid approach in South Africa" (2008) 12/1 *EJC L* 1; Grant E "Human Rights, cultural diversity and customary law in South Africa" (2006) 50/1 *JAL* 1 at 3; Nhlapo T "Human Rights – The African perspective" (1995) 6/1 *ALR* 38; Pieterse M "Killing it softly: Customary law in the new constitutional order" (2000) *De Jure* 35 at 36; Kaganas F and Murray C "The contest between culture and gender equality under South Africa's interim Constitution" (1994) 21/4 *Journal of Law and Society* 409 at 410; Van Niekerk GJ "Indigenous law and the constitutional right equal protection and benefit of the law" in De Villiers B (ed) *The rights of indigenous people: A quest for coexistence* (1997) 207; Kerr AJ "The Bill of Rights in the new Constitution and customary law" (1997) 114 *SALJ* 346. The following foreign writers can also contribute to this debate, namely, Chanock M "Neither customary nor legal: African law in an era of African law reform" 1989 *International Journal of Law and the Family* 72 at 73; Deveaux M "Liberal constitutions and traditional cultures: The South African law debate" (2003) 7/2 *Citizenship Studies* 161 at 161. Raday F "Culture, religion, and gender" (2003) 1/4 *ICON* 663 at 663; Chirayath L, Sage C and Woollock M "Customary law and policy reform: Engaging with the plurality of justice systems" Paper prepared for the World Development Report: Equality and Development (2006); Verhelst T "Safeguarding African customary law: Judicial and legislative processes for its adaptation and integration" Paper posted at the U C LA International Institute (1970) 5.

⁴⁵ See Mqhayi *SEK Ityala lamawele* (1914).

⁴⁶ See Soga TB *Intlalo kaXhosa* (1935).

⁴⁷ See Setiloane GM *The image of God among the Sotho-Tswana* (1976).

⁴⁸ See Solilo J "Izinto Zekomkhulu LamaXhosa" (translation – "Xhosa royal symbols") in Bennie WG (ed) *Imibengo* (1935) 219.

⁴⁹ See Jolobe JJR "Umsenzi Wabafazi Kwisizwe Esintsundu" (translation – "The role of women in African society") in Bennie *op cit* 208.

into the value system that underpinned the African tradition of group solidarity and communal interest during the pre-colonial period. Their writings refer to an era characterised by lack of self-interest, where people's access to resources was directed by shared entitlement arising from claims of common belonging to their collective households. Their works describe a system that constrained the power of decision makers to the exigencies of common interest.

Mqhayi demonstrates how the metaphysical environment in which elders, men, women, and the youths interacted in their efforts to resolve social issues.⁵⁰ Mqhayi's work also shows the flexibility of the notion of rules in overcoming the adverse effects of patriarchy and other social ills in the protection of individuals within the communal life of the Africans. Solilo looks at the way in which religion and culture interacted to create an order in which the decisions of the living were ultimately sanctioned by the living-dead and the gods. This explains the paucity of crime and the survival of people in a system that combined law and religion without formal government structures such as the police, courts and public service.

Jolobe shows that technological developments affect culture, and can alleviate the oppression of women living under African tradition. According to him, the advent of the era of draught animals and vehicles to draw water and cultivate crops meant that men could take over the various chores that were traditionally reserved for women. Setiloane looks at the African concept of God, and shows how the indigenous religion fostered the observance of the custom of initiation that produced men and women of integrity who kept order and promoted prosperity among the Sotho/Tswana communities.

Soga's contribution glorifies the African culture by showing how the advent of colonisation, together with its instruments such as Westernisation, Christianity and "civilisation", resulted in substitution of a dysfunctional European value system for the African one. This contribution expresses a resentment of the distortion of African culture based on the usurpation of the African decision making powers by colonial officials who adjudicated on customs about which they knew very little, and understood still less.

⁵⁰ See Mqhayi *op cit* 51-52.

1.4(c) *The application of African Law under Colonial and Apartheid legislation*

A different set of scholars are those who view African law as it was applied in colonial and apartheid times. Among them are Kerr,⁵¹ Bekker⁵² and Bennett⁵³ whose works focused on the application of colonial and apartheid legislation in the courts. These scholars treated legislation that regulated the application of African law, and the courts' interpretation of it, as the true African law. This view of African law became distorted because legislation and court decisions that were conceived from the extra-cultural worldview of the colonial/apartheid officials constituted its major sources.

1.4(d) *The view that the Constitution perpetuates the inferior status of African law*

Thomas and Tladi are disillusioned by the Constitution's endeavour to force a reconciliation of the irreconcilable principles of African law and international human rights law.⁵⁴ They view the constriction of African law through the Bill of Rights as a recantation of the repugnancy dispensation. Thomas and Tladi see the imposition of Western notions of human rights on African law in the Bill of Rights, as subjecting African culture to the same opprobrium that existed under apartheid. For that reason they perceive the recognition of African law as nothing more than palliative, since the same censorship based on Eurocentric morality and public policy in the past, is now perpetuated under the Bill of Rights.⁵⁵ Such sentiments are echoed by Koyana and Mqeke,⁵⁶ for whom the retention of a repugnancy clause in section 1(1) of the Law of

⁵¹ See Kerr AJ "Inheritance in customary law under the Interim Constitution and under the present Constitution" (1998) 115 SALJ 262.

⁵² See Bekker JC *Seymour's customary law in southern Africa* (1989).

⁵³ Bennett TW *Customary law op cit* 357 writes: "Under customary law, the death of the family head leaves his wife and daughters dependent on the goodwill of a man who might be a comparative stranger, for the heir is not necessarily the widow's natural son. Moreover, in a typically self-serving interpretation of the patriarchal tradition, an heir may claim that the widow cannot be owner of property she brought in to the marriage. He may then claim that he is entitled to such property as successor to his father's estate. As notional owner, the heir can dispose of it for his own purposes, paying only lip service to the duty to consult the widow. She must put up with this situation, because, if she leaves, she loses any right to support." Unfortunately, Bennett uses lack of enforcement of customary law rules under colonial/apartheid rule, which worked well under indigenous rule, as the weakness of customary law itself.

⁵⁴ See Thomas PJ and Tladi DD "Legal pluralism or a new repugnancy clause" (1999) XXXII C/LSA 354 at 361.

⁵⁵ *Ibid.* See also Juma *op cit* 90.

⁵⁶ Koyana DS and Mqeke RB "Traditional authority courts" in Bekker *et al* (2006) *op cit* 131 at 143, write: "In addition, the repugnancy clause remains in place as ever before, whereas on attainment of independence it was abandoned in many countries. It was considered unfitting to the dignity of the indigenous laws of the people of those countries to suggest the repugnancy existed. In South Africa,

Evidence Amendment Act 45 of 1988 and section 211(3) of the Constitution which subjects the application of African law to applicable legislation illustrates the resilience of the old order.⁵⁷

For Mqoke the Constitution has not improved the status of African law, since old order legislation such as section 1(1) of the Law of Evidence Amendment Act, which subjects the interpretation of the African law to common law values remains intact. This is borne out by the fact that the repugnancy clause of the past co-exists with the new Bill of Rights, both of which treat African culture with the same level of opprobrium. Consequently, Koyana and Mqoke see no difference between the customary law of the old order and its post-1994 manifestation. This is echoed by Bennett who also decries the retention of the repugnancy proviso in the new order, and suggests that it is due only to some legislative oversight that it is still on the statute book as it has no role in the present era. He reckons that African law today needs only to be consistent with the Bill of Rights.⁵⁸ As far as Bennett is concerned, the repugnancy clause merely serves as a hoary reminder of colonial rule.⁵⁹

1.4(e) *The view that African values are inconsistent with the South African Constitution*

Keveey,⁶⁰ English,⁶¹ Kroeze⁶² and others see African law and its value system as irreconcilable with the South African Constitution and international human rights.⁶³

the repugnancy clause is still applied. It is presently contained section 1(1) of the Law of Evidence Amendment Act. Its application is further secured by section 211(3) of the Constitution, which directs the courts to apply customary law subject to the Constitution and to existing legislation, and thus subject to the repugnancy clause in the Law of Evidence Amendment Act. The problem with the repugnancy clause is that it imposes Western values on customary law." Notwithstanding these strong views from the authors, recent case law suggests the contrary with regard to the application of the apartheid-era repugnancy clause. Indeed *Alexkor supra* par 51, *Bhe 2 supra* par 43, *Gumede supra* par 43 and *Mabuza supra* par 30 authoritatively lay down that the time for looking at customary law with common law lenses is over.

⁵⁷ Juma *op cit* 88 states: "[A]frican law subsists on the fringes of juridical activism, its authority and content articulated within the narrow margins of utility provided by pluralism. But even within this narrow space, African law still has to contend with 'morality' standards pegged on a human rights culture underwritten by regimes of international law."

⁵⁸ See Bennett "Re-introducing" *op cit* 2.

⁵⁹ *Ibid.*

⁶⁰ See Keveey I "Ubuntu versus the core values of South African Constitution" (2009) 43/2 *Journal of Juridical Science* 19.

⁶¹ See English R "Ubuntu: The quest for an indigenous jurisprudence" (1996) 12 *SAJH* 641.

⁶² See Kroeze I "Doing things with values II: The case of ubuntu" (2000) 2 *Stellenbosch LR* 26.

⁶³ See Keveey *op cit* 19.

Keveey, in particular, denies that *ubuntu* is in consonance with the values of South Africa's new constitutional order because, as the basis of African law, it sustains the deep-seated patriarchal hierarchy which entrenched inequality in African society. Keveey finds the judgments of the Constitutional Court in *S v Makwanyane*⁶⁴ and *Bhe v The Magistrate Khayelitsha*⁶⁵ contradictory in that whilst the former stresses harmony between *ubuntu* and the Constitution,⁶⁶ the latter paints a gloomy picture of patriarchy in African law that derives its potency from *ubuntu* which, in turn, reserved for women a position of perpetual minority. Despite his acknowledgement of the consistency among judges and scholars who confirm the synergy between *ubuntu* and the core values of the Constitution, Keveey questions this consonance and concludes that both African values and their belief system trump and erode the core values of the Constitution.⁶⁷

Similarly, English views the campaign for the jurisprudence of *ubuntu* as a rather desperate effort to find a legitimate African imprimatur for indigenising the set of civil liberties listed in the Bill of Rights. He is, however, not convinced that any of these attempts has succeeded in establishing a guiding constitutional norm for deciding the side on which *ubuntu* would prevail when the interests of the individual and those of the community are in balance.⁶⁸ For English, the high levels of rationality and justice in ancient societies in Africa that Justice Sachs acclaims in various judgments, should not mean that *ubuntu*, without further evidence of its efficacy, can dictate the invalidation of validly enacted legislation.⁶⁹

English also regrets that all that *ubuntu* can contribute in the post-apartheid enthusiasm for indigenisation, is to provide an opportunity for reconciliation when, in fact, what is called for is revenge.⁷⁰ English insists that since constitutional adjudication is about conflict, the resurrection of *ubuntu* from desuetude in an effort to promote "a specifically ethnic South African jurisprudence is bound to fail".⁷¹

⁶⁴ 1995 (6) BC LR 665 (C C)

⁶⁵ 2005 (1) SA 580.

⁶⁶ *Idem* par 237.

⁶⁷ See Keveey *op cit* 21 and 53.

⁶⁸ See English *op cit* 642.

⁶⁹ *Idem* at 645.

⁷⁰ *Idem* at 646.

⁷¹ *Idem* at 648.

1.4(f) *The view that there is a synergy between the African value system and the South African Constitution*

The majority of South African scholars would, however, like to see the values of African culture respected through the mainstreaming of the jurisprudence of *ubuntu* as the premise from which South African law can be transformed. In accordance with this view, there is demonstrable harmony between indigenous norms that are warehoused in the concept of *ubuntu*, and the Bill of Rights. Among these scholars are Mahao,⁷² Dlamini,⁷³ Nhlapo,⁷⁴ Juma,⁷⁵ Pieterse,⁷⁶ and others, all of whom believe in the ability of African jurisprudence to provide answers to today's legal and political challenges. Mahao challenges the impression created by the detractors of African culture that African jurisprudence is conservative and is inconsistent with the South African Constitution.⁷⁷ In amplification, he conflates African jurisprudence with *ubuntu/botho* which he regards as the very root of African humanism and the epitome of homocentricity in African philosophy.⁷⁸

Mahao proceeds to challenge African scholars to consider African jurisprudence as a valuable source of insights for reimagining ways for resurrecting the continent's failed development project, and for reviving the hopes for democracy, human rights, and social cohesion currently under threat from neo-liberal globalisation.⁷⁹ Such conditions demand a distillation of *ubuntu/botho* as a normative value system that could assist in reinventing contemporary state institutions in the image of Africa's indigenous institutions.⁸⁰ Mahao proceeds to call upon African scholars to direct their attention towards African jurisprudence as a strategy by which to restore democratic accountability, indivisible human dignity, and social cohesion which traditionally nurtured a symbiotic synergy between the limits of royal power and the extent of popular enfranchisement.⁸¹

⁷² See Mahao NL "O se re ho morwa 'morwa towe!' African jurisprudence exhumed" (2010) X LIII/3 *CILSA* 317.

⁷³ See Dlamini CRM "The clash between customary law and universal human rights" (2002) 1/1 *Speculum Juris* 26.

⁷⁴ See Nhlapo "Human Rights" *op cit* 38.

⁷⁵ See Juma *op cit* 89.

⁷⁶ See Pieterse "Killing it softly" *op cit* 35.

⁷⁷ See Mahao *op cit* 318.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Idem* 3.

⁸¹ *Idem* 3-14.

In its unique way, indigenous governance bound royal power to popular approval through mass participation in all decisions that were taken during a free expression of ideas.⁸² Mahao defines human dignity in the African context as comprising physical, spiritual, cultural and, material wellness, which was the nucleus of humaneness in the pursuit of indigenous statecraft. The preponderance of these qualities in the African judicial tradition paved the way for the development of restorative justice.

Mahao illustrates how King Moshoeshe of Lesotho prevailed against calls for the imposition of the death penalty on convicted murderers driven to cannibalism by material deprivation unleashed by the *difaqane/imfecane*⁸³ catastrophe. The strength of the ethic of restoration in African jurisprudence in which humanism meant treating the worst criminal mercifully, formed the basis for the king's insistence on the value of forgiveness in the face of national outrage against the criminals.⁸⁴ This reconciliatory attitude provides an historical response to English who remains unconvinced of the wisdom of choosing forgiveness in the face of calls for revenge.⁸⁵

Mahao goes back in history to illustrate *ubuntu's* notable record in the distribution of social justice in traditional societies. He joins Soga in blaming the decay of African culture and its value system on colonisation which concentrated on re-crafting African culture in the image of the corruptible Western civilisation. Mahao links this form of cultural imperialism to the grave co-existence of civil rights with material wretchedness; and blames it on the absence of *ubuntu/botho* in modern democracies.⁸⁶

In the same vein, Soga blames the downfall of traditional governance and its institutions on lawyers and magistrates (including judges) who usurped the judicial functions of traditional authorities by making decisions on indigenous institutions about which they never had sufficient understanding, such as *lobolo*, traditional marriages, initiation, rituals,

⁸² *Ibid.*

⁸³ Mahao *op cit* 319 explains *difaqane* as the “[s]ocial upheavals caused by wars among the African communities of southern Africa by the end of the second decade of the nineteenth century. These led to the emergence and consolidation of new nations in the region.”

⁸⁴ *Idem* 330-331.

⁸⁵ See English *op cit* 644.

⁸⁶ Mahao *op cit* 326.

royalty and succession.⁸⁷ For Soga, the imposition of the Western-style of governance, which substituted money and prisons for cattle as forms of punishment, served to divert the wealth generated by litigation from its traditional social beneficiaries, to lawyers who became rich but had no social responsibility towards the poor.⁸⁸ Under the indigenous system wrongdoers were fined cattle which were then distributed to the poor.⁸⁹

Both Soga and Mahao reminisce about the days when the traditional institutions handled their own affairs with dignity, and deplore the loss of respect for the African tradition, and the demise of its structures which has seen them replaced by inadequate Western institutions.⁹⁰ These scholars insist that African traditional institutions were successful in socio-economic redistribution. Socio-economic distribution was the source of the deep respect and esteem that the traditional governments enjoyed in the pre-colonial period. Mahao likewise refers to the time of the *imfecane/difaqane*⁹¹ brutalities, to illustrate the genius of home-grown African humanism which generated hope for scores of people under conditions of utter traumatising that would have dwarfed the capacity of today's self-serving Western institutions.⁹²

African tradition imposed the responsibility on everyone so that no one could be an island in life. Mutual dependence was a human rights value which instilled in the minds of all Africans that *umuntu ngumuntu ngabantu/motho ke motho ka batho* (translation – a person is a person because of others).⁹³ This sense of community compelled everyone to treat other people as he/she would like to be treated. The kinship networks that this interrelationship generated extended beyond relatives, to include strangers, and indeed enemies.⁹⁴

⁸⁷ See Soga *op cit* 94.

⁸⁸ *Ibid.*

⁸⁹ *Idem* 94-95.

⁹⁰ See Soga *op cit* 94 and Mahao *op cit* 330.

⁹¹ These terms refer to the huge social, political, economic and humanitarian upheavals sparked by the formation of the Zulu Kingdom in the early 19th century that shook the foundations of all institutions in the southern and central African regions. Mahao *op cit* 319 erroneously fixes the turmoil in the first quarter of the 18th century. In fact this was the 19th century as the height of *defaqane/imfecane* was during the decade 1820-1830.

⁹² Mahao *op cit* 319.

⁹³ *Ibid.*

⁹⁴ *Ibid.* See also Biko S "Some African cultural concepts" in Coetzee PH and Roux AP (eds) *Philosophy from Africa – a text with readings* (1998) 26. At 28 he writes: "Poverty was a foreign concept ... In almost all instances there was help between individuals, tribe and tribe, chief and chief, etc. even in spite of war."

Dlamini insists that, properly understood, the concept of *ubuntu/botho* is in fact synonymous with human rights;⁹⁵ and proceeds to demonstrate judicial support for the impossibility of the notion of the conflict between African law and human rights. Dlamini refers to the judgment in *S v Makwanyane*, where Madala J held that the Constitution owes its human rights attributes to its permeation by the spirit of *ubuntu* (that is the source of African values).⁹⁶

According to Pieterse, so important is the role of *ubuntu* in African jurisprudence, that no text can be complete without it.⁹⁷ He attributes the significance of this concept to various academic⁹⁸ and judicial⁹⁹ efforts to lend legitimacy to South Africa's post-apartheid jurisprudence which needs to forge common ground between the Constitution and indigenous values.

Nhlapo believes that the future of South African law lies in the integration of the culture of the majority of the country's inhabitants¹⁰⁰ as the basis for the transformation of the national value system. Like Mahao, Nhlapo fingers the Western-oriented international human rights movement for re-creating the world in the image of the west. Consequently Nhlapo cautions that such universalisation of Western norms threatens to swamp African culture once and for all.¹⁰¹ According to Nhlapo, these inequalities in the administration of human rights, have alienated many Africans who perceive them as suggesting that theirs was a delinquent culture that needed to be fixed by a "superior one".¹⁰²

⁹⁵ See Dlamini *op cit* 46.

⁹⁶ *Idem* 44 referring to *S v Makwanyane* 1995 (4) SAC LR 1 (C C) pars 238-245.

⁹⁷ See Pieterse M "'Traditional' African jurisprudence" in Roederer C and Moellendorf D (eds) *Jurisprudence* (2004) 438 at 441.

⁹⁸ Some of the academics who expressed themselves on the concept of *ubuntu* are Van Niekerk GJ "A common law for southern Africa? Roman law or indigenous African law?" (1998) 31 *CILSA* 159 at 168-169; Mokgoro Y "Ubuntu and the law in South Africa" Paper delivered at the first colloquium Constitution and Law held at Potchefstroom on 31 October 1997; available at <http://www.puk.ac.za/lawper/1998-1/mokgoro-ubuntu.html> 1; English *op cit* 641; Kroeze I "Doing things with values: The role of constitutional values in constitutional interpretation" (2001) 12 *Stellenbosch LR* 265; Lenta P "Just gaming? The case for postmodernism in South African legal theory" (2007) 17 *SAJH R* 173; Cockrell A "Rainbow jurisprudence" (1996) 12 *SAJHR* 1; Klug H *Constituting democracy: Law, globalism and South Africa's political reconstruction* (2000).

⁹⁹ Among the earliest court judgments involving *ubuntu* are *S v Makwanyane and Another* 1995 (3) SA 391 (CC); *AZAPO v President of RSA* 1996 (4) SA 671 (CC) and *Hoffman v South African Airways* 2001 (1) SA 1 (CC).

¹⁰⁰ See Nhlapo "Human Rights" *op cit* 38.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

For Nhlapo this is reminiscent of the approach of European missionaries of some hundred years ago, whose technique of cultural imperialism was to bombard blacks with lectures about their “backwardness”. Like Dlamini, Nhlapo suggests that the first step is to strive to deepen one’s understanding of African culture in order to appreciate what was good in it, and what has perverted it.¹⁰³ He suggests that the vital step towards the achievement of the envisioned version of African law, is to isolate the colonial/apartheid distortions from the non-racial and democratic norms of “living” African culture that harmonise with the Constitution.¹⁰⁴ This is important because the legitimacy of the post-apartheid legal system in South Africa depends on the incorporation of the African experience, although it is viewed as controversial in the context of the history of South Africa.

Some have whipped up greater controversy by relying on the “official” version of African law as ostensibly protecting culture.¹⁰⁵ This is because the “official” version developed through the connivance of colonial authorities and African male elders, to invent a distorted tradition in which the latter gained exaggerated control over women and children under colonialism/apartheid.¹⁰⁶ This revelation exposes the colonial origins of patriarchy in African law, and belies Keveey’s thesis of an inherent disharmony between African culture and human rights. It further illustrates the danger of relying on distortions in the formulation of a critique of African philosophy.¹⁰⁷

In Nhlapo’s diagnosis of the problem, the culture of individualism in which human rights lessons are presented, is for many Africans reminiscent of “Westernisation”, which historically lacks respect for the African viewpoint.¹⁰⁸ In contrast to Keveey’s campaign for the discarding of African jurisprudence, Nhlapo believes that African support for the human rights project is possible, especially if enlisted after convincing the majority of the role of the indigenous value system in influencing South Africa’s constitutional norms. For Nhlapo, a good strategy for an acceptable concept of human rights would

¹⁰³ *Idem* 39.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Idem* 40.

¹⁰⁸ *Ibid.*

entail reassuring people that the title they hold in their rights is an entitlement, not a privilege that was enjoyed on sufferance.¹⁰⁹

Such a reassurance imbues people with a vision of a South Africa that does not exploit individuals and groups for the benefit of a particular segment of society.¹¹⁰ Nhlapo emphasises the Constitution's wisdom in positioning African law on par with the general law, whilst guaranteeing the right to culture and subjecting both to the Bill of Rights.¹¹¹ He then formulates his own understanding of the tension between the two legal cultures in South Africa as follows:

The [relationships] that have ethnicity and/or culture at their centre are the ones which suffer most from the legacy of the past. African customary law is doubly vulnerable. The imperatives of transformation require that this law not only re- negotiate its own content, but also the "political" relationship between itself and the rest of the legal system. This has to be done against the background of a dominant legal system and a dominant culture whose relationship with African culture has not in the past been very positive.¹¹²

Nhlapo characterises the tension that persists between the Western notion of retributive justice, and the traditional African concept of restorative justice, as the conflict between the classical "Western" approach where the task of the court is to adjudicate and punish; and those African notions reflecting values of reconciliation, restoration, and compromise.¹¹³ He then notes that the value of restorative justice is deeply embedded in African thinking, and that its incorporation into the mainstream would lead to an improved administration of justice.¹¹⁴

He further suggests that this could be achieved by regularising, strengthening, and enhancing the judicial function of the institution of traditional leadership, because African traditional methods of dispute resolution have always involved a strong

¹⁰⁹ *Idem* 41.

¹¹⁰ *Ibid.*

¹¹¹ Nhlapo T "The judicial function of traditional leaders: A contribution to restorative justice?" Paper presented at the Conference of the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) 14-17 March (2005) 2.

¹¹² *Idem* 3.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

restorative element.¹¹⁵ By emphasising the value of mainstreaming African thinking and the benefits of restorative justice, this would contribute to the legal system.

Nhlapo's views challenge both the Afro-pessimistic campaign by Keveey, and English's nihilistic approach to African history. Nhlapo sees no disharmony between African culture and the Constitution, but acknowledges the historical tension between the Western and African cultures. He develops what he calls the "paradigm of argument", to demonstrate the uniqueness of African thinking in the conduct of indigenous judicial proceedings.¹¹⁶

1.4(g) The view that the African justice system seeks to resolve the problems between the victims of crime and the offenders

Writing from their Nigerian perspective, Elechi¹¹⁷ and Ajayi¹¹⁸ embrace all the views expressed by Nhlapo regarding the grip of indigenous values on traditional institutions of social control in Africa, which have endured despite Africa's entanglement in the colonially-sponsored justice system. These scholars regard Western institutions as alien,¹¹⁹ prone to abuse and corruption, and antithetical to the African concept and practice of justice.¹²⁰

The resilience of the principles of the African indigenous justice system, lies in the fact that it is community based, human centred, and employs restorative and transformative methods which involve victims, offenders, and the community as participants in the

¹¹⁵ *Idem* 4.

¹¹⁶ To illustrate this Nhlapo T "The judicial function of traditional leaders: A contribution to restorative justice?" Paper presented at the conference of the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) 14-17 March (2005) 2 at 6 says: "At its most fundamental, the rule centred paradigm is grounded in a conception of social life as rule-governed and of normal behaviour as the product of compliance with established normative concepts. Consequently, [a] dispute acquires a pathological character; it signals deviance, a malfunction that the control institutions of a society are essentially designed to put right. Associated with this view of order is the contingent assumption, which goes a long way back in political theory that societies do not cohere effectively in the absence of centralised authorities, which formulate rules and ensure conformity with them."

¹¹⁷ See Elechi O O "Human Rights and the African indigenous justice system" A paper presented at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8-12 (2004) at Montreal, Quebec, Canada).

¹¹⁸ See Ade *op cit* 3.

¹¹⁹ See Elechi *op cit* 1.

¹²⁰ *Ibid.*

definition of harm, and the search for conflict resolution.¹²¹ These scholars reject the illusion that pre-colonial Africa had no concept of human rights. This view amounts to a denunciation of Keevey's thesis that the African concept of *ubuntu* is in conflict with idea of human rights.¹²²

Elechi dismisses the latter perception as generating questions as to whether current African institutions of justice are capable of protecting the rights of litigants and suspects. Such questions, in turn, derive from the skewed notion that human rights are the product of Western liberal regimes, which ignore the role of African culture in the conception of the worldview in which the administration of justice is playing out.

In Elechi's view, the goal of the African indigenous justice system is the restoration of human rights, dignity, interests, and well-being of victims, offenders, and the entire community.¹²³ That being the case, the opportunities for the achievement of justice are higher under African indigenous systems where the central principle is empowerment of victims, offenders, and communities, than under the Western justice systems, where the focal point is the punishment of offenders.¹²⁴ For Elechi, the African indigenous justice system is victim-centred, and as such its first priority is the safety of the victim. This can be assured by restoring the injured to their normal condition, recovering their lost property, and helping them regain their sense of security and dignity. The victim's needs for information, validation, social support, and vindication, must be at the centre of all remedial action.¹²⁵

Ajayi, in turn, sees African culture as an indispensable medium for resolving issues in Africa. Like Dlamini, Nhlapo, and Himonga, Ajayi believes that the history of the African tradition must be studied seriously in order to excavate the real norms and values that may have been buried by the past.¹²⁶ Unlike English, Ajayi cherishes the value of ancient African jurisprudence and its significance in shaping the profoundly altered

¹²¹ *Ibid.*

¹²² See Keevey *op cit* 52.

¹²³ Elechi *op cit* 1.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ See Mahao *op cit* 317.

modern African environment.¹²⁷ To Ade, present-day Nigeria is an example of a modern African state's inability completely to jettison African culture, even in the face of the temptation to do so from the dominant Western institutions. He sees this as evidence of the durability of the indigenous normative system. For Ajayi, African culture hinges on three basic concepts, namely, humanism, community and participation, which are the reason why modern perceptions of social justice continue to be influenced by their traditional version.¹²⁸

In a way that is comparable with Dlamini's conception of *ubuntu*,¹²⁹ Ajayi defines humanism as the responsibility of accepting all human beings as creatures of God who possess dignity and social and moral worth that demand respect. This respect extends to relatives, friends, strangers, and enemies, and includes the relations between rulers and the ruled, urban and rural dwellers, farmers and cattle rearers, rich and poor, masters and slaves, elders and the youth, and men and women alike. As a feature of good governance, humanism curbs corruption by simultaneously limiting the temptation to accumulate, and facilitating access to land and other resources. This blocks the emergence of social classes by investing wealth in the people and not in large estates.¹³⁰

Ajayi presents the community as the heart of African society, in which the value of the individual lay in the context of the collective. The latter was the centre around which all activities were organised. Together with humanism and community, Ajayi adds participation in community activities engendered by the closeness of the relations and interdependence between community members, as the third concept that characterised

¹²⁷ See Ade *op cit* 3 and Abiodun *op cit* 72.

¹²⁸ Ade *op cit* 4.

¹²⁹ See Dlamini *op cit* 42.

¹³⁰ *Ibid.* See also Allott *op cit* 59-60 where he agrees that serious changes occurred in the African life-world. He writes: "there was, however, a very substantial modification of the customary laws in the years of colonial rule. This could be attributed to changes initiated by the people themselves in their patterns of family life, in their forms of economic activity, in their notions about property rights responding to the introduction into Africa of western systems of education, religious principles, economic activities and property holding. The possibility of cultivating crops for the market rather than for consumption led to enormous changes in African land tenure. It was of the very nature of customary law that these changes could be made without formal legislation, by the people themselves who were subject to the law – the people as lawmakers. It was similarly of the essence of customary law that the customary courts should reflect these changes in popular practice and attitude through their decisions, which they duly did."

traditional African society.¹³¹ This feature entailed that the individual's actions, including accidental ones, could affect the well-being of the whole community. This made participation in the affairs of the community both a right and a civic duty, as it went far beyond the periodical election of leaders to public office.

Like Mahao, Nhlapo, and Juma, Lehnert believes in the symbiotic co-existence of African law and the Constitution.¹³² Unlike Keveey, Kroeze, and English, Lehnert's contribution to the debate on the application of African law in a constitutional democracy, revolves around the possibility of harmony between African law and the Constitution provided there is a proper balancing of culture and human rights as the basis for the operation of state institutions.¹³³

Whilst Lehnert sees the constitutional requirement that the courts must develop African law in line with the Bill of Rights, as the erosion of the Constitution's own cultural imperative,¹³⁴ he believes that the transformation of African law in South Africa is possible if the arrangement of the constitutional provisions and the norms that inform their application are studied carefully. According to Lehnert, harmony in the human rights/African culture dilemma depends on maintaining a proper balance between the constitutional provisions that oblige the courts to apply African law in line with human rights, on the one hand,¹³⁵ with those that demand respect for culture, on the other.¹³⁶

Lehnert finds a considerable convergence between human rights and the "living" law, and regrets that the courts have at times hidden behind the common law or statutory law, when the "living" law, suitably adjusted, could have resolved the matter.¹³⁷ For Lehnert, when African law is offensive to the Bill of Rights, the development of "living" law is preferable to the options of applying common law or striking African law down.

¹³¹ *Ibid.*

¹³² Lehnert *op cit* 243 says that not only the decisions of the Constitutional Court, but also those of the High Courts and the SCA are important in developing African law in line with Constitution, because these courts' judgments have a binding effect and create precedent; and most of the substantive law they deal with is uncodified. It can therefore be declared unconstitutional and invalid without the need for confirmation by the Constitutional Court in terms of section 167(5) of the Constitution.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ See section 211(3) of the Constitution.

¹³⁶ See sections 30 and 31 of the Constitution.

¹³⁷ See Lehnert *op cit* 262.

He concludes that the pedigree of African law as the culture of black South Africans, resolves the question of which of the two versions is recognised by the Constitution in favour of “living” law. The version of African law that the Constitution recognises, and which must conform to the Bill of Rights and constitutionally compliant legislation in order to achieve the envisioned transformation is, according to Lehnert, the “living” law.

Bennett,¹³⁸ Himonga and Bosch,¹³⁹ Pieterse,¹⁴⁰ and Juma¹⁴¹ agree with Lehnert that on a proper reading of the constitutional structure, as analysed in the context of the history of African law and the politics of its recognition, the African law of post-apartheid South Africa, is the “living” version. With regard to the judicial development of African law, Lehnert,¹⁴² Himonga and Bosch,¹⁴³ Van Rensburg,¹⁴⁴ Bonthuys,¹⁴⁵ and Van Niekerk¹⁴⁶ are concerned by the fact that, as the courts are obliged to apply “living” African law, they are constitutionally obliged to develop it in line with the Bill of Rights where tension arises between the two.

Van Niekerk resolves this dilemma by adding that “the adaptation of indigenous laws should not be in accordance only with the Bill of Rights as an instrument of entrenching western values; it should also be in harmony with its own underlying postulates”.¹⁴⁷ This view is supported by Bronstein who emphasises the importance of vigilance against the

¹³⁸ Bennett “Re-introducing” *op cit* 7 writes: “Accordingly, sections 30 and 31 of the Final Constitution of 1996 gave all persons a right to participate in the cultures of their choice and, because customary law was closely identified with an African cultural tradition, the courts accepted that those claiming application of customary law could base their demands on the right to culture”. However, he personally thinks that the starting point in the application of African law is the “official” version.

¹³⁹ Himonga and Bosch *op cit* 328 write: “Denying that law can exist outside the state-generated law is tantamount to denying that there is a right to culture”.

¹⁴⁰ Pieterse “Killing it softly” *op cit* 45 writes: “[T]he written rules of customary law should as far as possible be reconciled with actual cultural practice”.

¹⁴¹ Juma *op cit* 110 writes: “[T]he concept of living law ... places [African law] in a more accommodating and evolving system of societal organisation that we see in African communities today”.

¹⁴² *Idem* 251.

¹⁴³ See Himonga and Bosch *op cit* 316.

¹⁴⁴ See Van Rensburg AM “The judiciary and its constitutional mandate to develop and apply customary law – *Mthembu v Letsela revisited*” (2001) 22 *Obiter* 216 at 227.

¹⁴⁵ See Bonthuys E “The South African Bill of Rights and the development of family law” (2002) 119 *SALJ* 748 at 757.

¹⁴⁶ See Van Niekerk GJ “Indigenous law and the constitutional right to equal protection and benefit of the law” in De Villiers B (ed) *The rights of indigenous people: A quest for coexistence* (1997) 207 at 229.

¹⁴⁷ *Ibid.*

imposition of Western values in the transformation of African law.¹⁴⁸ Similarly Pieterse would also like to see South Africa's constitutional institutions incorporating as much African law and its values as are not in conflict with Constitution. He argues that the basic values underpinning the Constitution are not inherently in conflict with African law norms, and are amenable to legislative and judicial manipulation in influencing patterns of behaviour that are sensitive to human rights.¹⁴⁹

Like Himonga, Pieterse believes that the Bill of Rights does not necessarily mandate the constitutional institutions to abandon African law in favour of the common law. According to Pieterse, the tension between certain African cultural practices and the Bill of Rights can gradually be overcome by a judicial extension of transformative influences through an innovative development of African law in terms of section 39(2) of the Constitution.¹⁵⁰ Himonga and Bosch see the culture of depriving African law of the legal status of law of the land under apartheid, as the reason why South Africa's constitutional institutions are struggling to accord equality to the two systems. These scholars attribute the difficulties that inhibit these institutions from achieving the envisioned post-apartheid legal system, to the culture of using the repugnancy proviso¹⁵¹ to re-create African law in the image of the Western-oriented common law.¹⁵²

Himonga and Bosch believe that it is possible to accord equality to the two systems, if the nature of the transaction can be used to determine the law that must regulate the legal relationship between the parties. In terms of this view, the fact that *lobolo* negotiations preceded the marriage, must mean that the resultant marriage is a customary marriage, as *lobolo* can only be associated with the latter system. Like Mahao, Himonga would like to see African values take centre stage in the South African juridical discourse, so that African culture and its institutions can be projected in their ontological context. According to Himonga, the mandate of the South African state demands institutional sensitivity in the application of African culture in the context of the Constitution.

¹⁴⁸ See Bronstein V "Reconceptualizing the customary law debate in South Africa" (1988) 14 *SAJHR* 388 at 402-404.

¹⁴⁹ See Pieterse "Killing it softly" *op cit* 47.

¹⁵⁰ See Pieterse M "It's a black thing: Upholding culture and customary law in a society founded on non-racialism" (2001) 17 *SAJHR* 364 at 392.

¹⁵¹ Section 1(1) Act 45 of 1988.

¹⁵² See Himonga and Bosch *op cit* 309.

A wanton disregard of African law, when it is the system that is indicated by the circumstances, would therefore be unconstitutional. This means that constitutional recognition cannot amount to a licence for legislative and judicial institutions to gratuitously replace African law with the common law in cases involving customary law that does not offend the Constitution. For Himonga, the squandering of the opportunity to include the African value system as a tool in the development of human rights by state institutions, through their culturally-insensitive application of common law, symbolises unresponsive governance. This could, in turn, generate apathy within the customary constituency,¹⁵³ and is symptomatic of an institutional laxity that amounts to a subversion of the constitutional mandate itself.¹⁵⁴

Juma displays considerable faith in the compatibility of African law and human rights, provided that the relationship is properly handled. He believes that the ideological framework on which the South African Bill of Rights is based, differs fundamentally from that on which the erstwhile repugnancy clause was founded, and has the potential to contribute to the realisation of the envisioned African law.¹⁵⁵ This is because the “momentums for change that reside within the African traditional structures make them suitable as agents of societal transformation, and not inhibitors of such transformation”.¹⁵⁶ Juma, therefore, agrees with the majority of scholars who believe in the transformability of African law to suit a human rights environment. In his evaluation of the opinions that are sceptical of African law, Juma concludes that they also desire to see African law operating in a human rights environment in the end. All that needs to be done is to find a way of applying African law in the context of international human rights premised on individual rights and freedoms.¹⁵⁷

Some African law writers had been writing on this subject since the days of apartheid when African law was defined to fit within the common law normative system.¹⁵⁸ In one

¹⁵³ *Idem* 100.

¹⁵⁴ *Idem* 100-101.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Idem* 91.

¹⁵⁷ See Juma *op cit* 90.

¹⁵⁸ Bennett TW *A source book of African customary law for southern Africa* (1991) and Kerr AJ *Customary law of immovable property and of succession* (1990) were used to affirm the official rule of primogeniture in the *Mthembu* case.

of the earliest cases to come before the courts after 1994, the works of Bennett¹⁵⁹ and Kerr, which expounded the “official” customary law of intestate succession as it had been applied by the apartheid courts, were used to resolve an intractable matter that pitted African culture against the Bill of Rights. As applied under the old order, the rule of primogeniture preferred males for intestate succession, while women were legally regarded as perpetual minors¹⁶⁰ who depended on their husbands and male heads of their marriage-families for social assistance.

Koyana observes that the main distinguishing feature between African law and common law is that the former has more communal, concrete, and transparent, as well as religious or sacred characteristics, than the latter.¹⁶¹ Each system has distinctive background rules and regulations for enforcing order, which makes it inappropriate to judge one by using the other’s values.¹⁶² Koyana traces the history of non-recognition of African law to the British colonial policy of civilisation and Christianity driven by Governor Grey. Under this policy, the enforcement of African law in the courts was denied.¹⁶³

This policy was eventually abandoned after the annexation of Transkei where complete subjugation by the demoralising white rule, was avoided thanks to the reality of a large and well-organised African population, and physical distance from the centre of colonial power. Even then, the application of customary law had to be “compatible with the general principles of humanity, observed throughout the civilised world”.¹⁶⁴

Koyana resents the retention of the Westernising influence of the repugnancy clause, which, after 1927, was extended over the whole of South Africa by section 11(1) of the Black Administration Act, and survived apartheid through section 1(1) of the Law of

¹⁵⁹ See section 11(3) of Act 38 of 1927.

¹⁶⁰ *Ibid.*

¹⁶¹ See Koyana DS “The resilience of the repugnancy clause in the customary law of South Africa” in Osode PC and Glover G (eds) *Law and transformative justice in post-apartheid South Africa* (2010) 491 at 491.

¹⁶² *Idem* 492.

¹⁶³ Bennett T W *Application of customary law in South Africa* (1985) 41 writes: “The white opinion of customary law was a low one and it was argued that if everyone in the colony were compelled to abide by the laws of the more civilised section of society those of the lower station would be forced to reach the higher standards”.

¹⁶⁴ *Ibid.*

Evidence Amendment Act 45 of 1988. He notes a worrying point of similarity between the status of African law under apartheid and under the Constitution, where African law was again subjected to the Westernising influence of the Bill of Rights.¹⁶⁵ Hence the negation of African law by the Constitutional Court in recent cases, reminds Koyana of the following dictum from the erstwhile Native Appeal Court:

It is not always in the interests of the natives themselves to give the court's sanction to all their present day alleged customs. It is one of the functions of this court to interpret native law and custom in conformity with civilised ideas of what is fair and just.¹⁶⁶

Koyana observes with dismay the similarity between the repugnancy clause of yesteryear and the application of the Bill of Rights by the Constitutional Court in the *Bhe-Shibi* case where the primogeniture rule had to give way to the equality provision in the Constitution. For Koyana, this is proof that there is no difference between the old repugnancy clause that proclaimed that “where native custom is in conflict with common law or statutory law, the former must give way” and the new Bill of Rights.¹⁶⁷

1.4(h) The view that certain traditional African law rules, principles and concepts are central to the resolution of social disputes

Koyana decries the resilience of repugnancy jurisprudence in South Africa, and resents that dissenting voices that protested against the jettisoning of African law in the name of justice and equity, have still not been heeded, even in the new South Africa. Among such protesters, Koyana counts a member of the Native Appeal Court who once deplored the use of foreign ethical ideas to judge the *lobolo* institution.¹⁶⁸

Koyana is disappointed by the legislature's overlooking of the important traditional remedies of *ukuthleka*¹⁶⁹ and *ukuphuthuma*,¹⁷⁰ which are so relevant to the dissolution

¹⁶⁵ See Koyana “The resilience” *op cit* 495.

¹⁶⁶ See *Gidja v Yingwane* 1944 NAC (N & T) 1 at 4.

¹⁶⁷ See Koyana “The resilience” *op cit* 495.

¹⁶⁸ See *Gomani v Baqwa* NAC Records (1912-1917) 71.

¹⁶⁹ See Koyana “The resilience” *op cit* 495.

¹⁷⁰ See also Bekker *Seymour's customary law op cit* 181-182.

of customary marriages.¹⁷¹ *Ukuthleka* is an indigenous marriage wife-protection method, in terms of which the wife's maiden relatives asserted their right to protect her against her abusive husband until he had fully accounted for ill-treating her in the past, and assured them that he would treat her with dignity in future. *Ukuphuthuma* is an indigenous method for resolving problems under the *ukuthleka* practice, in terms of which the return of the abused wife to her abusive husband is negotiated.

During the *ukuphuthuma* negotiations, the husband and his family must account for the abusive conduct of the husband to the wife's family. He must apologise profusely and unreservedly to the wife and her family and must undertake to keep peace in future. More importantly the husband must pay the fine imposed by his wife's family as part of their acceptance of the apology and must commit himself to adhere to the terms and conditions of his wife's return to him.

Koyana concludes that in the absence of these traditional remedies, "the impact of the new provision prescribing the common law ground of irretrievable breakdown, as the only ground for divorce in customary marriages, on customary law and the law relating to marriage is simply devastating". He is, however, not the only scholar who feels disappointed by these developments, as his despondency about the negative effect of the Constitution on African values, is echoed by other African scholars.

Mailula suggests a balancing of constitutional rights with indigenous values in a way that recognises the primacy of the cultural imperative over individual autonomy.¹⁷² In that way the preservation of the primogeniture rule as a method of succession in traditional leadership can be justified.¹⁷³ Whilst she supports this view, Ntlama resents the over- emphasis on the principle of equality in customary law adjudication and decries such an attitude as undermining the ability of African culture to develop its own jurisprudence based on non-discrimination.¹⁷⁴

¹⁷¹ See Koyana "The resilience" *op cit* 501-502.

¹⁷² See Mailula D "Abdication of judicial responsibility, cultural self-determination and the development of customary law: Lessons from *Shilubana*" (2008) 23 *SAPR /PL* 215 at 235.

¹⁷³ *Ibid.*

¹⁷⁴ See Ntlama N "'Equality' misplaced in the development of customary law of succession: Lessons from *Shilubana v Nwamitwa* 2009 (2) SA 66 (C C)" (2009) 20/2 *Stell LR* 333 at 355-356.

Bronstein endorses these views, and rejects the idea that African women must resort to equality jurisprudence each time they fight for their rights in African law. She insists that African law is capable of resolving its intra-cultural disputes without the need to drag in the Constitution as a club to quell a cultural quarrel.¹⁷⁵ This new threat from the Constitution as the standard of highest principles and values of society,¹⁷⁶ induced the traditional leaders to seek, without success, to exempt African law from the inevitable review process that awaited the whole of the South African legal system under the Bill of Rights. The ensuing frustration among traditional leaders and their constituency's failure to secure the desired exemption induced them to raise questions about the prospects of revival, survival, and development for the African normative value system in an environment dominated by the Western concept of human rights.¹⁷⁷

As scholars from different backgrounds continue to disagree, the present author see the unrestrained Westernisation of the African life-world as the dilemma faced by the Africans in their efforts to rescue their knowledge system from complete oblivion. The context is the relentless disconnect between the divergent perspectives of Europe and Africa, characterised by the liberating attraction posed by individual autonomy on the one hand, and the fulfilment provided by collective solidarity, on the other.¹⁷⁸

These different roles offered to the individual in society, and the social benefits or ills deriving from each culture constitute the root of the divergent perspectives. The present author aligns himself with the view that has been expressed by the majority of the scholars that the African society requires the individual to fulfil his obligations in the community in return for its protection, membership and security.

The present author disagrees with the scholars who believe that African culture can only make sense when interpreted through Western epistemological lenses. The latter group regards society as a threat to the security of the individual, who must, therefore seek to liberate himself/herself from the tyranny of the group because freedom from the

¹⁷⁵ See Bronstein *op cit* 403.

¹⁷⁶ See Ade *op cit* 5. See also Ebo *op cit* 144.

¹⁷⁷ See Lehnert *op cit* 241; Bennett "Customary law" *op cit* 1 and Himonga and Bosch *op cit* 306.

¹⁷⁸ See Abiodun *op cit* 54.

group is the goal of the individual in the West.¹⁷⁹ This analysis reveals that the African concept of law and justice, based on indigenous values, can withstand constitutional scrutiny as an illustration of the possibilities for a non-western human rights dispensation, and can integrate the needs of both urban and rural South Africans.

This approach aligns customary law's natural form and social context within its architectural setting in African society so that the traditional processes that regulated legal matters can connect the agnatic legal subjects with their communal transactions. The institutions of primogeniture, the concept of communal representation and agnatic legal subjectivity would then gain prominence as they can explain customary responsibility and accountability better than the western notions of majority age and adulthood.

Viewed through the indigenous lenses, the institution of manhood, which is nurtured by the initiation into adulthood and training in cultural lore, provides an insight into how the notion of primogeniture allocates family legal subjectivity to senior men as symbols of patrilineal responsibility. Before men's societal role was distorted by those who genderised their relationship with the very women they protected, they were in the forefront of the fight against patriarchy for the benefit of society. Manhood was synonymous with accountability for the welfare of vulnerable groups, particularly women and children.

The indigenous society confined the power of manhood and primogeniture under the law, by reducing masculinity to a mere agency for determining the propriety of transactions aimed at maintaining the social order. Once an understanding of male primogeniture as an institution for the delivery of important services such as ensuring livelihood for vulnerable members of the family is achieved, it becomes easy to deconstruct the false consciousness created by the detractors of African culture that this institution is an instrument for male domination and unfair gender discrimination. This latter myth can then be debunked as an alien transplant that distorts indigenous culture for the nefarious purposes of Westernisation. An intra-cultural understanding of

¹⁷⁹ Mahao *op cit* 328 where he says: "In this metaphysics, each individual is on his/her own, and his social being is directly linked to his capacity to bargain in a 'free' market place".

African tradition, offers an insight into how family seniority was institutionalised in an oral tradition, to contribute to the ordering of society so ensuring that no vulnerable members of the community went without adequate social security.

In the *Bhe-Shibi* case, Ngcobo J proposes a “de-genderised” primogeniture principle that can advance the realisation of a non-sexist and democratic society as envisaged in section 1 of the Constitution, because African culture argues that in each and every family there is some senior person who can be held liable to take responsibility for the support of vulnerable members. For this reason, the cultural orientation of the indigenous authors and their personal experiences, commend them as indispensable aids for re-conceptualising African law under the Constitution. This is particularly so as their contexts are located within a worldview that is governed by indigenous jural postulates.

The usefulness of their contributions also belies the almost axiomatic emphasis on the absence of original materials on customary law. Instead the materials reveal the workings of the “African indigenous economic, social and political institutions that function[s] as channels for conflict resolution ... as the basis for the system’s social solidarity, humane emphasis, popularity and legitimacy”.¹⁸⁰ The indigenous conception of law and justice articulated by indigenous authors, can serve as the basis for formulating a post-imperial notion of constitutionalism on which the transformation of our law depends.

Jolobe has long argued that technological advancement should serve to transform the roles of men and women to enrich the quality of family life in rural areas.¹⁸¹ He contends that draft animals and vehicles could be used to relieve women from tilling the fields and drawing water, so that wives can have more time to attend to their husbands; and mothers to their children. In this contention lies an acknowledgement of the value of interdependence between men and women in African tradition and is indicative of the presence of the seed for innovation in order to rekindle the norm for compassion in the

¹⁸⁰ See Elechi OO *op cit* 3 “Human Rights and the African indigenous justice system ” A paper presented at the 18th International Conference of the International Society for the Reform of Criminal Law, Montreal on 8-12 August (2004) 3.

¹⁸¹ See Jolobe *op cit* 225-226.

African culture¹⁸² for the new jurisprudence envisioned by the Constitution. Thus, African culture had a way of converting masculinity as a tool for fighting against oppressive patriarchal tendencies from within the African culture.

Yet patriarchy as entrenched in the colonial/apartheid legacy continues to manifest itself in the new dispensation as evidenced by Gumede.¹⁸³ In this case, the “official” customary law of marriage entrenched in the KwaZulu and Natal Codes of Zulu law, was declared unconstitutional for unfairly discriminating against African women. In terms of the Codes, the husband was designated as the sole owner of the family goods, leaving wives destitute on dissolution of such marriages. The court held that extending the community of property to such marriages was consistent with African law.¹⁸⁴

1.5 Hypothesis

This thesis takes the preliminary view that there is a prevailing professional reluctance to vacate one’s comfort zone which is influenced by legal culture’s tendency to inculcate in one’s mind the belief that the Western legal worldview is the only orientation possible. As a result very few legal and political functionaries are prepared to unlearn that the common law is no longer the only law of the land; and to relearn the constitutional axiom that customary law is now another.

Acquired values and training unwittingly steer such functionaries towards the common law when they amend customary law. This legal culture appears to accept the dominant notion that pre-colonial Africa had no developed jurisprudence, which discourages the common-law oriented politicians, professionals, and practitioners from appreciating the wisdom of studying the ontological background of African law as a path towards finding its epistemological underpinnings.¹⁸⁵

¹⁸² See also *Setiloane op cit* 40.

¹⁸³ See *Gumede supra* par 151.

¹⁸⁴ *Idem* par 30.

¹⁸⁵ *Idem* par 42. Kenyatta J *Facing Mount Kenya* (1938) 270 writes: “It was deemed unnecessary for white men to have any special training before dealing with and being put in charge of natives. It was a common assumption that work on the colonies required men of less education than work at home, so the colonies became a sort of clearing-house for failures and worse. This unfortunately applied equally to the missionary and to other callings, and until recently it was the prevalent opinion that the Gospel could be better preached and interpreted to ignorant and degraded savages by less intellectual and less educated men”

In this view the persistence of the common law dominance is logical and has the effect of reinforcing the denial of the distinctiveness of the African concept of justice. The resultant African pessimism leads to the tendency to look at the Constitution through common law lenses which, in turn, leads to the assumption that the cultural conflict between African law and common law is proof of the former's conflict with the Bill of Rights. Two flaws in this assumption will be proved – first, that none of the critics of African law is able to point to a human rights doctrine in the Western tradition that captures the notion of human rights better than the indigenous concept of *ubuntu*.¹⁸⁶ Second, for centuries *ubuntu* had successfully regulated issues of human rights and democracy in Africa without the aid of formal institutions.¹⁸⁷

It is noteworthy that when the legislature and the judiciary remove the unconstitutional aspects of “official” customary law in terms of section 9 of the Constitution, they do not then strive to rehabilitate the system by indigenising its interpretation as required by section 39(2)¹⁸⁸ read with section 31.¹⁸⁹ Having struck down the unconstitutional “official” rule of male primogeniture in the *Bhe-Shibi* case,¹⁹⁰ the Constitutional Court proceeded to erroneously import into the realm of African law, the common law principles of intestate succession.¹⁹¹ This approach to legal renewal by South Africa's state institutions does not present the application of African law as a constitutional

¹⁸⁶ As indicated above Keevy misguidedly condemns *ubuntu* on the basis of *ubuntu*-less acts committed by communities and individuals in violation of the essence of the concept. All cultures have developed concepts by which to discourage injustice in order to advance human rights in their communities. One would rather blame the violators of *ubuntu* for committing the injustices which the concept seeks to discourage.

¹⁸⁷ See Mahao *op cit* 319.

¹⁸⁸ Section 39(2) of the Constitution reads:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport or objects of the Bill of Rights.

¹⁸⁹ Section 31 – Cultural, religious and linguistic communities – reads:

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
(a) To enjoy their culture, practise their religion and use and use their language; and
(b) To form, join and maintain cultural, religious and linguistic associations and other organs of society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with the Bill of Rights. See the constant reference to the legislation enacted to implement common law institutions in the Recognition of Customary Marriages Act 120 of 1998 (hereafter the Recognition Act). In chapter 4 vital provisions of the Marriage Act 25 of 1961 and the Matrimonial Property Act 88 of 1984 both of which were enacted to improve the common law institution of marriage will be discussed to illustrate how that which purported to be a recognition of the African marriage became a creation of a new type of marriage that is unknown to either the African, Western or Muslim traditions of marriage.

¹⁹⁰ See *Bhe-Shibi supra*.

¹⁹¹ See the Intestate Succession Act 81 of 1987.

imperative. This view gains impetus when the legislature joins the party, so to speak, and goes out of its way to enact into a permanent statute a rule borrowed from a different culture.¹⁹²

In the *Bhe-Shibi* case the Constitutional Court expressly warned that the borrowed remedy should be treated as a temporary measure only, and was to be applied as an interim order¹⁹³ pending the legislative transformation of South Africa's customary law of succession. However, in due course the legislature passed the Reform of the Customary Law of Succession and Regulation of Related Matters Act,¹⁹⁴ which unfortunately did not treat the *Bhe-Shibi* solution in its spirit as a temporary measure. Instead, the Act confirmed the judicial substitution of the common law for the African law of intestate succession.

The effect of the judicial and legislative interventions has been the adoption of common law principles as a way of addressing customary law challenges, contrary to the Constitutional Court's own counsel in *Richtersveld Community*¹⁹⁵ where it warned against the dangers of looking at African law through common law eyes. Failure to heed this warning is unfortunately untenable for two reasons. First, subjecting African law to common law principles perverts the African ontological structure and culture by forcing its adherents to submit to a legal regime that does not resonate with their ways of speaking and acting. Second, this approach has a debilitating effect on legal transformation since its implementation by constitutional institutions appears to contribute to the further distortion of indigenous culture.

By imposing alien legal concepts as a means of interpreting African law, the constitutional institutions misrepresent the system's true nature, content, and character in a manner reminiscent of colonial and apartheid distortions. When South Africa's constitutional institutions remove an unconstitutional "customary law" rule from the

¹⁹² See the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

¹⁹³ In *Bhe-Shibi supra* par 124 Langa D C J (as he then was) emphasised that the interests of vulnerable groups must be "protected ... until Parliament enacts a comprehensible scheme that will reflect the necessary development of customary law of succession".

¹⁹⁴ See Act 11 of 2009 (hereafter the Customary Law of Succession Act).

¹⁹⁵ 2003 (12) BC LR 1301 (CC).

statute book, they often proceed to fill the gap thus created without guidance from a theory of indigenisation. They also fail to extract solutions from within the African normative framework. The continued neglect of the indigenous worldview as a frame of reference from which to draw solutions to customary law problems, can be counted as one of the shortcomings of the interpreters of the law.¹⁹⁶

This unresponsive approach will be shown to have effectively disenfranchised Africans and reduced them to impotent spectators to the distortion of their culture. Ultimately the notion of justice generated by constitutional institutions loses legitimacy and results in the creation of the gap between the “official” system of law, and the lived experiences of the population. Such gaps are negatively exploited when delinquent heirs access their inheritances without accepting their cultural responsibilities to care for their vulnerable members.¹⁹⁷

In the recent cases where the courts have adhered to “official” customary law, they have found themselves defending a version of African culture that has left the real cultural beneficiaries of communal living destitute.¹⁹⁸ The divide between the “official” version and the lived experiences of the people, has led the courts to defend a conception of masculinity that has freed males from the traditional responsibilities associated with manhood.

This cultural distortion has resulted in women, children and other vulnerable groups being left destitute, and has aggravated the problem of homelessness as the demon of alienation has divested their communal homes of their cohesive nature. This is the result of empowering the heirs through distortive legal interpretation, to disown their members rather than acting as their traditional saviours.¹⁹⁹ Even virtues like the achievement of gender equality become vices when unresponsive legal reforms threaten the collective identity of the communities whose future is rendered uncertain

¹⁹⁶ See Brieger DM and Von Briesen M “Conflict in the Zimbabwean courts: Women’s rights and indigenous self-determination” (2000) 13 *Harvard Human Rights Journal* 1-24.

¹⁹⁷ See *Mthembu v Letsela* 1997 (2) SA 936 (T), 1998 (2) SA 675 (T) and 2000 (3) SA 867 (SC A).

¹⁹⁸ *Ibid.*

¹⁹⁹ See *Mthembu v Letsela* 1997 (2) SA 936 (T) (*Mthembu* 1), 1998 (2) SA 675 (T) (*Mthembu* 2) and 2000 (3) SA 867 (SC A) (*Mthembu* 3).

by judgments the transformative impact of which destroys the tried and tested formula of succession to traditional leadership without offering a viable substitute.²⁰⁰

1.6 Limitations underlying the study

This thesis concentrates on recent judgments and legislation on African law framed under the Constitution. It is further limited by being anchored in African jurisprudence which has scant written material. The scope is also limited by the fact that other African jurisdictions have not developed post-imperial indigenous jurisprudence on the renewal of the African value system. African legal systems seem to proceed from colonial jurisprudence on the assumption that pre-colonial Africa had no law.

1.7 Research design or methodology

The approach followed in this study comprises desktop and library research and involves a multi-disciplinary analysis of existing literature to reach reasoned conclusions. This is the method generally used in the human sciences, including law. The basic materials on which this thesis is based are the Constitution of the Republic of South Africa, selected pieces of legislation, decided cases, journal articles, legal textbooks, and non-legal literature. The latter includes a review of books on indigenous African culture in the context of law, literature, religion, and spirituality, which are traditional aids to the interpretation of African law and morality.

As the central theme of the study revolves around re-imagining the nature of the new African jurisprudence whose pristine sources in written form are scarce, the author reviews isiXhosa literature on law, politics, and religion, for case studies on pre-colonial and indigenous social practices in the application of African law and philosophy in their unadulterated form. These materials appear in narratives, folk tales and novels and are penned by indigenous South Africans, whose perspectives are not premised on a separation of law from politics, economics, and philosophy.²⁰¹

²⁰⁰ See *Shilubana and Others v Nwamitwa* 2008 (9) BC LR 914 (C C) (hereafter *Shilubana 2*).

²⁰¹ See Mqhayi SEK *Ityala lamawele* (1914); Mqhayi SEK "U Rarabe" in Bennie *op cit* 129; Mqhayi SEK "Inkokeli" (translation – "The leader") in Bennie *op cit* 208; Jolobe JJR "Um sebenzi Wabafazi Kwisizwe esiNtsundu" (translation – "The role of women in African society") in Bennie *op cit* 208; Solilo J "Izinto zeKomkhulu lamaXhosa" (translation – "Xhosa royal institutions") in Bennie *op cit* 219; Soga TB *Intlalo kaXhosa* (translation – "Xhosa culture") (1937); Ramose *African philosophy through*

The perspectives of indigenous writers contain useful tools for deconstructing and dispelling the myth of the universality and indispensability, of the Western concept of jurisprudence and constitutionalism. Deconstructive analysis reveals the salient features of the indigenous concept of justice that are embedded in “living” law, whose norms blossom when articulated in their own epistemological setting. This possibility was opened up when the apartheid legislature elected to abandon the requirement of proving African law in every case in which it was alleged.²⁰² From then on sources written in indigenous languages, which discussed matters of “living” law, had a chance of playing a useful role as the courts were no longer confined to “official” law, but could take judicial notice of African law where it was readily ascertainable.²⁰³

ubuntu (2002); Setiloane GM *The image of God among the Sotho-Tswana* (1976); Mtuze PT *The essence of Xhosa spirituality – and the nuisance of cultural imperialism (hidden presences in the spirituality of the amaXhosa of the Eastern Cape and the impact of Christianity on them)* (2002); Tamsanqa WK *Ithemba Liyaphilisa* (1979); Mandela N *Long walk to freedom* (1994); Biko S “Some African cultural concepts” in Coetzee PH and Roux AP (eds) *Philosophy from Africa – a text with readings* (2000) 26; Jobodwana N “Customary courts and human rights: Comparative African perspectives” (2000) 15 *SAPR /PL* 26; Nhlapo T “Human Rights – The African perspective” (1995) 6/1 *ALR* 38; Koyana DS “Customary law and the role of customary courts today” (1997) *Consultus* 126; Koyana and Mqeke *op cit* 131; Himonga C and Bosch C “The application of African customary law under the Constitution of South Africa: Problems solved or just beginning?” (2000) 117 *SALJ* 306; Odora Hoppers CA “Indigenous knowledge and the integration of knowledge systems – towards a conceptual and methodical framework ” in Odora Hoppers C (ed) *Indigenous knowledge and the integration of knowledge systems – towards a philosophy of articulation* (2002) 2; Ntuli PP “Indigenous knowledge systems – laying a foundation for the creation of counter-hegemonic discourses and the African Renaissance” in Odora Hoppers (ed) *op cit* 2; Ndima DD *The law of commoners and kings – narratives of a rural Transkei magistrate* (2004). See also African authors from outside South Africa such as Diop CA *The African origins of civilization: Myth or reality* (1974); Diop CA *The nations of black Africa and their culture* (1955); Senghor *African socialism* (1964); Williams C *The destruction of black civilisation – great issues of race from 4500 BC to 2000 AD* (1987); Ayinla LA “African philosophy of law: A critique” (2002) 6 *Journal of International and Comparative Law* 147; Ajayi *op cit* 3; Abiodun BO “Towards an African concept of law” (2007) 1 *African Journal of Legal Theory* 71; Irele A “Introduction” in Hountondji P (ed) *African philosophy: Myth and reality* (1996) 7; Ebo *op cit* 139; Himonga C “The law of succession and inheritance in Zambia and the proposed reform ” (1989) 3 *International Journal of Law and Family* 160; Idowu W “Positivists’ separability thesis reconsidered: Perspectives from African legal theory”(2008) 3 *3/2 Journal for Juridical Science* 164; Mamdani M “There can be no African renaissance without an African-focussed intelligensia” in Makgoba WM (ed) *African renaissance* (1999)125; Nwabueze RN “The dynamics and genius of Nigeria’s indigenous legal order” (2002) 1 *Indigenous Law Journal* 153; Ndulo MB “Widows under Zambian customary law and the response of the court” (1995) 18/1 *CILSA* 90.

²⁰² Bekker *Customary law op cit* 40 writes: “It appears that customary law must be proved. The reason is probably because the commissioners are not expected to know customary law. It is nevertheless unsatisfactory, especially as the litigants will not be entitled to use lawyers to assist them in proving a rule of customary law.” On the contrary, the current Constitution assumes that judicial officers know customary law as section 211(3) requires them to apply it.

²⁰³ Section 1(1) Act 45 of 1988 reads: “Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty ... ”.

This thesis also reviews journal articles whose contributions to the emerging jurisprudence are shaping the ways in which the authors formulate their opinions on how the judges define the relationship between human rights and state power in a democratising environment. It is these contributions from legal academics that facilitate the emergence of the new jurisprudence through their tendency to subject settled social traditions to rigorous interrogation. This is particularly so as the development of African law continues to be stifled by the paucity academic contributions.

Consequently, this thesis seeks to evoke new insights for tackling constitutional approaches towards integrating legislative enactments, common law and African law rules and principles, through scholarly analysis. The latter authoritative sources of law, when synthesised with indigenous norms, constitute the framework that the state can use to harness society's cultural traditions harmoniously with the fundamental rights and freedoms of individuals and minorities under the democratic Constitution.

1.6 Sequence of chapters

This study consists of seven chapters arranged as follows:

Chapter 1 sets out the background, aim and the methodology used in this study in providing a framework for the re-imagination of the envisioned African jurisprudence for the 21st Century. It also contains the aims and objectives of the study, the statement of the problem, literature review, the hypothesis raised as well as the research design and methodology.

Chapter 2 lays the foundation of the indigenous version of African law as it applied in its pristine condition as part of Africa's pre-colonial culture and value system. This background is captured through an illustration of the relationship between the indigenous social structure and its normative system, and presents the philosophy of *ubuntu* as the source of the African concept of justice. This portrayal reveals African jurisprudence as a thought system characterised by indigenous features of social participation, group solidarity, respect for elders, and the values of communal interest, collective ownership, restorative adjudication and the epistemology of inclusiveness.

These features explain why the values of reconciliation, reparation, and reciprocity occupy the mainstream of the African justice system.

Chapter 3 is a review of the history of the imposition of Roman-Dutch law and its application to the African population during the colonial period as it developed under colonial authorities and in the dynamics of the apartheid environment. This review shows how the application of indigenous law fell to the hands of the colonial/apartheid administrations which had no regard for the African value system. The colonial attitude towards the African thought system can be linked to the negative influence of Western anthropologists who painted a dim picture of African jurisprudence as a primitive and backward system. Such an anthropological influence generated the superiority complex of the Europeans, and was the source of the Western scholars' denigration of African culture.

Chapter 4 examines the policy of inequality of treatment between the common law and African law as the direct result of the subordination of the latter system to Western epistemology. It also illustrates how African law was stifled through the repugnancy clause which imposed Western values as the benchmark for judging the indigenous metaphysical reality. The examination includes a comprehensive study of the relationship between the numerous cultural distortions which ensued and the resultant inequality in the management of South Africa's national diversity. This analysis focuses on the difficulties attendant upon efforts to achieve the envisioned post-apartheid jurisprudence.

Chapter 5 outlines the role of the legislature in institutionalising the constitutional injunction to affirm African law by tracing South Africa's legislative contributions to the achievement of the version of African law envisioned by the Constitution. These legislative enactments seek to transform African law's most important institutions such as marriage, succession and traditional leadership in line with the dictates of the Constitution in an effort to disentangle them from the shackles of apartheid legalism.

Chapter 6 evaluates the performance of the courts as they seek to comply with the

constitutional mandate to apply African law as a component of South African law enjoying equal status with the common law in the dispensation of justice. The successes and failures of the judiciary are compared and balanced as some judgments reveal more advanced levels of compatibility between African notions of justice and human rights, than others.

Chapter 7 concludes the thesis by recalling the issues that were highlighted in the problem statement outlined in chapter 1 as the basis for designing the ways for re-centring the indigenous sense of justice as the catalyst for harmonising socio-cultural tensions between the African and the Western normative systems under the South African Constitution. The chapter then draws conclusions from the preceding chapters on the basis of the appraisal of the contributions made by the nation's constitutional institutions towards the attainment of the Constitution's vision for African law. This appraisal seeks to dispel the negative accretions that portray the concept of human rights as a Western invention and serves as a launch-pad for recommending the adoption of the theory for the re-indigenisation of the notion of African law as the panacea for mainstreaming the African justice system as a component of South African jurisprudence.

1.9 Understanding the key words for purposes of the study

African law/customary law/indigenous law: The indigenous component of South African law that has survived through a series of adaptations since pre-colonial time. These terms are used interchangeably to denote the law that has its roots in Africa to distinguish it from those components that were imported to South Africa but have their roots outside Africa. African law/customary law/indigenous law regulates the lives of the majority of African people in South Africa and bears a close relationship with its versions in other African countries. African culture/indigenous culture/indigenous rights have a corresponding meaning.

African jurisprudence: The epistemological and ontological milieu in which the African metaphysical legal thought system operates. It includes all the activities, studies, interactions and discourses taking place in the academic, legislative judicial and political spheres about the place, meaning, nature and characteristics of African law.

Constitution: The Constitution of the Republic of South Africa. Reference is often made to 1993 interim Constitution and to the 1996 final Constitution.

Constitutional Institutions: The public institutions established by the Constitution to ensure the enforcement of the rights, freedoms and obligations entrenched by the Bill of Rights.

Indigenisation/re-indigenisation: The pursuit of the objective to present African law and culture on the basis of its indigenous value system which has its origins in pre-colonial version but is currently prevalent among its adherents in an adapted form. Indigenisation/re-indigenisation also seeks to exorcise the cancer of coloniality dogging the present day African thought system so as to disentangle it from the hegemonic stranglehold of the dominant Euro-Western cosmology through the substitution of its own epistemology and ontology.

Official/living version of African law: Official African law is the static version that South Africa's state institutions developed and generated under the repugnancy dispensation which made it amenable to the Western value system. The living version of African law is the version that conforms to the daily dynamics of life among the adherents of African culture and which regulates their life-world.

Repugnancy clause: The statutory provision that was introduced by the colonial administration and was perpetuated under apartheid as a technique of condemning indigenous African values as contrary to public policy and natural justice when in fact such values clashed with Western standards of morality. In this way African legal and moral norms were condemned and removed in a subtle manner that masqueraded common law values as international standards to be imposed on African law. The effect of the enforcement of the repugnancy clause was the marginalisation of African ways of thinking and the distortion of African law, which became subordinated to the common law as the mother system.

State institutions: The public institutions established in terms of the Constitution to enable the state to deliver its mandate to the nation.

Traditional institutions: The cultural structures available to traditional communities and their authorities to fulfil their obligations and aspirations.

Ubuntu: The African philosophy of life which informed traditional communities and their authorities about the propriety of the exercise of power in families, communities and society and served as a barometer for measuring the boundary between humane and inhuman treatment. It is the most prominent philosophical concept that counteracted the evils that operated contrary to the interests of humanity such as cruelty, brutality and witchcraft, to mention a few. *Ubuntu* represented the African version of human rights which constrained the excesses of African leaders in their exercise of power.

1.10 Chapter conclusion

Chapter 1 offers the background to the study of the perennial problem of the persistence of the dominance of the Western value system in the conceptualisation of law in South African jurisprudence since colonisation. It sets out to enquire why state and constitutional institutions continue to struggle to affirm African law as a credible component of South African law at the same level as the common law of Western origin despite the removal of the constitutional obstacles that hindered its recognition and development in the past.

A review of academic discourse on this matter elicited a deeper appreciation of the negative impact of the history of colonisation and apartheid which ingrained the inferior stature of the African thought system in the legislative, professional and judicial establishments that produced the South African legal system. The realisation that South Africa's new constitutional framework has largely addressed the problems bedeviling the status of African law has informed the assumption that the African law of the 21st century which the Constitution envisions can be achieved. This assumption takes account of the fact that the problem at hand is a product of cultural imperialism which can be reversed by developing and carefully implementing a theory of re-indigenisation

as a counter-weight to the resilience of the repugnancy jurisprudence. The chapter also details the objectives to be pursued in each of the subsequent chapters as they proceed to inform the final conclusion of the thesis.

CHAPTER 2

THE ANATOMY OF AFRICAN JURISPRUDENCE: A BASIS FOR UNDERSTANDING AFRICAN SOCIO-LEGAL AND POLITICAL COSMOLOGY

2.1 Introduction

Having laid a firm foundation for the analysis of the issues of this study in the first chapter, chapter 2 delves into a systematic and coherent analysis of the anatomy and ontology of African jurisprudence, and aims at revealing the nature, purpose, and characteristics of the social, political, and legal cosmology in which its institutions operated during its uncorrupted pre-colonial condition. It does this by scrutinising how African culture functioned within a uniquely African paradigm of discourse premised solely on a distinctly indigenous frame of reference. For that purpose, the chapter will identify a few essential African principles and establish their nature, purpose and characteristics as they were applied during the uncorrupted pre-colonial social set up.

The analysis takes account of the changed socio-economic environment where both men and women often eke out their living in the cities which coincides with the increased status of women that demands their acceptance of the responsibility for family headship in appropriate instances. The changed circumstances also necessitate substitution arrangements in the administration of the rural communities who often have to fulfil customary responsibilities whilst their seniors are held up in gainful employment elsewhere. Hence the African culture of today has to adjust to these realities as its adherents continue to resist the tendency of Western culture to influence their worldview.

Before being contaminated by alien influences, the pillars of Africa's metaphysical orientation, rested on a worldview that was characterised by features of communal living and collective solidarity as evidence that it was as yet unsullied from alien influences. This was a firm foundation for the emergence of African jurisprudence underpinned by concepts moulded on its unsullied normative values which should be the basis of the

current post-apartheid renaissance of the system. To advance the objects of African renewal, the complexities of pre-colonial indigenous institutions, cultures, and values are revealed in the image of their lifeworld which mirrored the interaction between the various organs of African culture. This is a reflection of the African family home, personified by the family head, as a stabilising factor among family members. To avoid confusion the relationship between law, custom and culture must now be explained in order to illustrate their role in unpacking the anatomy of African jurisprudence.¹ These concepts are closely related and are often used interchangeably in discussions about African law in an endeavour to paint the picture of the indigenous African cosmology. Law refers to the rules and principles that govern the application, administration and enforcement of the rights, obligations and responsibilities contained in the customs; whilst customs themselves are the reference points where the community's good habits are stored as indicators of propriety in society. Customs are related to law because the latter reflects the manifestation of the former in social practice. Culture is also related to custom, and therefore to law because it consists of the traditions and contexts of applying the laws and customs as they impact on the various aspects of social interactions.² For example, when the traditions of dressing, singing, dancing or speaking take particular shapes during funerals, weddings or other celebrations such shapes concretise into the cultures of their adherents as they begin to insist on their observance on such occasions. The relationship between these concepts lies in the fact that a custom such as initiation into manhood happens in a particular cultural tradition and is regulated by a set of legal rules, which makes it proper for those people who may prefer to call it a custom, culture or law as they deem appropriate to do so.

2.2 The family as the basic unit of communal living and solidarity

Every family head occupied his customary position by virtue of the principle of primogeniture,³ which defined how he was selected, appointed, and disciplined in order to serve his constituency. Leadership at family level, was the responsibility of senior men and elders whose positions committed them to the service of their families.⁴ This

¹ See generally Bennett TW *Customary law* (2004) 1-7.

² *Idem* 20-23.

³ See generally Bennett TW *Customary law* (2004) 1-7.

⁴ *Idem* 20-23.

is the stable environment of the family home in which the role of leadership was shared between the elders and the family collective.

The indigenous family home was a corporate body with authority over family members and material resources, under the leadership of the head whose duty it was to manage the well-being of the family collective. The position of the family head portrays the primogeniture principle as the mainstream of African jurisprudence, conceptualised as the main organ for the functioning of the family collective. In this sense the primogeniture principle is presented as the repository of the central values of shared authority, communal living, common belonging, and collective ownership – all of which traversed the spectrum of African jurisprudence in which everyone owed his or her being to others.

The head of the family had to be selfless in his administration of the family home so as to instil egalitarian values in the distribution of resources and benefits to the family collective. Consequently, special qualifications linked to stringent conditions were demanded from candidates for appointment to the office of the family head. The selection process for the candidates was necessarily very flexible, and the order of birth served merely as an entry point.⁵ The features of competence, commitment, and capacity in the service of the family collective, were the real requirements for appointment as family head. Mahao sums up the rule as follows:

but a more discerning analysis would reveal that the rule of primogeniture was merely one of the rules – a point of departure – but most certainly not final. The correct interpretation of the rule is that it serves the limited function of providing the order of nomination for high office and nothing more. Accession was always subject to a second rule – the rule of ratification. This rule provided for participative processes through the family council, or the kgotla, and finally through a public assembly.⁶

Ultimately eligibility to family headship positions was decided on the relevance of substantive qualifications rather than the mere fact of having been born first.⁷ So strong

⁵ See Mahao NL “O se re ho morwa ‘morwa towel’ – African jurisprudence exhumed” (2010) X LIII/3 *CILSA* 317 at 321

⁶ *Ibid.*

⁷ See Mqhayi SEK *Ityala lamawele* (1914) at 20.

were the values of flexibility and adaptability that the rule very often not only led to the selection of junior brothers⁸ as family heads but also accommodated the appointment of women as traditional leaders in deserving circumstances.⁹ The principle of primogeniture notwithstanding, African culture compared favourably with Western societies when it came to the affirmation of women.¹⁰

In this chapter the primogeniture rule is seen as the centre around which the corporate family home demonstrates its personality through the family head who also manages its property. In these capacities, the role of the family head transcends the spheres of the law of persons where he personifies the home and its collective, the law of property where he is the nominal owner of family resources, the law of succession where he exercises the responsibilities of his deceased parents, and the law of obligations where he pays the debts and prosecutes the claims of the household and its collective.¹¹ As such all the concepts and institutions of African culture dovetail to inform the rule of primogeniture which becomes the pivot of African jurisprudence.

2.3 The principle of primogeniture and the concept of the family head

The introduction above alluded to the principle of primogeniture as it existed side by side with the concept of the family head. All indigenous institutions were administered by well-defined collectives of members, headed by leaders selected through the primogeniture principle. In terms of this principle, the most senior family member was selected as the head of the family or traditional leader, as the case may be. In this sense, primogeniture provided a structure for organising society at family, community, or national level, by conflating the definition of seniority with that of responsibility. Ngcobo J describes the primogeniture rule as:

the primary purpose of the rule is to preserve the family unit and ensure that upon the death of the family head, someone takes over the responsibilities of the family head. These responsibilities include looking after the dependants of the deceased and administering the family property on behalf of and for the benefit of the entire family.¹²

⁸ *Ibid.*

⁹ See Mahao *op cit* 325.

¹⁰ *Ibid.*

¹¹ See Bekker JC *Seymour's customary law in southern Africa* (1989) 81.

¹² See *Bhe v The Magistrate Khayelitsha*; *Shibi v Sithole*; *Human Rights Commission v President of Republic of South Africa* 2005 (1) BC LR 580 (CC) (hereafter *Bhe-Shibi*) par 180.

Contrary to the general belief that the principle of primogeniture serves as a means of selecting despotic rulers, the reality is that it was focused on the selection of a responsible servant to serve a particular constituency.¹³ The primogeniture rule was merely a tool for supplying the family collective with a leader who would facilitate the participation of the members in the affairs and resources of the home. In this sense the operation of the principle of primogeniture served as an assurance that the head did not act alone in administering the affairs of the family. This phenomenon shows how the powers of the family head were severely circumscribed by custom. In essence the family head was the mouthpiece of the council of elders and seniors who were the real owners of family decisions. This view is confirmed by Bekker as follows:

A family head is by no means a despot in law, as is sometimes supposed; he has control of each house, but its members have a collective interest in its affairs and property.¹⁴

This is a far cry from the current dominant pejorative trivialisation of the concept of primogeniture as “the organising principle of male primogeniture which allows succession from father to firstborn son only”.¹⁵ This description springs from “official” customary law, which ignores the leadership responsibilities imposed by the rule and trivialises it as a rule that “discriminates unfairly on the grounds of age, birth and most conspicuously, gender”.¹⁶ It is a narrow view that exposes a deep-seated harbouring of alien metaphysics that seeks to juxtapose man’s powers against the very interests of family women and children with whose welfare his position entrusted him.¹⁷

Moreover, by equating the primogeniture rule with a facile preference for males in matters of inheritance, the narrow view displays a fundamental ignorance of the nature

¹³ *Ibid.*

¹⁴ See Bekker *Seymour’s customary law op cit* 70. In this regard Ndima DD “African law of the 21st century in South Africa” (2003) XXXVII/3 *CILSA* 325 at 332 writes: “All property was owned by the home and the head (only one male) merely exercised the rights in the property for and on behalf of other members and himself. Even the head would not take important decisions without consulting the other members of the home, especially the mother of the family.”

¹⁵ See Mireku O “Customary law and the promotion of gender equality: An appraisal of the *Shilubana* decision” (2010) 10 *African Human Rights Law Journal* 515 at 517.

¹⁶ *Idem* 516.

¹⁷ See *Mthembu v Letsoalo and Another* 2000 (3) SA 867 (SCA) for the manner in which the distorted narrow view that primogeniture meant that the senior man owned family property was endorsed by the courts.

of the rule, and overlooks that the rule was a tool for transmitting responsibilities from earlier to later generations through the instrumentality of seniority and manhood. It also undermines the corporate nature of ownership of family assets by ascribing private ownership to the family estate as an asset that passes from father to son.¹⁸

This chapter also contests the narrow view of the principle of primogeniture as a distortion of its indigenous conception. To counter this situation, a broader view that displays the position occupied by the institution of manhood in society is advocated as it does not look at the difference between men and women through gendered lenses. The broad view appreciates the role played by the principle of primogeniture in the social, political, and legal organisation of society in that it advances the rights and interests of vulnerable members of the family in accessing their benefits in the assets and resources of the family, secured by the notion of communal sharing and common belonging, which they could enforce against an irresponsible family head.¹⁹

To this end the powers of the family head were inherently geared towards promoting the welfare of the entire household and especially its most vulnerable members. More importantly, the broad view appreciates the concept of the family head as the agency through which the family collective protects its vulnerable members. Seen in this light, the principle of primogeniture is an institution for allocating accountability within the household, and for distributing socio-economic goods and services at domestic, community, and social levels. As a reminder for family heads primogeniture committed them to rededicate themselves to the very sources of their powers by connecting every exercise of authority to responsive purposes, through advancing the interests of collectivity, communality and common belonging.

This chapter does not deny the concept of primogeniture's close association with the institution of manhood, but insists that the latter institution never existed for its own sake. Manhood was a handy tool by which to provide stability and continuity in society in order to preserve the identity of communities, and to address the socio-economic interests or needs of vulnerable groups. These values demanded that a man's sons should succeed

¹⁸ See *Sigcau v Sigcau* 1944 AD 67 at 79.

¹⁹ See *Bhe-Shibi supra* par 180.

him so as to perpetuate the home as a permanent entity for the collective survival of the members. Furthermore, the virilocal or patrilocal²⁰ nature of the indigenous marriage ensured that sons remained at their homes to perpetuate the legacy of the family.

The centrality of primogeniture as an institution directed the psyche of Africans towards establishing an appropriate education system to equip men to assume and advance the responsibilities of their fathers in line with the dictates of indigenous metaphysics. This philosophy holds that the current generation does not own the world it received from the previous one, but rather holds it in trust for onward transmission to future generations.²¹ This appreciation of their position as transient caretakers of their responsibilities was vital for the understanding why men were always preferred over their sisters in the appointment of successors to family headship. The successor had to remain at the family home to look after women and children.²²

The principle of primogeniture presents the family head as the provider of responsible and accountable leadership for the benefit of young and junior family members and has been found to be justifiable in a democratic society characterised by equality and human dignity.²³ Because of the emphasis on the lofty values of responsibility and accountability the rule justified the preference given to seniors on the basis of competence and capacity which were found to exceed the problem created by overlooking junior members for the position.²⁴

This consideration also manifested itself in the marriage institution. An important part of the marriage agreement entailed the transfer of the woman together with her reproductive capacity²⁵ to the husband's family so as to provide the latter with a successor who would be charged with the responsibility of perpetuating that family's legacy. This is in accordance with the African tradition which directed that when a daughter married she begot children that fell under her marital family.²⁶

²⁰ See Bennett *Customary law in South Africa* (2004) 213.

²¹ See Prophet Landwandwe "Akusiko Kwami, Kwebantfu" *unearthing King Sobuza II's philosophy* (2009) 178.

²² See *Bhe-Shibi supra* par 180.

²³ *Idem* par 183.

²⁴ *Ibid.*

²⁵ See Bekker *Seymour's customary law op cit* 150.

²⁶ See Soga *Intlalo kaXhosa* (1937) 72. See also Bekker 234.

When viewed from the context that most women necessarily married away from their maiden families and actually moved to their marital homes, family headship meant that women would not ordinarily be available to provide their maiden homes with the requisite stability and continuity associated with the nature of the position. The primogeniture principle was centred around the values of accountability and responsibility. This means that the purpose of the family head's life was the advancement of the lives of other family members.²⁷ While men's responsibility was to advance the interests of their families women were transferred through the *lobolo/bogadi* agreement to their husband's families to enrich them with children, particularly successors to headship positions.²⁸ For this reason African culture could not imagine a marriage that was entered into for a purpose other than the provision of children. A childless marriage, therefore, was regarded as the most abysmal thing that could befall an African family.²⁹

In order to provide the services demanded by her married condition a woman relinquished all her succession rights within her maiden family,³⁰ as "[s]uccessorship also carries with it the obligation to remain in the family home for the purposes of discharging the responsibilities associated with heirship".³¹ This was particularly so in the case of succession to traditional leadership as a princess who married a commoner outside of her maiden heritage could not demand to succeed to the position of her deceased father.³²

The functions of traditional leadership are required to be exercised from the royal family and not from some family of commoners into which the princess married.³³ In this way, the princess was seen to have abdicated her royal heritage and assumed the status of

²⁷ In this sense primogeniture functioned to advance the philosophy of *ubuntu*.

²⁸ Bekker *Seymour's customary law op cit* 150.

²⁹ See Abiodun BO "Towards an African concept of law" (2007) *African Journal of Legal Theory* 71 at 74.

³⁰ The case of *Shilubana and Others v Nwamitwa* 2008 (9) BC LR 914 (CC) (hereafter *Shilubana 2*) discusses a daughter of a traditional leader who married a commoner outside the royal household but came back to claim succession rights to the traditional leadership position at her maiden home.

³¹ See *Bhe-Shibi supra* par 180.

³² Dlamini *op cit* 39.

³³ In *Shilubana 2 supra* the Constitutional Court overlooked the rule that "[s]uccessorship also carries with it the obligation to remain in the family home for the purposes of discharging the responsibilities associated with heirship" and appointed the princess who had married into a commoner family and could not satisfy the requirement of remaining at the royal family and discharging her duties.

a commoner, and thus could not claim a traditional leadership position. For this reason, under the South African Constitution, an unmarried maiden who meets that primogeniture qualification should have no difficulty in succeeding her deceased father as a traditional leader.³⁴

A married woman and her children acquired succession rights within her marital family, while the marriage itself established a secure economic entity known as the house.³⁵ One of the most important consequences of the indigenous marriage was the duty of the husband to provide such an estate, to enable the wife and her children to prosper in accordance with principle that upon marriage the wife and her children's welfare became the responsibility of the corporate home of her husband which they accessed through its head. The latter ensured that the husband established and headed the house as a unit for the wife and her children. After the husband's death the house remained under the protection of the family head.³⁶

For these reasons, the present author cannot accept the view that the primary purpose of the concept of primogeniture is to promote the interests of males and to oppress women in society. The relegation of women to a seemingly subordinate position is the natural adjunct of a culture where common survival and shared belonging are more greatly prized than individual autonomy. The broad view of primogeniture rejects the pejorative equation of primogeniture with narrow patriarchy in the sense that conflates the relationship between manhood and womanhood, with the Western liberal "contest" between feminism and male chauvinism. This is rejected as part of Euro-Western liberalism which tends to impose its hegemonic features on the definition of indigenous institutions in order to undermine the African life-world and its underpinnings.

2.4 The concept of substitution in African law

The importance of the role of the family head was such that in his absence someone had to be there to execute his duties. The context was that the corporate home was a

³⁴ *Bhe-Shibi supra* par 180.

³⁵ See Bekker JC *Seymour's customary law of southern Africa* (1989) 135.

³⁶ See *Mthembu v Letsoalo supra* discussed in chapter 7 below for a family head who repudiated his customary obligations by contesting the validity of his daughter-in-law's marriage and thus the legitimacy of his grand children.

continuing entity and a juristic person, with rights to be enforced and duties to be performed regardless of any individual's absence or incapacity. This brings to the fore the need for the emergence of the concept of substitution which provides that any adult or initiated male, was in the event of the absence or incapacity of the head, empowered to substitute the head in expressing the collective voice of the corporate family home.³⁷ Age and status were important because the capacity of a family member to speak or act depended on these attributes.

The role of a competent member of the family who replaced his or her absent seniors in representing the family, was valid and whatever he or she undertook to do bound the family as if the head himself had acted.³⁸ That is why all men were treated as potential family heads during training and initiation, regardless of their rank or status.³⁹ In any event, the institution of substitution was designed to facilitate the appointment of junior men who were not eligible for succession, to act as representatives of their families in the absence of the heads. That is why all men were trained for this function as all of them would eventually become heads of their own families with the same obligations and responsibilities as those inherited through succession.

Substitution also followed the primogeniture principle as the substitutes were selected in accordance with their order of seniority. The effect of substitution was that the corporate home remained liable for all customary obligations undertaken by the substitute. For instance a fully grown man would not hesitate to substitute his absent seniors in negotiating his wife's *lobolo/bogadi* with his prospective in-laws, and would clinch a marital deal that bound his family home to honour its customary obligations.⁴⁰ Nor would primogeniture prevent the prospective mother-in-law, as a responsible member of her family, from substituting her absent husband and representing her marital family in the *lobolo/bogadi* negotiations for her daughter's marriage.⁴¹ The reason why the principle of primogeniture insisted on seniority and maturity was to ensure the participation of a responsible and accountable family member in negotiations

³⁷ See Mandela N *Long walk to freedom* (1994) at 33.

³⁸ See Bekker *Seymour's customary law op cit* 81.

³⁹ See Setiloane *op cit* 36.

⁴⁰ See *Mabena v Letsoalo* 1998 (2) SA 1068 (T).

⁴¹ *Ibid.*

that would bind the family collective. Ebo expresses this matter from a Nigerian Ibo perspective thus:

Every individual is born into a certain status relative to all other members of the community. It is not a personal status, as it might be in an individualistic society, and does not imply rank, but reciprocal obligations and benefits which he incurs as a member of the community ... Consequently, an individual may be required to act as a "stand-in or surrogate for any of his status kith and kin".⁴²

In the event of the return of the senior member of the group, he would resume his position and accede to all the transactions and commitments undertaken by his substitute. The latter transactions remained valid and binding on the senior, and, therefore, on the corporate family home. In this sense, African law did not recognise the notion of an age of majority which liberated a person from submitting to the decisions of the collective, nor did it recognise a state of perpetual minority that prevented an adult person from acting as a substitute who could undertake commitments that were binding on the corporate home.

It can therefore be said that just as the presence of seniors reduced every junior person to the position of a minor, their absence provided adult juniors with a majority status.⁴³ At the same time junior status did not detract from the mature individual's unfettered personal capacity to participate on an equal basis in all family, clan, and community activities which had nothing to do with primogeniture.⁴⁴

Mandela acknowledges that full capacity to act and to represent or substitute seniors grows with age and is reflected in the mature habits of caring for others, generosity of spirit, moral strength and resourcefulness in giving weighty advice in public fora. Referring to the effect of his own initiation to manhood Mandela writes:

⁴² See Ebo "Indigenous law and justice: Some major concepts and practices" (1979) 76 *African Law and Legal Theory* 139 at 143.

⁴³ See Setiloane *op cit* 36 where he says that upon initiation a boy became a man, and a girl became a woman. The purpose of initiation was to train the youth to obey the seniors and to be able to carry his burden of pain and suffering.

⁴⁴ Mandela *op cit* 33.

I had now taken the essential step in the life of every Xhosa man. Now I might marry, set up my own home and plough my own field. I could now be admitted to the councils of the community. My words would be taken seriously.⁴⁵

2.5 The African family and the concept of the corporate home

The indigenous African home was a corporate legal entity that enjoyed the right to own property and incur obligations in respect of wrongs committed by family members through the agency of the family head. Every family home owned the collective family estate through the agency of its head.⁴⁶ This much is conceded by Bekker, who otherwise ascribes family property to the ownership of the head.⁴⁷ He writes:

The family home was not owned outright by the family head, but was held in communal ownership by the family as a unit, under his administration and control.⁴⁸

Bekker's admission that the family owned the estate as a unit, is at odds with his simultaneous insistence that the goods of other family members vested in the family head.⁴⁹ In fact it is the juristic personality of the family home that capacitated it to sue and be sued through the family head and a council of elders. The family head prosecuted claims due to the home and defended those against it. In this sense the corporate legal personality of the indigenous home was predicated on the principle of primogeniture which enabled it to function.⁵⁰

As the personification of the communal home, the family head was the nominal manager of its estate and the nominal guardian of the entire corporate family.⁵¹ In respect of the estate, the head was the accounting officer bearing obligations to settle claims against the family home.⁵² With regard to the family collective, the head enjoyed

⁴⁵ *Ibid.*

⁴⁶ Bekker Seymour's customary law *op cit* 74 states: "Although the property of the house is commonly spoken of as belonging to the family head, because this is a brief and convenient way of describing the matter, it belongs in law to his family as a unit, under his supervision and control; it has also been described as belonging in communal ownership to the family, which, of course, includes the family head".

⁴⁷ See Bekker Seymour's customary law *op cit* 82.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Idem* 297.

⁵¹ See Ebo *op cit* 143.

⁵² See Bekker Seymour's customary law *op cit* 297.

paternal powers to maintain discipline and instil good behaviour. In both capacities, the head executed his functions together with family elders and seniors who had the experience to preserve the identity and the legacy of the family.⁵³

The position of the family head was therefore that of the servant of the corporate home as opposed to its owner.⁵⁴ This accounts for the severely circumscribed manner in which he exercised his powers and capacities. Contrary to popular belief regarding the apparent expansive extent of his powers, the true position is that the family head, like everyone else in the family, never had the capacity to own major assets such as livestock and farms, which were in fact owned by the corporate home for the benefit of the family collective.⁵⁵ Consequently, ownership of such items as the cattle was always expressed in inclusive terms with connotations of a shared access to their enjoyment.⁵⁶

This explains why people always referred to family assets in non-possessive language such as *inkomo yakuthi* (translation – “our cow” or, in literal terms “the cow of our home”),⁵⁷ which located the ownership of the beast at the behest of the corporate home, whose resources were shared by every family member. Corporate ownership ensured that every family member, including the women and children, was a shareholder in the family estate proportionate to their rank and status.

The family head maintained and supported the other family members as the nominal manager of the family resources. Yet he was not dispensing his own generosity to the family. Instead, he merely controlled the distribution of the shares to the real owners.⁵⁸ His position as a family agent demanded that he be accountable for the welfare of even the most vulnerable family member.⁵⁹ It also belies the representation of the family head

⁵³ *Idem* 298 refers to the “official” version of customary law when he presents the heir as having the sole interest in family property and cannot be required to account by family elders and seniors.

⁵⁴ See Prophet Landwandwe “*Asiko Kwami, Kwebantfu*” *Unearthing King Sobuza II’s philosophy* at par C of the “Foreword” by Prince Mabandla.

⁵⁵ See Bekker *Seymour’s customary law* op cit 72.

⁵⁶ See Seema J “The significance of BaSotho philosophy of development as expressed in their proverbs” (2012) 11/1 *Indilinga African Journal of Indigenous Knowledge Systems: Africa Indigenous Systems: An Account* 128 at 129.

⁵⁷ See Ndima “The place of customary law” op cit 334-335.

⁵⁸ See Seema op cit 129.

⁵⁹ See Soga op cit 72.

as the owner of the family estate⁶⁰ with powers to evict other members from the family home.⁶¹ The request for goods and services by family members from the family head was, in fact, a demand to him to make their shares accessible for use. He, therefore, had no discretion to refuse that to which they were entitled by custom.

The family head's designation made him the first servant of the corporate home, and not the owner of family assets. To assure family elders and seniors of his loyalty to the corporate home the head would often rededicate himself to the pedigree of his position in family council meetings. As his normative referent he emphasised his commitment to the responsibility of serving his father's family.⁶² He demonstrated his unwavering commitment to the service of the corporate home by calling his house "*motse wa borra*" (translation – the household of my fathers).⁶³

This customary convention ensured that humility was the main characteristic of a competent head of the family who respected and showed regard for order in society. Commitment to a fair and equitable service to the family members, particularly women and children was a pre-requisite for the application of the principle of primogeniture. Ngcobo J has this to say in this regard:

Two points need to be stressed here. First, *indlalifa* [the heir] does not inherit as that term is understood in common law. What happens is best conveyed by the expression that "*indlalifa* steps into the shoes of the family head". Far from getting any property benefit, the *indlalifa* assumes the responsibilities of a family head. He is required to administer the family property for the benefit of the entire family ... where there are insufficient assets in the family, *indlalifa* must use his own resources. Second, the selection of the eldest child must also be seen against the flexibility of the rule and the fact that he may be removed from office.

If the eldest child considers that he cannot perform the responsibilities, the next eldest [child] takes over the responsibility. What is more, the *indlalifa* may be held to account to the family, if he does not perform his responsibilities. The family may, if he fails to perform his duties, remove him.⁶⁴

⁶⁰ See Bekker *Seymour's customary law op cit* 72 refers to the "official" version of customary law by presenting the family head as the owner of family property.

⁶¹ See *Mthembu v Letsoalo supra* and *Bhe-Shibi supra*.

⁶² See Mahao *op cit* 322.

⁶³ See Setiloane *op cit* 40.

⁶⁴ See *Bhe-Shibi supra* par 182.

2.6 The institution of marriage in African law

The epistemology of inclusiveness clearly illustrates group solidarity in the operation of a number of indigenous institutions including marriage. Such institutions retain a communal character that continues to provide their modern versions with their traditional role in society as well as the basis on which they can be maintained, improved or abandoned as customary law develops according to its adherents' view of the world.

Whenever a marriage was concluded, an affinity relationship came into existence to join the two families, not just the two spouses.⁶⁵ Kenyatta has this to say:

female children are therefore looked upon as the connecting-link between ... one clan and another, through marriage, which binds the interests of clans close together and makes them share in common the responsibilities of family life.⁶⁶

The phenomenon of two families marrying derives from a metaphysics that imagines all the members of the husband's clan being conceived as a "block" of in-laws that regards itself as the husband's brothers and sisters. This block can figuratively be conceived as a mega-husband in that all members of the block, individually and collectively respond to their obligations towards the in-laws group in the name of the husband. Similarly all the members of the wife's clan regard themselves as the wife's sisters and brothers, and behave as the wife would do towards the husband's group. Theoretically the wife's clan as a whole becomes a mega-wife of the husband's clan. Both the husband and the wife were seen as the spouse of his or her collective block of in-laws. If any one of the members of the husband's clan attended a funeral taking place at the wife's clan, the husband himself was regarded as having attended.

Together these two clans assume the responsibility of being the assurers of the marriage as clan membership entitles everyone to participate in strengthening the relationship of affinity. The emphasis on the group in the communal nature of the African marriage does not, however, trivialise the role of the spouses. The two spouses were

⁶⁵ See Jansen RM "Family law" in Bekker JC, Rautenbach C and Goolam NMI (eds) *Introduction to legal pluralism in southern Africa* 31. Note also that Kenyatta J *Facing Mount Kenya* (1938) 175 writes in the context of the Gikuyu people of Kenya: "Keimba kea mothoni na mothoni igoaga ham we" (literally "Corpses of relations-in-law fall together"), meaning "Together let us live and if needs be together let us die".

⁶⁶ See Kenyatta *op cit* 175.

indeed important and occupied the centre of the marriage transaction and relationship. The families as marital assurers of the marriage stood to enjoy the benefits of the affinitive relationship that they had established by extending their mutual solidarity and unity. Most importantly, the responsibility to resolve future marital problems rested on the two families jointly.

The marriage relationship was therefore a good illustration of the ethos of common belonging in African culture. The wife belonged to the entire marital family through her husband, in the same way as her entire maiden group were connected to her husband's group through her. For this bond to emerge, consensus was necessary between the two families, underwritten by seniors, elders, and the living-dead. This process, which extended from marriage negotiation, through the actual marriage ceremony, and beyond, was mobilised through the transfer of communal assets at all stages.

The communal nature of the marriage relationship resulted in a complex and collective network of relationships that affected the spouses, their contemporaries, the elders and the youth of the two families.⁶⁷ Based on this broad dispensation, the relations between the two groups were more prominent and demonstrable in social practice where their members traded acknowledgements of affinity that enhanced the cooperative spirit. This can be ascribed to the fact that their families forged consensus which took account of the compatibility of spouses within their family contexts.

The resultant marriage was in the objective assessment of the negotiators and the families, an institution that functioned in the interests of the spouses and their families rather than in terms of what the spouses subjectively wanted.⁶⁸ Church *et al* express this phenomenon thus:

The rights, duties, obligations and interests of individuals and groups involved were, in each case, unique. The process [of lobolo negotiation] involved the selection of the group, the identification of the wife based on her features, talents, abilities, capacities and merits, her suitability for the husband [and his family], and the availability of

⁶⁷ *Idem* 169.

⁶⁸ See Church J, Schulze C and Strydom H *Human rights from a comparative and international law perspective* 64-65 quoted in Ntlama N and Ndimma DD "The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems" (2009) 4 *International Journal of African Renaissance Studies* 6 at 9.

marriage goods and their condition. The other party would go through a similar exercise in their appraisal process. In the end, both sides claimed the spouse as theirs – all the members of the bridegroom’s group had their reasons for accepting the bride as a suitable wife, in the same manner as the wife’s side had their reasons for claiming the husband. Marriage transcended law, politics, economics, ethics and religion. It was a product of multi-disciplinary discussions.⁶⁹

To encourage families to accept their affinitation proposals, the various clans competed with their neighbours for respect and recognition of their distinctiveness. In practice different clans distinguished themselves by displaying certain values and excelling in particular areas of expertise.⁷⁰ In the selection of marriage partners, the elders often based their reasons for asking for the hand of a particular woman in marriage on such spousal features as her clan’s reputation for diligence, integrity, generosity, neatness, humility or any other commendable attributes.⁷¹

Similarly, the bride’s family would often state that their attraction to the affinitation relationship with the husband’s clan was based on their reputation for bravery, generosity, productivity, and so on. Apart from the belief in the transmissibility of these qualities through the reproductive process, the central message was that no one should associate oneself with families which were not serious about life in general. This also shows the level of concern the elders had about the future of their progeny.⁷²

Owing to the communal nature of the marriage relationships such as husband, wife, parent, child and other kindred relationships, were entrenched in a vocabulary that reflected feelings of mutual belonging, collective solidarity and communal sharing among the members of the two families in their personal and collective interactions.⁷³

⁶⁹ See Church *et al op cit* 64-65.

⁷⁰ There is a tradition that says the amaXesibe community succeeded in getting land where they were settled along the Mthatha River as a buffer against would-be invaders because they were excellent manufacturers of weapons for the abaThembu Kingdom.

⁷¹ See Kenyatta *op cit* 176 noting such spousal features as “beautiful and industrious and people speak highly about her and her family”.

⁷² See generally Soga *op cit* 62-66.

⁷³ Ebo *op cit* 143 writes: “Every individual is born into a certain status relative to all members of the community. It is not a personal status, as it might be in an individualistic society, and does not imply rank, but reciprocal obligations and benefits which he incurs as a member of the community.” See also Ade Ajayi JF “Social justice in traditional African societies” in Falola T (ed) *Tradition and change in Africa* (2002) 3 at 5.

In Sanders's view the value of this unique notion of wide ranging relationships and networks lies in gratifying the emotional aspirations of the adherents of African law. He believes that "[whilst] autonomic customary law is not the same as the customary law of the pre-colonial past, the traditional communal spirit ... however, remains".⁷⁴ Initially, the affiliation relationship between the two family groups,⁷⁵ is forged during the *lobolo/bogadi* negotiations which are conducted in the names of the clans. The *ikhazi*⁷⁶ (marriage goods) is delivered and received in those names. Thus two family groups became joint assurers of the marriage.⁷⁷ Such goods were often in the form of communal assets such as cattle, which were owned by the family collective, and not by the individual husband.⁷⁸ Being a communal asset *ikhazi* was symbolically transferred to the family home, not just to the woman's father as an individual.

During the *lobolo/bogadi* negotiations consensus gives rise to a number of crucial consequences. The celebration of the marriage changes the wife's membership of her maiden family as she assumes membership of her husband's family.⁷⁹ The agreement entails the irreversible transfer of her reproductive capacity to her marital family to which her children will belong. As a result, the latter family remains entitled to more children even after the death of her husband. This is because death does not terminate the customary marriage and its impact can be mitigated through the *ukungena* custom. This custom entitles the widow to a substitute husband selected from among her in-laws.⁸⁰

The African tradition, therefore, did not recognise widowhood as a disabling factor. Through *ukungena/kenela*⁸¹ arrangements, the woman was provided with a substitute

⁷⁴ See Sanders AJGM "How customary is African customary law" (1987) XX *CILSA* 405 at 409. In this sense the phrase "autonomic customary law" means the version of the system that is current in social practice.

⁷⁵ See *Fanti v Boto and Others* 2008 (5) SA 405 (C).

⁷⁶ *Ikhazi* is an isiXhosa term for the marriage goods as a unit and is always expressed in the singular.

⁷⁷ In the Xhosa culture this forging of the unique relationship through the *lobolo* transaction was sanctified by the term *ubulawu* (affinity), to distinguish its special status from the commercial activities that often took place between groups.

⁷⁸ See Magodla AS "Ixabiso Leenkomo" (author's translation – "The value of cattle") in Bennie WG (ed) *Imibengo* (1935) 252.

⁷⁹ Kenyatta *op cit* 170 says: "... the girl is regarded as having been blessed and given away to the boy's clan by her parents in agreement with the whole clan".

⁸⁰ See Bekker *Seymour's customary law op cit* 286.

⁸¹ See Soga *op cit* 52 where he compares this tradition with those of the Old Testament in Genesis 38:8; Deuteronomy 25:5-6; and Ruth 4:10. According to Soga, even David, an ancestor of Christ, was a progeny of *ukungena*. Indeed the practice was still in vogue during the time of Christ. See the New Testament Matthew 22:25-28; Mark 12: 19:23; and Luke 20:28-33.

husband from among the deceased's kinsmen who would then continue to perform the deceased's reproductive responsibilities.⁸² The widow's children by her initial husband would, in addition to the communal guardianship of the family collective that every child enjoyed in the clan, continue to have a father figure.

The children of the *ukungenakenela* arrangement were procreated in the name of the deceased.⁸³ From the *ukungenakenela* practice one sees African culture's resolve to overcome the twin scourges of widowhood and orphanhood.⁸⁴ By providing the widow with a husband, African law attested to the ideal of the permanence of the African marriage which endured beyond the death of the spouses. Under the *ukungenakenela* arrangement, the deceased's children continued to live in a normal home environment with a mother and a father like normal children. In this sense communal living tempered life's rough edges by resolving the plight of widows and orphans through the prevention of the tragic manifestations of death. *Ukungenakenela* children, like all children, belonged to the family collective through their mother's deceased husband, and were treated no differently from other children of the extended family.⁸⁵ As a result the death of the husband did not dissolve the marriage, instead it left the family structure to which the wife was married intact.

The bond that joined the two households was immortalised by the *lobolo* consensus, and sealed by the delivery of *lobolo/bogadi*. The procreation of children lent permanence to the affinitive relationship.⁸⁶ Death did not end the deceased's membership of his or her house.⁸⁷ If anything, death strengthened the position of the deceased because by undergoing transformation from the physical condition to the state

⁸² Bekker *Seymour's customary law op cit* 286 writes: "Since a widow continues to keep her status as 'wife' at her husband's family home after his death, she is expected to continue to give effect to one of the main objects of matrimony, namely, the procreation of children; no widow who is young enough to bear children is required to live a chaste life after her husband's death ... she will be induced to accept as a consort one of her husband's male relatives".

⁸³ *Idem* 235.

⁸⁴ Section 28(2) of the Constitution provides for the rights of children. In African law, the best interests of the child were protected through communal obligations (to arrange a father for them), rather than the individual rights of the child (which it could enforce against its parents).

⁸⁵ Bekker *Seymour's customary law op cit* 235.

⁸⁶ *Idem* 215 Bekker says: "... they remain connected, however, by the collective interest common to all families belonging to the same group"

⁸⁷ *Ibid.* See also Jansen RM "Family law" in Bekker JC, Rautenbach C and Goolam NMI (eds) *Introduction to legal pluralism in southern Africa* (2006) 29 at 49.

of living-dead, death brought him or her nearer to the creator than ever before.⁸⁸ Not even the death of a family head who was the controller of the family estate, affected the proprietary rights of the other members as it did not impact negatively on their communal shares.

What the death of a family head did was to trigger succession to the position of the head as the controller and trustee of the affairs of the family so that the proprietary interests of the collective were not thereby adversely affected. Most transactions were conducted in recognition of the cooperation between the living and the living-dead (the hidden presences within the family).⁸⁹ The latter were the benevolent hidden presences and underwriters of the blessings that accompanied the performance of birth, initiation, marriage and death rites.⁹⁰ The collective spirit with which families pursued these rituals entrenched them as the catalysts for the development of being. Death was therefore something to look forward to, rather than to be feared, as everyone cherished the opportunity to oversee the fortunes of his/her progeny.⁹¹

The same principle means that divorce was an unknown concept in African law, as spousal loss of mutual passion could not affect the permanence of the culturo-religious blessings that were enacted by the consensus reached by their clans through the *lobolo* covenant. In this regard Kenyatta writes from the Gikuyu experience in Kenya as follows:

⁸⁸ Mtuze TP *The essence of Xhosa spirituality – and the nuisance of cultural imperialism (hidden presences in the spirituality of the am aXhosa of the eastern Cape and the impact of Christianity on them)* (2003) 25 says: “The living-dead being so close to the Deity act as intermediaries between the living, the dead and the Deity”. Biko S “Some African cultural concepts” in Coetzee PH and Roux APJ (eds) *Philosophy from Africa – a text with readings* (1998) 26 at 29 adds “We all accepted without any doubt the existence of a god. We had our own community of saints. We believed – and this was consistent with our views of life – that all people who died had a special place next to god. We felt that a communication with god could only be through these people. We never knew anything about hell – we do not believe that god can create people only to punish them eternally after a short period on earth.” See also Tamsanqa WK *Ithemba liyaphilisa* (1979) at 131; Mqhayi “Ityala” *op cit* 64; and Hodgson *The god of the Xhosa* (1982) 85-86 regarding the Xhosa version of the African religion.

⁸⁹ *Ibid.* Mtuze *op cit* 25 describes them as “... the living-dead who are benevolent beings (not spirits) whose main function is to ensure good life and well-being except when someone has gone against any ritual norms in which case they exercise their prerogative to punish the offender”.

⁹⁰ Setiloane *op cit* 40 says: “The ultimate development is when, after a long life, a person joins the ranks of ‘*badimo*’ to continue his influence and share his beneficence with the living. Death thus becomes not an enemy but a further graduation in personal growth, ‘the ecstasy of fulfilment’”. See also Ntuli PP “Indigenous knowledge systems and the African Renaissance – laying a foundation for the creation of counter-hegemonic discourses” in Odora Hoppers CA (ed) *Indigenous knowledge and integration of knowledge systems* (2002) 53 at 61 where he says: “Respect for the elders was given priority so that, among other things, the old would not fear ageing, as many do today. To the contrary, in the Zulu culture, when people aged, they graduated and were ‘capped’ with *isicoco*”.

⁹¹ See Ntuli *op cit* 61.

Among the Gikuyu divorce is very rare, because of the fact that a wife is regarded as the foundation-rock on which the homestead is built. Without her the homestead is broken, therefore it is only when all efforts to keep the husband and wife together have failed that an action for divorce can be taken.⁹²

As communal living is the reality of many Africans and rural communities who inherited it from their forebears and its adherents continue to expect to be governed according to their customs the intricacies of their mutual relationships need to be examined. For instance, collective ownership of property implied that no one had a private material interest in property. Even when junior family members incurred obligations through their own activities, their identity with the corporate home bound the family resources. In litigation, the technique of the joinder of the head of the family was applied to facilitate the satisfaction of judgments. The family head had to appear as a co-defendant with the wrong-doer during legal proceedings so that the judgment would also bind family resources.⁹³ The joinder of the head was very important as the home could only perform in terms of judgments issued against its members through the head as its accounting officer. Without such joinder, creditors would get empty judgments as there would be no way of accessing the collective resources. Everyone's legal personality was inextricably embedded in that of the family, because all members regardless of age shared a common estate. Hence African law did not develop the notion of individual legal personality based on majority and private property.

In the sphere of the law regulating wrongful conduct amounting to what common law would term the law of delict the notion of shared belonging was most clearly reflected in the exposure of family members to common fortunes and burdens.⁹⁴

When committed by individuals such wrongs were settled from the collective resources because the common membership of a single family home meant that all members of the family were tainted by the wrongful act committed by an individual member.⁹⁵ This is to say that if a member contravened the law, the entire corporate family was haunted

⁹² Kenyatta *op cit* 183.

⁹³ See Whelpton FPvR "Law of contract" in Bekker JC, Rautenbach C and Goolam NMI (eds) *Introduction to legal pluralism* 67 at 69.

⁹⁴ See Ebo *op cit* 143.

⁹⁵ *Ibid.*

by that misdeed.⁹⁶ A consequence of this is that the stigma of dysfunctionality incurred through the wrongful act stigmatised the whole membership. Hence all members of the family had to be cleansed by settling the debt from the corporate resources. Ebo illustrates this phenomenon thus:

The liability for his offence is shared equally by his “status brothers” who stand equally accountable as far as concerns the spiritual retribution which attaches to the deed committed by their compatriot. In order to absolve themselves from the dire consequences of the act of their mate, it becomes a direct duty they owe to their self-interest to see to it that the offender is apprehended and punished. For only thus can they purge themselves of the onerous burden of responsibility for the offence.⁹⁷

The settlement of the debt from the corporate fund ensured that the collective was cleansed of contamination resulting from the impact of the wrongful acts of individuals. The fear of these burdens strengthened the hand of family members against misbehaving colleagues which in turn compelled family seniors to ensure that family heads imposed strict disciplinary measures.⁹⁸ In this sense the real guardian was the corporate family whose powers were exercised collectively by the membership through the head.

Corporate legal personality concentrated juristic personality in the home in accordance with the principle that the life of one is indivisible from the lives of others. This was reinforced by the principle of primogeniture in terms of which the status of the head of the family, his authority over the other members and their property affected the status of all the members of the family with whom he shared the community of life.⁹⁹ The principle of primogeniture affected the structure of the indigenous household and gave direction to its activities. The head personified the home and the family by performing its obligations.

⁹⁶ Ayinla LA “African philosophy of law: A critique” (2002) 6 *Journal of International and Comparative Law* 147 at 155 attributes the following statement to Mbiti: “The guilt of one person involves his entire household, including his animals and property. The pollution of the individual is corporately the pollution of those related to him whether they were human beings, animals or material goods.”

⁹⁷ See Ebo *op cit* 143.

⁹⁸ Ayinla *op cit* 156-157 recalls this proverb from his Yoruba language: “If a kinsman is not warned in time when he eats poisonous insects, the resulting itch and discomfort will keep the whole family awake”, (original translation from “*Bi ara ile eni n je kokoro buruku tia ko ba tete wi fun un, herehuru rekonijeki a sun l’oru*”).

⁹⁹ See Ntlama and Ndima *op cit* 9.

Corporate legal personality was bolstered by the reality that the members of the family supported their head with honour and service, while he provided them with household support and necessities.¹⁰⁰ The head's position was determined by custom and approved by the members who entrusted their collective interest to him as a responsible person. In this way the constitution of the institution of the family fostered a culture of inter-dependence and mutual belonging in that for the indigenous state to run smoothly families needed to be organised and well-ordered legal entities.

Setiloane demonstrates the concept of primogeniture by describing the head of the family as a responsible man who was not judged by his political or economic status in an acquisitive society, but by his moral quality, acquired through initiation and experience which culminated in wisdom.¹⁰¹ On this basis a proper man was the one who had the capacity to represent the home and its entire membership. Setiloane rejects the notion that manhood was a matter of gender or birth, insisting rather that it was a matter of human relationships, which included being able to carry personal burdens with endurance.¹⁰² According to Setiloane a man who became a leader had:

to learn obedience to seniors, to carry one's burden of pain and suffering – these are the qualities of manhood; a goal that is constantly before the boy from a very early stage. “Monna kenku ha alle” (man is like a sheep. He does not cry out even if he is in pain). Life in community is the aim of all training in childhood and youth; and adulthood is understood not as the attainment of age, but as qualification for, and admission into full participation in, the life of society.¹⁰³

Corporate legal personality was vested in the family as a unit in which all the family members participated in the exercise of communal ownership and social solidarity under the head of the family. The family spoke and acted through the head who represented all the individuals' identities and personalities that were seen as augmenting the mega-personality of their family. Whenever the head or someone substituting him spoke or

¹⁰⁰ See Setiloane *op cit* 36.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* In this regard see also Ayinla *op cit* 154 writing: “In the Azande tribe, an unmarried man cannot sue the father of a family, but must be represented by someone who him self is a father”.

¹⁰³ See Setiloane *op cit* 36 and Mqhayi “Inkokeli” (author's translation – “The leader”) in Bennie *op cit* 208-211, where he decries leaders who always seek attention and recognition, but do not have leadership qualities. He counts humility, bravery, integrity, wisdom, responsiveness, patience, faith, and foresight, among qualities of a good leader. Mqhayi rejects greed, promiscuity, alcoholism, materialism, elitism, arrogance and pettiness as some of the attributes of a bad leader.

acted it was the corporate personality of the family that was being exercised. Corporate legal capacity reflected the voice of the group as a whole.

As Setiloane says, the concept of majority age could not develop as communal responsibilities implied that the group was to account for the conduct of the membership as a whole, regardless of their age. This explanation brings to the fore the virtues of a system that places high premium on respect for seniority as the basis for generating good attitudes, like humility and loyalty, which are pivotal to a system where group interest is the embodiment of the aggregate interests of the individuals. This is different from societies characterised by autonomous individualism and the age of majority, where individuals may approach the courts in their personal capacities to seek protection against their own family leaders.

Women played a generally subordinate role¹⁰⁴ in indigenous institutions. Yet according to Setiloane there was a role for a wife in the smooth running of a household. In his view a proper African wife was the one who was raised in accordance with custom, and underwent initiation before becoming *mma-motse* (translation – mother of the household).¹⁰⁵ She would then embrace all the members of the corporate home into her love, not only those of her own house and over the years her dignity, poise, diligence and resourcefulness would increase.¹⁰⁶ She would later acquire maturity and “become the stabilising factor, the backbone of the family, the ward and the village, loyal to her husband and reliable in all her actions and advice”.¹⁰⁷

¹⁰⁴ See Mahao *op cit* 325 and Mandela *op cit* 24.

¹⁰⁵ See Setiloane *op cit* 40.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* See also Jolobe “um Sebenzi waBafazi kwiSizwe esiNtsundu” (author’s translation – “The role of women in African society”) in Bennie *op cit* 224-226 where he sees the difference between functions of men and women as a reflection of the age-old division of labour for the well-being of the family. Therefore, men started by hunting animals which they domesticated to invest for future food security; whilst women collected, and then began to grow and nurture crops. For these reasons men always provided security, and always had to carry fewer things in their hands so that they could handle weapons as they moved around and could kill prey for the pot, whilst the woman carried goods and cared for the children. According to Jolobe, today’s changed circumstances in which men and women often have to perform almost similar functions, and the availability of new facilities and technology, should be used to alleviate the burden of hard work from the shoulders of women. He concludes that such an arrangement would enhance family relations, the quality of marriage, and give women more time to provide for their children and husbands. See further Kenyatta *op cit* 53-54 who says: “the chief occupations among the Gikuyu are agriculture and the rearing of livestock, such as cattle, sheep and goats. Each family, ie, a man, his wife or wives and their children, constitute an economic unit. This is controlled and strengthened by the system of the division of labour according to sex. From the homestead to the fields and to the tending of the domestic animals, every sphere

However, beyond the precincts of the home women assumed more challenging leadership roles in national politics. Among women heroes Mahao counts warrior queen Mmanthatsi of the Batlokwa, and prophetesses Mmantsopa of the Basotho Nongqawuse of the amaXhosa, who were not forgotten when the history of their communities was written.¹⁰⁸ According to Mahao the prominent role played by these women in the difficult past evidences African culture's capacity to overcome the problem of the subordination of women. This, he argues, would indeed have been achieved had Africa's development not been interrupted by colonialism.¹⁰⁹

Mahao singles out Princess Mmamochesane Sebetoane of the Makololo who was a provincial governor in her own right. More significantly, she became a regent ruler when her father died in 1851. Her popularity was such that the people would not allow her to abdicate her position even when she became disillusioned with it.¹¹⁰ However, among women leaders in southern Africa, Queen Nzinga, the unconquerable, occupies a special place.¹¹¹ She succeeded her deceased brother as a ruler of Angola for some forty years during which she wrested control of the country from the Portuguese and reversed colonial rule for at least thirty years during the 1500s.¹¹² Nandi was Shaka's mother who bravely defended and protected her son in difficult times during his tender years until he became a military expert and founder king of the Zulu people.¹¹³

2.7 Shared belonging and guardianship in African law

Guardianship over children was a communal activity which involved the participation of

of activity is clearly and systematically defined. Each member of the family unit knows perfectly well what task he or she is required to perform, in their economic productivity and distribution of the family resources, so as to ensure the material prosperity of the group. The best point for starting our analysis of the division of labour is from the homestead and then moving gradually to the fields. In home-building the heavy work of cutting timber and putting up the framework falls on men. Carrying and cutting of the grass for thatching and plastering the wall with clay or cow-dung is the work of women. Men build fences around the homestead or gardens and also cattle-pens. They are the night watchmen to protect the crops against wild animals. The entire housework naturally falls within the sphere of women's activities. They cook, bring water from the rivers, wash utensils and fetch firewood from the forests or bush. They also perform the task of carrying the loads on their backs."

¹⁰⁸ See Mahao *op cit* 325.

¹⁰⁹ *Idem* 326.

¹¹⁰ *Idem* 325.

¹¹¹ See William C *The destruction of black civilization – great issues of race from 4500 BC to 2000 AD* at 260.

¹¹² *Idem* 257.

¹¹³ See Kunene *Emperor Shaka The Great – A Zulu epic* (1979) (xvi).

the family collective. This included the position of a child who was a ward¹¹⁴ from another family who had joined the family collective to be raised by them. Through the head, the ward became a member of the latter's extended family and the entire clan. When the time came for him/her to return home,¹¹⁵ the ward's group had to pay one female beast known as the *isondlo/dikotlo* beast,¹¹⁶ to the host family as a way of registering the ward's transfer home. Like marriage, *isondlo* was an affirmation of the relationship between two groups which were connected through an individual whose membership of the host family could only be terminated by the transfer of a communal asset such as a cow.¹¹⁷

The purpose of *isondlo* was to account for the termination of the ward's membership of the host family.¹¹⁸ *Isondlo* had spiritual connotations because it was a procedure to transfer the ward from the ancestral traditions of the host family to those of his or her biological family. This ritual symbolised his or her transfer from the one family's religious cult, and amounted to a licence for re-integration to the biological family for protection by its gods through the transfer of the cow.¹¹⁹ For this reason, *isondlo* was different from the common law concept of maintenance because the delivery of the cow was not aimed at providing support for the ward, and remained payable even if the ward was the one who sustained the host family financially. In this scenario the latter would have gained rather than lost assets whilst staying with the ward, yet *isondlo* was payable for his or her transfer. It was therefore, unrelated to compensation for any losses incurred by the host. Delivery merely served to smooth the transition of the ward from one spiritual cult to another.¹²⁰

This explains why *isondlo* was always payable in one cow, regardless of the amount of resources incurred or the length of time spent in looking after the ward. The amount of one cow rather represented a token of appreciation for assistance given than compensation for the expenses. *Isondlo* can therefore not be properly compared to

¹¹⁴ A ward is a child living under a guardian who is not its parent. See Bekker *Seymour's customary law op cit* 343.

¹¹⁵ *Idem* 242.

¹¹⁶ See Soga *op cit* 93.

¹¹⁷ See Bekker *Seymour's customary law op cit* 242-246.

¹¹⁸ See Bennett *Customary law op cit* 282.

¹¹⁹ See Bekker *Seymour's customary law op cit* 243.

¹²⁰ Bennett TW *op cit* 282.

maintenance, which could properly be claimed even if *isondlo* had been paid. It was rather a record used by an oral society as a collective signature to release the ward from the communal guardianship of the host clan. The transfer of the cow was not without its own challenges, not least of which was that it happened to have an economic value. Cultural outsiders often, erroneously, equated *isondlo* with the western concept of maintenance.¹²¹ Whilst the latter concept relates to the actual expenses incurred for the sustenance and upbringing of the child of another.

2.8 The role of rituals in African culture

2.8(i) *Meaning and characteristics of rituals*

Rituals are traditional and religious performances which are used to legitimise developments and changes that take place in a clan or community. In African culture the performance of rituals was always accompanied by the slaughtering of an innocent animal to invite divine beneficence through the spilling of its blood.¹²² Shared belonging among relatives was bolstered by bestowing clan identity on new members through the observance of rituals which took different forms depending on the particular one being undertaken. For instance, a new-born baby and a newly-wed bride were incorporated into the collective identity of their group by participating in rituals that served to confer or confirm group membership for them. Expressing the Kenyan perspective, Kenyatta writes:

a sheep is killed, the fat of which is fried and the oil is used to anoint the bride in a ceremony of adoption into the new clan. After she has been admitted as a full member of the husband's family, she is free to mingle with its members and take an active part in the general work of the homestead.¹²³

This Kenyan practice is similar to South Africa's *utsiki* ritual that is prevalent in the Xhosa tradition whereby an animal is slaughtered upon the arrival of the bride to the family of the groom to mark her admission as the family's bride (*umakoti*). She thereby attains full capacity to function as such without any inhibition. The ritual of *ukutyisa amasi* (literary administering a dose of milk) also involves a slaughter of an animal. The bride who could initially not enjoy milk products at her marital home since her admission

¹²¹ See also Tamsanqa WK *Ithemba liyaphilisa* (1979) 125 who shows how the rituals associated with initiation usually produced humble, generous and resourceful men.

¹²² See Soga T *Intlalo kaXhosa* (1937) 129-130.

¹²³ See Kenyatta *op cit* 173.

at the time of the *utsiki* ritual because of her lingering outsider status gets promoted to full membership with far-reaching uxorial powers and succession rights in the family. The milk represents the food product that her marital family extracted from its most sacred animal, the cow, to mark her permanence as the wife of her husband.

Similarly upon the birth of a baby an animal is slaughtered for *imbeleko* (literary a blanket from the skin of the goat for carrying the baby at its mother's back). The ritual serves as a report to the family in its extended form, including its elders, the clan and the living-dead that a new member has been born so that the baby can be accepted to both the physical and the spiritual spheres of the home.¹²⁴

At the time of initiation to manhood an animal is slaughtered to sever the ties of boyhood from the initiate (*umkhwetha*) who thereby enters a transitional stage towards the attainment of the status of manhood.¹²⁵ A similar ritual is performed among the amaXhosa at the commencement of the *intonjane* initiation proceedings during the initiation of girls to womanhood.¹²⁶ As part of these rituals a part of the right foreleg of the animal is administered to the initiate before other people could taste it as *umshwamo* (a communion).

2.8(ii) *The purpose and importance of rituals in African culture*

As the above discussion indicates rituals played a very useful role in the life of a people as they legitimise the changes that take place and restore equilibrium in society.¹²⁷ At university graduates need the ritual of a graduation ceremony which confers on them the degrees that they have already passed during assessments. In this way society gets thereby informed and assured that the students do not only claim to be graduates but have been recognised as such by those qualified to do so at a graduation ceremony arranged for that purpose. Hence their certificates proclaim that they were conferred at the congregation of the university.

¹²⁴ Mtuze PT *op cit* 26 says: "The invocation of the ancestors as the plenipotentiaries of Qamata (god) during the *imbeleko* ceremony ... is also aimed at enhancing creation and linking the hidden presences with the visible presences ... a member of the family ... comes up to the doorway holding a goat by its horns before it is slaughtered as a ritual to introduce the new member of the family to the living and the living-dead."

¹²⁵ See Soga T *Intlalo kaXhosa* (1937) 80.

¹²⁶ See Soga T *op cit* 60.

¹²⁷ Setiloane GM *The image of god among the Sotho-Tswana* (1975) 43.

The purpose was to give public recognition that the student has been promoted from his or her previous status of an ordinary student to a graduate who must now advance the good name of the university through his behaviour, performance and actions. By trying to avoid bringing the university to disrepute the student himself/herself becomes a better graduate than would have been the case had he/she had nothing else but himself/herself to protect.

Rituals therefore have the effect of changing status, which is accompanied by an increase in responsibilities. In turn, added responsibilities tends to limit a person's freedoms and permissiveness in society. After listening to the words of wisdom uttered at the initiation ceremony the young man must forego some of his favourite activities that he used to enjoy as a boy. As Mandela reveals, after going through the ritual of initiation to manhood, he could no longer go around milking cows directly into his mouth or stealing people's pigs or green mealies.¹²⁸

Similarly, after undergoing the transforming rituals of *utsiki* and *ukutyisa amasi*, a married woman gets the added responsibility of protecting the reputation of her husband and his family in addition to maintaining her own dignity as a maiden of her own home which had earned her the new status that she holds now.

2.8(iii) *Incidents/examples where rituals are required and practiced*

In the preceding paragraphs incidents of rituals being performed after child-birth, and during wedding, initiation to adulthood and graduation ceremonies have been identified and discussed as examples of how changes in society get legitimised. In addition to the rituals that are performed in such instances, there are some that result in very serious and far-reaching transformations. For instance, through a ritual, a deceased person who has ceased to function as a visible physical member of the family attains the superior status of being the invisible benevolent living-dead¹²⁹ who distributes beneficence among the living and the unborn.

¹²⁸ See Mandela N *Long walk to freedom* (1994) and Tamsanqa WK *Ithemba liyaphilisa* (1979) 125 who shows how the rituals associated with initiation usually produced humble, generous and resourceful men.

¹²⁹ See Mtuze PT *The essence of Xhosa spirituality and the nuisance of cultural imperialism (hidden presences in the spirituality of the amaXhosa of the Eastern Cape and the impact of Christianity on them)* (2003) 25.

This is achieved through the ritual of slaughtering a good-bye beast (*inkomo yokukhapha*)¹³⁰ to stabilise his/her soul in the new environment. This is followed by the slaughter of the *ukubuyisa*¹³¹ beast to re-direct the soul and the spirit of the deceased towards the family and its affairs in order to operate permanently as a benevolent hidden-presence in an invisible form. As this ritual imbues the living-dead with the power to distribute beneficence to deserving members of the family it also empowers them to punish wayward ones.¹³²

Thus the performance of a ritual enhances the deceased's positive influence as a benevolent being whose invisible form brings them closer to *Qamata/Nkulunkulu /Modimo* to better attend to the affairs of his/her group. The condition of invisibility of the living-dead as hidden presences also extended their beneficence to the whole clan through the performance of rituals.

2.8(iv) The emerging challenges related to the practice of rituals

Rituals are necessary in society as they play a legitimising role to emerging developments to restore the equilibrium thus unravelled by the changes that occur. For many people the ritual of being pronounced by a priest as man and wife is very important even though a valid customary marriage already exists after customary processes for getting married have been satisfied. The assurance given by the ritual serves to alert the world to the new developments and bolsters the commitment of the spouses. Similarly, to be sworn in as a judge or a member of the legislature gives public confidence to issues of governance and invites the support of ordinary citizens to the organs of state.

The converse is also true. Where new developments simply take place unobserved without the accompanying recognition which rituals provide, social arrangements lack legitimacy. This leads to social degeneration as there is no public demonstration of accountability for social developments and changes. In such circumstances communities lose their sense of propriety and become apathetic. As rituals also have a cleansing function in terms of which offenders are identified, punished and re-integrated to society,

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

their absence leads to social apathy. In other words the absence of recognition for social events ingrained in the performance of rituals squanders the aspirations of individuals and communities to strive for improvement as they feel that there is no accountability for any events that occur in society.

Yet the apathy accompanied by non-performance of rituals is nothing compared to the destruction of the social fabric occasioned by performing rituals wrongly. There is nothing in South Africa at the moment which is as despicable as the subversion of the once revered rite of passage to manhood through the ritual of circumcision by distorters who have converted it into a death trap for unsuspecting children.

One would be forgiven for arguing that such distorters should abandon the ritual completely following the deafening crescendo of reports about dozens of dying initiates. A similar sentiment must go towards condemning the rapists who strive to discredit African culture by arguing that abduction and human trafficking should be condoned as the custom of *ukuthwala* when charged with criminal offences. The sub-text of this is the ignominy that Africans once accepted rape as a way of life.

2.9 Collective ownership and group solidarity in African law

African law dealt with categories of property which were determined by the nature of the object and of the transaction through which it was acquired.¹³³ The individual could only own personal items such as clothes, tobacco, cash, smoking pipes, cell phones, books, poultry, and pets.¹³⁴ The other members did not have a direct interest in such items, although they also fell under the protection of the group.¹³⁵

However, communal ownership applied in respect of major assets such as land, livestock, farming implements, vehicles, investments or weapons of war. The entire family exercised corporate ownership through the living-dead as the source of the assets, via the living as the trustees of the unborn who were the ultimate beneficiaries. In other words, major forms of property such as cattle and farms belonged to the home

¹³³ See Bekker JC and Maithufi I "Law of property" in Bekker *et al op cit* 55.

¹³⁴ See Pienaar JM "Customary law of property" in Rautenbach C , Bekker JC and Goolam NMI (eds) Introduction to legal pluralism in South Africa (2010) 75 at 78-79 and Bennett Customary law *op cit* 259-260.

¹³⁵ See Pienaar *op cit* 78-79.

as a corporate entity and were collectively owned by the family as its heritage from the living-dead for onward transmission by the living to the unborn.¹³⁶ Consequently, the ownership of these major family assets was always expressed in inclusive terms with a collective connotation, for example, *intsimi yakuthi* (translation – “our land”), or *inkomo zakuthi* (translation – “our cattle”).¹³⁷

The effect of using inclusive language was to limit the power of the seniors and elders who were thereby constantly reminded of the ancestral pedigree of their heritage.¹³⁸ This language served to encourage the head to consult other participants in their dealings with property rights. It must, however, be emphasised that the claims to collective ownership were solidarity claims aimed at bolstering the claims of the family in times of need and not beneficial claims aimed at personal consumption.

Whilst all the means of production belonged to the family the extended family shared the claim to their ownership. When members of the extended family asserted the ethos of common belonging among one another, they actually pledged solidarity to co-operate with each other, and if needs be, to die together in protecting group property. By extension of this principle, family assets such as land and farms did not exclude the claims of the rest of the clan. These were also not beneficial claims but claims of belonging and pledging solidarity to protect family property from possible outside aggression.¹³⁹ Communal ownership differed from beneficial ownership because its purpose was group cooperation if protection were needed.

In this regard, the interest of family members in the property, including that of the head, amounted to shareholding.¹⁴⁰ Whilst African law always embodied the notion of individual property ownership, it did not couch it in exclusive terms, as even in respect of personal items, individual property merely weakened, but did not oust the collective

¹³⁶ Bekker Seymour's customary law *op cit* 70 writes: "This mutual interest is difficult to define, but it is most real; it is attributable to the idea of collective right and responsibility which pervades customary law".

¹³⁷ See Ndima "The place of customary law" *op cit* 334-335. See also Seema J "The significance of BaSotho philosophy of development as expressed in their proverbs" (2012) 11/1 *Indilinga African Journal of Indigenous Knowledge Systems: Africa Indigenous Systems: An Account* 128 at 129.

¹³⁸ See Mahao *op cit* 322.

¹³⁹ *Ibid.* See also Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (1977) 388, and Bekker Seymour's customary law *op cit* 69.

¹⁴⁰ See Bekker and Maithufi *op cit* 55.

interest of the group in regard to the protection of the assets from claims emanating from outsiders.¹⁴¹

2.10 Traditional leadership and governance

The structure of traditional leadership was informed by the nature of traditional communities in which various families led by their family heads were organised into clans which in turn were led by clan heads. Each extended family had the authority to finalise the matters it handled in a council consisting of the various heads of extended families and chaired by the head of their clan. A number of these clans formed a village with its own council headed by clan heads chaired by the headman¹⁴² (*usibonda/induna*). Apart from the governance levels occurring within the extended family,¹⁴³ headmanship is the lowest rung in the official hierarchical structure of traditional leadership recognised by the state today. Whilst the clans handled their disputes and administrative matters at their level, more serious inter-clan disputes were handled by the village council and adjudicated upon by the village headman.

Clans were the main organs of the village scheme. For that purpose the village was modelled as a “mega-clan” under the leadership of the village headman (*usibonda*). The family head, clan head and the village headman were heads of their respective units and were related to one another through their common ancestor.¹⁴⁴ The village authorities did not have much socio-political activities in their hands because the jurisdiction of the clans was very extensive and overlapped with most of the village responsibilities.¹⁴⁵

The first level for the exercise of participatory democracy in the public sphere was the

¹⁴¹ See Ndima DD “The place of customary law in the general law of South Africa” (2002) 1/2 *Speculum Juris* 233 at 234.

¹⁴² See Peires *The House of Phalo – a history of the Xhosa People in the days of their independence* (1981) 32-34.

¹⁴³ See Ntlama and Ndima “The significance of South Africa’s Traditional Courts Bill to the Challenge of Promoting African Traditional Justice Systems” (2009) 4/1 *IJARS* 6 at 8-9.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.* Ntlama and Ndima note: “The lowest level of governance was the head of the household. The person who occupied this position was connected to every member of his lineage through his grandfather and his brothers, his father and his brothers, [his brother and their sons], his sons and their sons, with whom he formed a powerful patrilineage (Peiris 1981). The group managed its own economic production and security, settled domestic quarrels and performed its religious functions (*ibid.*) 37 ... The head of the household presided over the first level of the traditional justice system, to which every member of the lineage had access, before a matter could proceed to the ruler and further to the court of the king for final determination (Mqhayi 1914) 3.”

village forum where ordinary men participated fully without inhibition from the authorities. Hence Ajaji observes from the Nigerian perspective that “participation could be at village assemblies in which every adult had a right to speak and be listened to, and decisions were taken by consensus”.¹⁴⁶

The next level was the chiefdom (a “mega-village”) composed of several interrelated villages headed by the *inkosilkgosi* (senior traditional leader),¹⁴⁷ previously known as the chief) who was the incumbent of the position that he inherited from his ascendant who was the common ancestor of all the headmen in the chiefdom. The decisions of village councils (headmen’s courts) were appealable and reviewable before the forum of the chiefdom (*inkundla*) where inkosi, sitting with his *isigqeba* (council) led the discussions from matters arising from the villages under their jurisdiction.

The chiefdom was usually named after the common ancestor of the interrelated clan leaders and was led by the *inkosilkgosi* who was related to all the heads of the clans through their common ancestry, such as the amaNqabe Chiefdom. *Inkosilkgosi* pronounced on all the political decisions made by the *imbizolpitso* (assembly) or judicial decisions made by the *lekgotla/inkundla* consisting of all the headmen, councillors and the people in the forum of his chiefdom. In most smaller polities the chiefdom was the highest authority and the jurisprudence generated from its proceedings defined the chiefdoms’ value system and concept of justice as they impacted on social organisation, public administration, education, economics, law, religions, agriculture and war.

The various chiefdoms such as amaQwathi, amaQiha, amaHegebe, to mention a few from the Thembuland Kingdom of the Eastern Cape, were distinct and autonomous authorities, each of which was famous for its unique sense of justice in various fields. The jurisprudence produced by the various chiefdoms was similar because it developed from the same broad binding principles of the kingdom, but there were fine varieties between groups on some matters of detail.

In bigger polities all related chiefdoms shared the collective identity as constituent parts

¹⁴⁶ See Ajaji *op cit* 3-8.

¹⁴⁷ See Traditional Leadership Framework and Governance Act 41 of 2003.

of their kingdom, eg, the Thembuland Kingdom. For many groups the chiefdom was the highest level of African sovereignty. Whilst the various chiefdoms maintained their individual identities, at the same time they had to harmonise with the design of their kingdom (a mega-chiefdom) headed by the king (*ukumkani*), whose position was transmitted through his ascendants from the ancestor he shared in common with his subordinate traditional leaders. Such subordinate chiefdoms reported to the king who presided with them as members of his council over the highest judicial, political and social decisions. The king was the most senior descendent of their common ancestor and was respected by all traditional leaders as the father of the nation.¹⁴⁸ He was the mouth-piece of the entire kingdom which consisted of all the various levels of traditional leaders, councillors (*isigqeba*)¹⁴⁹ and the people, who freely participated in the discussions which culminated in the kingdom's royal decisions that were reached by consensus. The kingdom's jurisprudence became distinct from that of other kingdoms and distinguished between the law of the amaZulu and of the Batswana and so on. In all clans, communities and kingdoms the main objective for dispute resolution was the attainment of consensus, restorative justice, conciliation and mediation.

The current condition of traditional leaders is fully discussed in chapter 6 below where the manner in which it has been ameliorated by the Traditional Leadership and Governance Framework Act is examined.¹⁵⁰ The Act seeks to restore the status and dignity of traditional leaders as understood in African society through the reaffirmation of the participation of royal families and traditional authorities in the identification and appointment of traditional leaders.

The Traditional Leadership and Governance Framework Act takes account of the imperatives of the Constitution and transforms the traditional leadership institution to accommodate democratic changes and the dictates of human rights. Whilst retaining some indigenous aspects such as the identification of the traditional leader by the royal family before he or she can be appointed by the government, it also introduces some novel statutory features such as the participation of women, the contribution of the

¹⁴⁸ Pereis *op cit* 32.

¹⁴⁹ Solilo "Izinto zeKom khulu lamaXhosa" (author's translation: Xhosa royal institutions) in *Imibengo* by WG Bennie (1935) 219 at 220 uses this term to include the place where the councillors seat and deliberate on issues regarding their royal advisory functions. See also Soga *op cit* 154.

¹⁵⁰ Act 41 of 2003.

national and the provincial houses of traditional leaders as well as the royal and traditional councils. All these structures serve at least two purposes, namely, to shed the traditional leadership's lingering apartheid hang-over that continues to haunt its image and to promote its amenability with the Constitution.

2.11 Chapter conclusion

African culture developed the concept of a corporate home to ensure a collective administration of and equitable access to family resources. This concept ensured that family resources belonged to all members collectively and insulated such resources from personal abuse by powerful individuals who might wish to appropriate them for their own selfish purposes. This was achieved by making the family head the nominal manager rather than the owner of family resources. He would then support the family members by affording them access to their own customary shares as opposed to dispensing his own generosity. To care for, support and defend the family, especially women and children was the duty he inherited from his predecessor in title.

As a culture that favoured stability and continuity in the family and harmony in the community, African culture developed the principle of primogeniture for selecting responsible and accountable leaders as family and community heads. This principle relied on seniority as the criterion for appointing leaders to preserve the corporate home as a unit.¹⁵¹ This method ensured that the enormous responsibilities necessary to keep family resources intact were entrusted to a mature family head.

The objective was the perpetuation of the family legacy using the stable institution of manhood. The focus of the primogeniture principle was not only a responsible and accountable family head but also one who would remain permanently available at the family home.¹⁵² This entailed identifying someone with the capacity to personify the family home by bearing the collective identity of all its members.

As such the family head would sue or be sued together with, and on behalf of, other family members whose collective resources he administered. By so doing he would foster communal living through an equitable sharing of the resources without necessarily

¹⁵¹ *Bhe v Magistrate Khayelitsha and Others* 2005 (1) BC LR) 1 (CC).

¹⁵² *Ibid.*

receiving any personal gain from these activities. As such primogeniture operated within a tradition where women often married away from their maiden homes and became members of their marital families which they enriched with children. Considerations of survival and self-preservation also pressured African society to choose men for appointment to leadership positions in the family and in the community because the primogeniture rule demanded that that position be occupied by someone who was always available to administer the daily affairs of the family home.

Chapter 2 has discussed the pillars of African culture and its cardinal features of communalism and solidarity as the basis for understanding Africa's socio-legal and political cosmology. These features remained in pure form and uncontaminated by corruptible alien influences until the interference by the colonialists as discussed in the next chapter.

CHAPTER 3

THE IMPOSITION OF ROMAN-DUTCH LAW AS THE COMMON LAW OF SOUTH AFRICA¹

3.1 Introduction

Chapter 3 examines the mechanics governing the imposition of Roman-Dutch law in South Africa in 1652 following the advent of the first group of the employees of the Vereenigde Oost-Indische Compagnie (“the VOC”), otherwise known as the Dutch East India Company. This group arrived at the Cape of Good Hope under the leadership of Jan van Riebeeck, ostensibly to establish a refreshment station to supply fresh food for use by the company’s trading empire.²

This chapter also exposes the fallacy that the VOC came to open a refreshment station and demonstrates that its true colours as a colonial expedition were revealed as soon as its initial settlement expanded beyond its original confines. The VOC was transformed into a permanent governing authority by arrogating jurisdiction over the African population to itself. These early moves towards exercising colonial power in its interactions with the indigenous population betrayed the company’s real intentions as nefarious in a number of ways.

First, the VOC extended the reach of Roman-Dutch law to the Cape to regulate the legal affairs of its employees, exactly as it had done in the province of Holland in the Netherlands. Second, the jurisdiction of Roman-Dutch law covered transactions involving both Africans and Europeans whilst African law played no role at all.³ In this way the foregrounding of Roman-Dutch jurisprudence became the basis for managing

¹ In *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BC LR 1301 (CC) par 51 the Constitutional Court tried to rectify the problem of cultural domination as follows: “Whilst 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.”

² See Rautenbach C “South African common and customary law of intestate succession: A question of harmonisation, integration or abolition” (2008) 12/1 *EJCL* 1 at 2. See also Hosten WJ, Edwards AB, Bosman F and Church J *Introduction to South African law and legal theory* (1997) 337.

³ See Van Niekerk GJ “Legal pluralism” in Rautenbach C, Bekker JC and Goolam NMI (eds) *Introduction to legal pluralism* (2010) 3 at 6.

the legal affairs of the diverse South African communities⁴ administered through the Raad van Justitie, the highest judicial authority of the VOC, as if indigenous African law did not exist.⁵

3.2 The imposition of Roman-Dutch law

The chapter notes that the assumptions underlying the superimposition of Roman-Dutch law over African indigenous law were based on the myth that African law was not a legal system.⁶ This view was aimed at justifying the substitution of the former legal system for the latter as the primary law of South Africa⁷ notwithstanding that the latter had hitherto been the sole legal system in force throughout the various jurisdictions in South Africa.

This chapter further traces the various stages in the development of the South African legal system from earliest times after the arrival of the VOC by identifying the steps taken by the authorities who contributed to the dominance of Western jurisprudence in South Africa. These include official support for the resilience of Roman-Dutch law under the various regimes, the persistent repression of African law throughout the colonial period and the enthusiastic modification of African law through the statute book. As the chapter unfolds it shows how Roman-Dutch law retained its status as the primary legal system of South Africa, even after the VOC's regime was overthrown by British forces in 1795 and throughout the various stages of the latter's rule until the end of apartheid in 1994.

When juxtaposed with the simultaneous repression of African law and its normative values which were persistently subjected to Western standards of justice through the

⁴ Grant "Human rights, cultural diversity and customary law in South Africa" (2006) 50/1 *Journal of African Law* 1 at 13 writes: "While the Dutch had perpetuated an ambiguous policy towards indigenous law, neither abolishing nor specifically recognizing it, the British approach initially specifically excluded the application of indigenous law". See also Rautenbach *op cit* 3.

⁵ See Hosten *et al op cit* 347.

⁶ *Idem* 352-353.

⁷ *Idem* 1248 it is stated: "It would be appropriate to add a fourth layer [to the hybrid system of South African law], namely indigenous law, since a large proportion of the South African population adhere to its principles. However, indigenous laws (variously termed autochthonous, customary and African customary law) have, in the past, not been recognised as part of the general law of the land but only as part of a special system of law".

infamous repugnancy dispensation, the consensus of the European settlers to replace African law with Roman-Dutch law reveals their imperialist intentions. This exposition ascribes to this act of imposition the persisting dominance of Western jurisprudence which endures to this day in South Africa.

3.3 The emergence of the English common law

The First British Occupation of the Cape in 1795 heralded the end of the Dutch administration of the territory and raised the prospect of a substitution of English law for Roman-Dutch law as the legal system of the colony. However, the changes in the administration of justice did not affect the dominant position of Roman-Dutch law but proved its resilience under British rule as it remained the sole law of the land.⁸

Instead the position of Roman-Dutch law was further secured under the Articles of Capitulation signed at Rustenburg (Cape) on 16 September 1795 by the conquered Dutch settlers under Commissioner-General Sluysken and the victorious British forces.⁹

Under the British administration the old Raad van Justitie was substituted by the newly instituted Council of Justice as the highest court of the colony, confirming fears of an impending English common law domination.¹⁰ Yet the position of Roman-Dutch law as the law of the land remained intact and continued under the rule of the Batavian Republic which took over the control of the Cape from the British during the period 1803-1806.¹¹ Again Roman-Dutch law survived the Second British Occupation of the Cape in 1806, and remained the sole law of the Cape in terms of the negotiated package to preserve the rights and privileges of the Dutch settlers.¹² In particular, Roman-Dutch law's primary position was recognised in private law matters, such as the law of contract and family. In due course, the influence of English law increased following the arrival of the 1820 British Settlers which triggered new fears from the Dutch establishment that the British legal system might threaten the position of Roman-Dutch law as the primary law of the Cape. Yet English law retained its primacy in the

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ See Van Niekerk "Legal pluralism" *op cit* 5.

¹² *Ibid.*

sphere of public law including constitutional law, law of evidence, commercial law and administrative law.¹³ These developments later spearheaded some serious English law oriented reforms which were brought about through the statute book.

Indeed the enactment of the First Charter of Justice of 1827 by the British government increased the influence of English law institutions. This document substituted the Supreme Court of the Cape of Good Hope¹⁴ for the Council of Justice.¹⁵

It was the Second Charter of Justice of 1828 that entrenched English common law at the Cape through an injunction to the colonial authorities to appoint only English judges trained at British universities to the bench.¹⁶ This development had an anglicising influence as the common law of the Cape was applied through the medium of English jurisprudence as espounded in English precedents. This remained the position throughout the colonial period until the formation of the Union of South Africa in 1910 and beyond, when it was an established custom to run the courts according to the English tradition.¹⁷ The English law of evidence, criminal and civil procedure as well as court attire and decorum were imported wholesale to South Africa.

3.4 The resilience of Roman-Dutch law under British rule

As alluded to above, the imposition of Roman-Dutch law as the law of the Cape after 1652 dealt a death blow to the privileged position previously occupied by pre-colonial African law, which had until then applied in its unsullied form within its indigenous African metaphysics and frame of reference. As a result of this imposition the indigenous cultural perceptions of the concept of law held by the adherents of African law became severely distorted in the hands of cultural outsiders.¹⁸

Business transactions involving Africans and Europeans were conducted through the

¹³ See Hosten *et al op cit* 356.

¹⁴ *Idem* 352.

¹⁵ See Van Niekerk "Legal pluralism" *op cit* 6-7.

¹⁶ Grant *op cit* 13 writes: "[T]he application of Roman-Dutch law to legal transactions with the Dutch settlers, and the prevailing attitude that indigenous systems were inferior, had in the course of the eighteenth century led to virtual obsolescence of those systems".

¹⁷ *Ibid.*

¹⁸ *Ibid.*

medium of Roman-Dutch law which impacted negatively on the bargaining power of the increasingly marginalised African population. In due course the indigenous African value system would be relegated to a subordinate position in South African jurisprudence.

Notwithstanding the British takeover African law continued to struggle for survival under the new institutions which failed to enhance its profile. Instead these institutions worsened the condition of African law as the policy moved from the position of ambivalence under Dutch rule which neither approved nor abolished African law to a total non-recognition under the British administration.¹⁹ The latter's institutions of justice were mandated to maintain and perpetuate the centrality of Roman-Dutch law. Consequently African law did not feature in the criminal and civil law jurisdiction of the colony at all.

All successive European regimes in South Africa concurred in the marginalisation of African law whilst preserving the rights and privileges of the Dutch settlers to continue to live under Roman-Dutch law. This is evidenced by the earliest intention of the colonists to undermine African law. When the white settlement later expanded to include the Eastern Cape, a vigorous policy of non-recognition of the indigenous legal system was already part of the colonial culture, despite the fact that large territories that they had annexed were occupied by black people who subscribed to African law.²⁰

3.5 The survival of African law under colonial rule

The colonial courts were often forced by circumstances beyond their control to apply African law due to the indigenous nature of the disputed transactions. Such cases were indeed decided under African law – provided that the values of the latter system were screened through the repugnancy clause which subjected the indigenous norms to the Roman-Dutch law standards of justice the colonists regarded as superior.

It was only when the densely populated Transkeian territories were annexed that the colonial government realised that it did not have enough resources to administer Roman-Dutch law which demanded far more manpower than was available. This realisation put

¹⁹ *Idem* 5-6.

²⁰ *Idem* 16.

pressure on the government to revise its policy of total non-recognition of African law in favour of the policy of indirect rule in terms of which traditional leaders were co-opted to assist in the administration of justice.²¹ These leaders had to pledge loyalty to the British government in return for a right to apply African law in their jurisdictions.²²

In terms of this arrangement the traditional leaders were obliged to ensure that the application of their own law did not offend the colonial notions of justice, even if it meant sacrificing their own normative values. Instead of affirming the scale of values embraced by their own indigenous constituency, the traditional leaders had to convince their subjects to respect Western notions of justice.²³ In this way the repugnancy clause was used to preserve the superiority of Roman-Dutch law by restricting the application of African law.²⁴ The history of this encounter between Roman-Dutch law and African law is captured by Grant in the following terms:

The history of customary law in South Africa is well documented. When Britain occupied the Cape in 1806, the Roman-Dutch law, which had applied hitherto under the previous Dutch administration, was retained. Theoretically, under the previous administration, the indigenous Koisian communities had continued to apply their own legal systems in respect of their personal relations. In practice, integration into settler society (albeit usually in subordinate positions as servants), the application of Roman-Dutch law to legal transactions with the Dutch settlers, and the prevailing attitude that indigenous systems were inferior, had in the course of the eighteenth century led to virtual obsolescence of those systems. While the Dutch had perpetuated an ambiguous policy towards indigenous law, neither abolishing nor specifically recognizing it, the British approach initially specifically excluded the application of indigenous law. One of the justifications for the policy of non-recognition of indigenous law was, ironically, based on the principle of equality: that nobody should be subjected to an inferior system.²⁵

²¹ *Ibid.*

²² See Hosten *et al op cit* 33.

²³ See section 23 of Proclamation 110 of 1879. See also Van Niekerk GJ "Legal Pluralism " *op cit* 7 n 13 referring to the situation in the British Kaffraria as recorded by Brookes EH *The history of native policy in South Africa from 1830 to the present day* (1927) at 33: "At a special meeting with the chiefs of the territory, their position as British subjects was explained to them. Besides the fact that they were expected to obey the laws of England and to force their subjects to do so too, they were to 'disbelieve in and cease to tolerate or practice witchcraft in any shape', to 'acknowledge no chief but the Queen of England and her representative', and to 'abolish the sin of buying wives'."

²⁴ See Grant *op cit* 13.

²⁵ In Natal legislation established separate courts for black people. Section 80 of the Courts Act 49 of 1898 provides: "All civil Native cases shall be tried according to Native laws, customs and usages, save so far as may be otherwise specially provided by law, or as may be of a nature to work some manifest injustice, or be repugnant to the settled principles and policy of natural equity; except that all cases arising out of trade transactions of a nature unknown to Native law shall be adjudicated

With the expansion of white rule into the northern interior of South Africa after the Great Trek which started in 1835, the same policy of non-recognition of African law was replicated in the territories now known as KwaZulu-Natal²⁶ in the then Voortrekker Republics of the Transvaal (comprising present-day Gauteng, Limpopo, Mpumalanga and North-West) and Orange Free State (now the Free State), where the application of African law was subjected to even more rigorous versions of the repugnancy clause.²⁷

3.6 Modification of African law through statutes: Emergence of the South African common law

The political unity forged through the formation of the Union of South Africa in 1910 brought all the previously autonomous areas governed by Roman-Dutch law together.²⁸ This paved the way for a uniform policy to modify African law through legislation. The culmination of this policy was the adoption of the Native Administration Act (later Black Administration Act (the BAA)) in 1927²⁹ which consolidated the relationship of inequality between African law and Roman-Dutch law.

The statutory modification of African law and culture in the BAA is confirmed in a Constitutional Court judgment where Ngcobo J exposed the nefariousness of its underlying philosophy as follows:

The Native Administration Act appointed the Governor-General (later referred to as the State President) as “supreme chief of all Africans”. It gave him power to govern Africans by proclamation. The powers given to him were virtually absolute. He could order the removal of an entire African community from one place to another. The

upon according to the principles laid down by the ordinary colonial law in such cases; provided that nothing in this section shall be deemed to extend the operation of any law of limitation or prescription of action to any case to which but for this Act such law would not have applied”.

²⁶ In the Transvaal section 2 of Law 4 of 1885 reads: “The laws, habits and customs hitherto observed among the Blacks shall continue to remain in force in this Republic as long as they have not appeared to be inconsistent with general principles of civilization recognized in the civilized world”.

²⁷ See Hosten *et al op cit* 360-361.

²⁸ See Act 38 of 1927 which later became known as the Bantu Administration Act, and finally, the Black Administration Act (hereafter the BAA). See Olivier NJJ, Olivier NJJ and Olivier WHD *Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 610-611. This was made to coincide with the changing labels given to Africans who were initially called “natives”, then “Bantu” and finally, “blacks”.

²⁹ See *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North-West Provincial Government and Another* 2001 (1) SA 500 (CC) par 41.

Native Administration Act became the most powerful tool in the implementation of forced removals of Africans from the so-called “white areas” into the areas reserved for them. These removals resulted in untold suffering. This geographical plan of segregation was described as forming part of “a colossal social experiment and a long term policy”.³⁰

Following the enactment of the BAA, the African population fell under the exclusive administrative machinery that completely redefined African law in the image of Roman-Dutch law which remained the law of the land. The Act also gave guidance as to how customary law should be interpreted through the repugnancy clause to conform with the dictates of Roman-Dutch law.³¹

To institutionalise the exclusion of Africans, the BAA established an exclusive and extensive statutory framework for a separate ministry, a separate administration and a separate court system whose mandate was to target black South Africans for the delivery of inferior justice.³² At the time the only components of South African law that were acknowledged by both scholars and practitioners were Roman-Dutch law, English law and legislation as there has never been parity between the transplanted law and the indigenous law. African law did not feature as an independent legal system but was rather seen as a sub-system to be approved only if it did not offend against Roman-Dutch law principles.

Without ousting the jurisdiction of Roman-Dutch law over the indigenous Africans, the BAA established a separate legal dispensation applicable exclusively to indigenous Africans in South Africa. This created a dualist system which left the courts grappling with difficult choice of law questions. By allowing the courts to apply African law as a matter of discretion the provisions of section 11(1) of the BAA did nothing to alleviate this difficulty. The section reads:

Notwithstanding the provisions of any other law, it shall be in the discretion of the courts of native commissioners in all suits or proceedings between natives involving

³⁰ See section 11(1) of the BAA.

³¹ See *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North-West Provincial Government and Another supra* par 41.

³² See *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 at 397.

questions of customs followed by natives, to decide such questions according to native law applying to such customs except in so far as it shall have been repealed or modified ...

In an appeal from a decision of the president of the Native Appeal Court holding that African law rather than Roman-Dutch law was primarily applicable in a dispute between Africans, Schreiner JA put the position of African law *vis-a-vis* the common law beyond doubt in the following terms:

I find no support in the language of Act 38 of 1927 for the president's view that native law should be treated as *prima facie* applicable in cases between natives. On the contrary, the indications are rather that common law was intended to be applied unless the native commissioner in his discretion saw fit in a proper case to apply native law. That view is supported by the general shape of the sub-section, which does not provide that the native commissioner shall have the discretion to apply common law or native law. Framed as it is, it appears to me that the sub-section assumes that the native commissioner should in general apply common law and on that assumption empowers him in a proper case to apply native law.³³

From this dictum it appears that the application of African law was in fact ousted by the structure of the BAA which assumed the primacy of Roman-Dutch law by granting the courts a discretion to apply the former system only when the judicial officer concerned was convinced that the interests of justice demanded the application of African law. Therefore the Yako judgment put it beyond doubt that Roman-Dutch law was the statutorily mandated system to be applied by all judicial officers and African law was only a sub-system to be applied subject to the discretion of the presiding judicial officer and consistently with Roman-Dutch values. African law's subordinate position was perpetuated when this provision was re-enacted as section 1(1) of the Law of Evidence Amendment Act,³⁴ which also confirmed the judicial application of African law as a matter of discretion.

The BAA further modified African law in section 11(3) by designating African women perpetual minors who could never attain the status of majority, not even after reaching the age of adulthood. As a result of the denigration of their status, African women

³³ See Act 45 of 1988.

³⁴ See Bekker JC *Seymour's customary law* (1989) 106.

required the consent of their father or guardian in order to enter into legal transactions, including marriage.³⁵ Consequently, as minors they needed to be transferred from the guardianship of their fathers to that of their bridegroom's family by means of a handing over ceremony if their customary unions were to be valid.

This statutory modification of custom distorted African law by disregarding African women in matters of intestate succession in terms of section 23(10)(a)(e) of the BAA, read with Regulation 2 of the Regulations to the Administration and Distribution of the Estates of Deceased Blacks. Having been reduced to the status of minority women could neither acquire nor dispose of property in their own names. This predicament aggravated the condition of African women who already suffered from systemic patriarchal domination in the indigenous African tradition.³⁶ The statute transformed heads of families from nominal managers of family resources, into despotic personal owners with power to do as they pleased with such resources. Under modified customary law, African women lost the benefit of the system's manipulative features by which they could break the "gender glass ceiling" under special circumstances and become effective participants, national heroines and leaders.³⁷

In terms of section 31 of the BAA, Africans who were "sufficiently civilised" in the assessment of certain designated officials, could apply to be exempted from the application of African law. In terms of this provision, qualifying black estates would be exempted from the application of African law, and administered as though they were the estates of Europeans.³⁸ In the *Bhe-Shibi* case, Langa DCJ, noted with disgust "[t]he purported exemption of certain Africans – who qualify from the operation of Black law and custom to the status of a European is not only demeaning, it is overtly racist".³⁹

³⁵ See *Motsoatsoa v Roro* All SA 324 (GSJ).

³⁶ See Mandela N *Long walk to freedom* (1994) at 24 and Mahao NL "O se re ho m orwa 'm orwa towel' – African jurisprudence exhumed" (2010) X LIII/3 *CILSA* 317 at 325.

³⁷ See Mahao *op cit* 325. See also Williams C *The destruction of black civilization – great issues of race from 4500 BC to 2000 AD* (1987) 260; and Adams RN "Africa unknown: Addressing the effects of an alienating education amongst learners in South Africa" (2011) 6/1 *International Journal of African Renaissance Studies – Multi-, -Inter- and Transdisciplinarity* 149 at 160.

³⁸ See section 23 of the BAA.

³⁹ See *Bhe v The M agistrate Khayelitsha; Shibi v Sithole; Human Rights Commission v President of Republic of South Africa* 2005 (1) BC LR 580 (CC) (hereafter *Bhe-Shibi*) par 67.

Section 23 of the BAA modified the custom which reserved succession to the kingship position to the royal house by means of primogeniture. The section provided for the appointment of any person including commoners who could be approved by the government.⁴⁰ Subsequently this section was applied to resolve a dispute between Botha Sigcau and Nelson Sigcau regarding succession to kingship after the death of their father, King Marelane Sigcau.⁴¹ The latter had occupied the position of King of Eastern Pondoland according to the laws and customs of the amaMpondo people until his death in 1921. Eventually Botha Sigcau was appointed after a government-sponsored investigation into the suitability of the disputants.

At the same time, the institution of African marriage was modified by section 10 of the BAA. The impact of this statutory modification was the loss of the status of marriage for this ancient institution. This was exposed in *Santam Insurance v Fondo*,⁴² where the court answered the question whether a widow of a customary marriage was entitled to compensation where her husband was unlawfully killed by an insured vehicle. The court held that the recognition of the customary marriage by section 10 of the BAA did not elevate that institution into the status of a lawful marriage at common law. Underlying the judgment was the notion that an institution with features so irreconcilable with those of the civil marriage could not share an equal status.

In addition to the above provisions of the BAA and the Law of Evidence Amendment Act which were the major pillars of a comprehensive framework through which African law was modified by statute country-wide, section 230 of the Code of Zulu Law introduced the same limitations to the application of African law in KwaZulu-Natal through the repugnancy clause.⁴³ Statutory modification of custom had the effect of cultural imperialism. For example, the African marriage lost its right to be classified as a “marriage” after the BAA had coined the inferior term⁴⁴ “customary union”⁴⁵ to denigrate

⁴⁰ *Idem* 75.

⁴¹ See *Sigcau v Sigcau* 1944 AD 67.

⁴² 1960 (2) SA 667 (A).

⁴³ See *Tshiliza v N tshongweni* 1908 N H C 10.

⁴⁴ See *Gumede v President of the Republic of South African and Others* 2009 (3) BC LR 243 (CC) par 16. The “unionisation” of customary marriages still manifests itself today as is clearly evident in the Immigration Act 13 of 2000 which defines the African marriage as a customary union and a conjugal relationship according to indigenous law and custom .

⁴⁵ See section 10 of the BAA.

customary marriage. A host of consequences flowed from this loss of recognition for the most important institution in the lives of the Africans.

The spouses of this down-graded customary union were excluded from various rights that the common law or legislation bestowed on spouses and left all non-Western marriages outside the protection of the law.⁴⁶ It was only after the Bantustan system had reached “independence” stage that some limited recovery was recorded in the sphere of customary marriage. For instance, the 1978 Transkei Marriages Act⁴⁷ elevated the status of customary marriage to the same level as civil marriage.

However, very little else was done about the inequality between common law and customary law. The repugnancy clause continued to apply unabated in the independent homelands. Whilst the resilience of this clause cannot be underestimated as it has not been specifically repealed even in the democratic South Africa, it has virtually been superseded by section 211(3) which, as the recognition clause, subjects African law to the Constitution rather than to the common law-oriented repugnancy clause.

Disillusioned by the abuse of the statute to advance the purposes of cultural imperialism, Le Roux makes the following observations:

For the greatest part of South Africa’s modern history our patriarchal common law was supplemented by a series of statutes which were all designed to impose a narrowly understood Christian Nationalist (some claim civilised) conception of marriage onto a diverse and multi-cultural population. Many of these statutory measures were designed to financially reward members of this population who willingly entered into officially recognised marriages. The inequities and indignities which resulted from this discriminatory use of the law scarcely need recounting.⁴⁸

3.7 Chapter conclusion

This chapter exposes the mission of the VOC to establish a refreshment station in

⁴⁶ See *Zulu and Another v Minister of Justice and Another* 1956 (2) SA 128 (N) and *Santam v Fondo* 1960 (2) 467 (A). Compare *Daniels v Campbell and Others* 2004 (7) BC LR 735 (CC).

⁴⁷ Act 21 of 1978 (Transkei).

⁴⁸ See Le Roux WB “Undoing the past through statutory interpretation: The Constitutional Court and the marriage laws of apartheid” 2005 *Obiter* 526.

South Africa for its trading empire as a pretext for colonising the country. This much was revealed by the VOC's simultaneous assumption of political power over the indigenous inhabitants and the imposition of the Roman-Dutch law of the Netherlands as the law of South Africa. These twin processes betray the whole exercise as an act of imperialism which sought to spread Western law over the African territory, without any negotiation involving Africans whose law had hitherto enjoyed undisturbed sovereignty.

The unilateral nature of the act of imposition indicates that the Africans had never abdicated the sovereignty of their law when the colonists proceeded to conduct all the legal transactions between the Africans and the Europeans through the medium of Roman-Dutch law. Colonial intentions were also exposed when the settlers excluded the role of African law in mediating the disputes ensuing from these interracial business contests. From the earliest times the fairness in the handling of the relations between the two legal systems was vitiated by the demonstrable disequilibrium in their mediation.

From the earliest times of the Dutch settlement, a succession of policies pointed towards the implementation of cultural imperialism which would persist throughout the colonial period. First the successive regimes showed consistency in preserving the primacy of Western jurisprudence in South Africa by foregrounding Roman-Dutch law. Alongside this policy, was the persistent suppression of African law and its value system that was pursued through the discredited repugnancy policy. Focusing on Western standards as a method of conceptualising African law had the effect of distorting the African system's institutions and concepts beyond recognition.

This juridical genocide was sought to be validated through the technique of statutory modification of custom, which was realised in a dichotomy between the "official" version of African law used by the authorities, and the customary "living" version that was used in social practice. Eventually even the traditional leaders were bullied into presenting their own law in the image of Roman-Dutch law. The "official" version developed as an illegitimate representation that emerged without the manipulative features of indigenous law and left the system's patriarchal traditions of African law gravely aggravated. This

misinterpretation transformed the concept of the family head into a despot with powers of ownership over family resources and reduced women to the status of perpetual minors. In the end, the courts were instructed by the Appellate Division to apply Roman-Dutch law as a general rule and to use their discretion to apply African law in exceptional circumstances only.⁴⁹

⁴⁹ See *Ex Parte Minister of Native Affairs In re – Yako v Beyi supra*.

CHAPTER 4

THE SUBORDINATION OF THE AFRICAN VALUE SYSTEM TO WESTERN MORAL STANDARDS

4.1 Introduction

Chapter 4 focuses on the denigration of African law and its value system as a result of colonial and apartheid policies that relegated African law to a virtual sub-system of the Roman-Dutch law whose standards it was forced to reflect and uphold through the repugnancy clause. The repugnancy clause was the statutory instrument used to subordinate African law to Western law by labelling the indigenous normative values repugnant to public policy and natural justice.¹ This phrase was not applied as neutrally as may appear but was in fact a euphemism for the substitution of Euro-Western moral standards for the African belief system. Non-recognition of African culture in this manner moved Nwabueze to make the following observation:

An English sense of justice was used as the standard and the judges, especially the colonial judges, proceeded from a Western superiority complex and self-proclaimed cleansing mission. The proclivity to reject customary law ... for being contrary to natural justice, equity and good conscience, was fostered by the elliptical nature of the triple formula that deprived it of any objective criterion and analysis. For instance, many people are likely to differ on what amounts to good conscience. The result has been a huge field of judicial discretion in which the judges' idea of civilization becomes the litmus test by which a customary law must be adjudged valid and acceptable. As GFA Sawyer noted, "no matter how well-established a custom was, its application in any particular case depended on the discretion of the judge before whom the issue arose".²

Nwabueze's misgivings about the degrading treatment visited on African law are endorsed here by tracing the origins of the problem to Western anthropological studies which attributed barbarism and savagery to Africans and their culture in order to justify the classification of Africans as ignorant and Europeans as superior. This perception is based on the way Westernisation was made the litmus test for measuring the level

¹ See section 11(1) of the Bantu Administration Act (later Black Administration Act) 38 of 1927.

² See Nwabueze RN "The dynamics and genius of Nigeria's indigenous legal order" (2002) 1 *Indigenous Law Journal* 153 at 179 quoting Sawyer GFA "Internal conflict of laws in East Africa" in Sawyer GFA (ed) *East African law and social change* (1997) 134.

of civilisation of Africans so that colonial and apartheid authorities could invalidate even the worthiest of the indigenous values.³

In order to expose the cultural imperialism of this magnitude, the chapter seeks to analyse the various statutory mechanisms devised by the colonial and apartheid establishments to consolidate the anthropological theses of non-recognition as the basis for cleansing African law of its indigenous norms and values so as to reduce it to a clone of Roman-Dutch law. The trophy for the successful de-indigenisation of African law would be the production of an “official” version that would reflect Western concepts of natural justice, equity, and good conscience. The chapter further reveals the complicity of academic lawyers and legal practitioners in advancing this colonial project of imposing Euro-Western jurisprudence as the foundation of South Africa law through scholastic and judicial interpretation.

4.2 The degradation of indigenous thought systems by Western anthropologists

At the forefront of the unequal presentation of the African world-view and Westernisation is Morgan’s evolutionary theory that places society on a continuum of stages of civilisation from the lowest to the highest levels of social development.⁴ The theory enumerates such stages as lower savagery, middle savagery, upper savagery, lower barbarism, middle barbarism, upper barbarism and civilisation.⁵ In this continuum, the seven stages of evolution were substantiated with reference to nameable societies in which indigenous peoples occupied the lowest social level whilst Europeans were at its apex.⁶

³ *Ibid.* See also Abiodun BO “Towards an African concept of law” 2007 *African Journal of Legal Theory* 71 at 79.

⁴ See Morgan LH *Systems of consanguinity and affinity of the human family* (1870).

⁵ *Ibid.*

⁶ Interestingly Gadfly A “Barbarians in suits laying waste to SA” *Pretoria News* 13 June 2011 at 7 writes: “More than 50 years ago Professor Clare Graves found that for humans there were, broadly speaking, six different development stations or stages”. Gadfly is commenting on the failed development programme in South Africa where he believes that everything seems to be falling apart due to laziness, sleaziness, corruption and generally crooked people who concentrate on accumulating wealth rather than developing the country. He counts these stages as the hunter-gatherer whose main purpose is survival; the tribalistic-animistic stage where people respect tribal customs and traditions and are superstitious; the egocentric-exploitative stage, where people seek more clout and respect, and are amoral and guiltless and uninhibited and seek immediate gratification, showing little trust towards others; then is the absolutist-saintly stage, where the person

Similarly, in Harris's *Rise of anthropological theory*, the African was seen as brutish, ignorant, idle, crafty, treacherous, bloody, thievish, mistrustful and superstitious.⁷ However, not all European anthropologists subscribed to Morgan's stages theory of evolution. Levy-Bruhl, for instance, departed from it in his characterisation of "underdeveloped peoples". He preferred to call the African approach a "pre-logical mentality", which was synthetic and concrete in its intellectual participation. Yet, even under the latter approach, Africans were still not capable of abstract and analytical reasoning.⁸

Levi-Strauss vigorously disagreed, within the context of the European perspective, by imputing logical categorical abilities to the "primitive" mind.⁹ His mode of inquiry was known as "bricolage" which described the "bricoleur" African mind, as perceptual as opposed to the conceptual and scientific Western mind. In his view, the latter always opened up new possibilities of knowledge by extension and renewal. Western thought systems were scientific, innovative, and inventive of new technological forms. On the other hand, the African mind only conserved knowledge by re-organising what was already known; was mythical, conservative and recreated existing structures, without creating anything new.

The dichotomy between the African and the Western mind has unfortunately had a lasting effect on how people in Africa continue to understand law and society. The advent of independent African societies has regrettably not changed this negative perception of the continent. Knowledge has continued to be pursued on the basis of the superiority of the written nature of Western ideas as opposed to the inferior oral African tradition.¹⁰ The contrast fell between the Western abstract, analytic, syllogistic, and definitional tendencies which resulted in Western privatist contexts; and the

seeks purpose in life, and religion, duty and honour count heavily; the next stage is inner focused, materialistic, competitive and entrepreneurial and is called the multiplistic-materialistic stage, where technology, progress and achievement take centre stage; and the final stage of development of social development is humanistic-relativistic, colour coded green and more outwardly focused, in which societal goals are important.

⁷ See Harris M *The rise of anthropological theory* (1969).

⁸ See Levy-Bruhl L *How natives think* (1910) (reprinted 1988).

⁹ See Levi-Strauss C *The savage mind* (1962).

¹⁰ See Havelocke E "The oral-literate equation: A formula for the modern mind" in Olson D and Torrance N (eds) *Literacy and orality* (1991) 11.

traditionalist, conservative, and concrete participatory practices which resulted in communalist contexts in African thought systems.¹¹ On this basis, the African approach has also been described as religious, mystical and magical when compared to the Western scientific and rational approach.¹²

In South Africa these perceptions were expressed in the highest echelons of the judiciary when Wessels CJ held:

In punishing them [the “natives”] we must remember that they are not civilised Europeans but kaffirs living more or less in a state of nature and they act according to their natural and inherited impulses, they do not deserve to be punished too severely as if they were civilised Europeans dwelling in a city or village. On the other hand they must learn to restrain their natural impulses and not treat life too cheaply.¹³

This mindset reflects the extent to which the world view of the colonial establishment which generously assumed the superiority of Europeans was embraced by the legal profession which also placed the Western value system at the apex of the social order. This is comparable to the New Zealand judgment of *Wi Parat v Bishop of Wellington*¹⁴ where the chief of the Ngati Toa community sought to regain land he had earlier ceded to the British Crown for the purposes of building a school for educating Maori children, by oral arrangement with the Lord Bishop of New Zealand. As the school was never built the indigenous community demanded that the land be returned to it. In the ensuing suit for the return of the land, Prendergast CJ found in favour of the Crown in the following terms:

On the foundation of this colony, the aborigines were found without any civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognize the independent nationality of New Zealand. But the thing neither existed nor at the time could be established. The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community.¹⁵

¹¹ See Biakolo E “Categories of cross-cultural cognition and the African condition” in Coetzee PH and Roux APJ (eds) *Philosophy from Africa – a text with readings* (1998) 9-12.

¹² *Ibid.*

¹³ 1933 AD 197 at 200.

¹⁴ [1877] 3 NZ JUR (NS) 72.

¹⁵ *Idem* 77.

4.3 The reaction of indigenous scholars to theories of non-recognition

Non-Western scholars reject the negativity directed towards Africa and her thought systems and dismiss it as the basis for the scepticism shown by colonial authorities schooled in Western perceptions of philosophies from “other” parts of the world. These scholars blame the racist conceptions that planted the seeds of inequality between Western and African cultures on European anthropological studies¹⁶ which spread negative cultural paradigms of the “other”.

African scholars have vented their frustration at being insulted by colonial policies, by pointing out the faults of Western jurisprudence and the role African law can play in improving it. Mahao draws lessons from the pre-colonial history of the Basotho Kingdom, to demonstrate that Westernisation played no role in teaching Africans the values of popular participation in governance, democratic accountability, freedom of speech, and the indivisibility of human dignity.¹⁷ According to Mahao, colonisation has stripped African jurisprudence of these indigenous values by keeping Africans imprisoned in the gaol of socio-economic disenfranchised.¹⁸ On this basis, Mahao debunks suggestions by scholars such as Keveey that African jurisprudence is unenlightened and inconsistent with the progressive values undergirding the South African Constitution.¹⁹

Nhlapo also blames Western domination for the poor status of African law and insists that the latter system indeed embodies attributes such as restorative justice the exclusion of which from the mainstream legal system has robbed South African law of such unique dispute resolution mechanisms as reconciliation which could provide an alternative to retribution.²⁰ According to Nhlapo the problem lies with the disconnect that

¹⁶ See Roederer C “Traditional Chinese jurisprudence and its relevance to South African legal thought” in Roederer C and Moellendorf M (eds) *Jurisprudence* (2004) 499-531 where he refers to legal systems other than Western as “other systems” in acknowledgement of their menial role in the South African legal system .

¹⁷ See Mahao “O se re ho morwa ‘morwa towel!’ – African jurisprudence exhumed” (2010) XLIII/3 *C/LSA* 317-329.

¹⁸ *Idem* 336.

¹⁹ *Idem* 317.

²⁰ See Nhlapo T “The judicial function of traditional leaders: A contribution to restorative justice?” (Unpublished paper presented at the Conference of the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) 14-17 March (2005) 2 at 17.

exists in the minds of Western-oriented human rights activists between African culture and their conception of human rights.²¹

This view proffers two suggestions to resolve the resultant alienation, namely, such activists must acquire a deeper understanding of the extent of the distortion of African law resulting from Western domination. Secondly, they must desist from pontificating on the worthlessness of the values that Africans hold dear if they indeed wish to avoid popular apathy and to enlist participation from the adherents of African law.²²

Biakolo's analysis of these stereotypes presented by early European anthropologists is that they associate the west with progress and Africa with stagnation; which provides justification for both Africa's underdevelopment and Europe's development.²³ The European anthropological researchers created notions of Western superiority in the minds of their scholars by affording the status of civilisation only to Euro-American standards and norms to the exclusion of other thought systems. Their point of departure was the art of writing and the phonetic alphabet which were regarded as indicators of social advancement.²⁴ Consequently, in colonial/apartheid jurisprudence, African law depended for its ultimate force and validity on the common law, notwithstanding that the two systems represented totally different cultural orientations.²⁵

These negative perceptions of the "other" philosophies were clearly not restricted to African philosophy,²⁶ but extended to cover Islamic philosophy,²⁷ Chinese philosophy and others.²⁸ On the basis of their otherness Western anthropologists accorded them a status comparable to that of the "step-children" of the "real" discipline, namely Western philosophy. Offering a perspective other than that of the Western life-world deprived these thought systems of the right to be termed philosophies.²⁹

As "other" philosophies they supposedly did not fit the "universal" criteria for acceptance

²¹ See Nhlapo T "Human Rights – The African perspective" (1995) 6/1 *ALR* 38 at 41.

²² See Abiodun *op cit* 78.

²³ See Biakolo *op cit* 1.

²⁴ *Ibid.*

²⁵ See Abiodun *op cit* 74.

²⁶ See Pieterse M "Traditional African jurisprudence" in Roederer and Moellendorf *op cit* 438.

²⁷ See Moosa N and Goolam NMI "Islamic jurisprudence" in Roederer and Moellendorf *op cit* 463.

²⁸ See Roederer *op cit* 499.

²⁹ See Kaphagawani DN "What is African philosophy" in Coetzee and Roux *op cit* 86 at 86.

as philosophies.³⁰ The seriousness of the dissimilarities between the different thought systems was enough to exclude these “others” from the definition of philosophy. This difference convinced early Western anthropologists that other thought systems were un-philosophic. Kaphagawani makes this observation:

For the anthropologists, the situation was that of unphilosophy rather than prephilosophy. What they claimed to have established in Africa were (1) the impossibility of philosophic dialogue and (2) an obvious non-existence of a tradition of organised philosophical systems.³¹

To the Western philosophers the concept of philosophy was synonymous with Western philosophy. On that basis, African philosophy did not merit the term philosophy, not because it was indeed not a philosophic thought system, but because it did not emphasise the essential features that defined Western philosophy.³² To justify the exclusion of indigenous philosophy from the definition of the discipline of philosophy, everything African was labelled savage or barbaric, while the European was civilised.³³

Miller, who writes from the perspective of a native American scholar, ascribes the undermining of the viewpoint of the indigenous peoples of the world to the doctrine of discovery in terms of which Europeans regarded themselves as superior to all the non-European and non-Christian native peoples outside of Europe.³⁴ According to this doctrine, the conquest of indigenous peoples by European and Christian settlers extinguished native rights to and interests in their lands and pre-empted other Europeans from further discovering that land.³⁵

This is echoed by Ruru, a Maori professor, who believes that the doctrine of discovery relied on elements such as Christianity, civilisation and conquest, which were attributed to English and American ingenuity to justify the dispossession of indigenous people of their lands.³⁶ Expressing his views on the doctrine of discovery, Ruru writes:

³⁰ See Roederer *op cit* 500.

³¹ See Kaphagawani *op cit* 86.

³² *Ibid.*

³³ *Ibid.*

³⁴ See Miller “The doctrine of discovery” in Miller RJ, Ruru J, Behrendt L and Lindberg T (eds) *Discovering indigenous lands* (2010) 1-25.

³⁵ *Ibid.*

³⁶ See Ruru J “Concluding comparatively: Discovery in the English colonies” in Miller *et al op cit* 247 at 262-267.

Apparently, Europeans believed they possessed the only valid religions, civilizations, governments, laws, and cultures, and Providence must have intended that these people and their institutions should dominate Indigenous people in their countries. As a result, the governmental, property, and human rights of Indigenous peoples were almost totally disregarded as Discovery directed European colonial expansion in our countries. Even in modern times, these assumptions remain dangerous legal fictions.³⁷

Ruru goes further to point out that not only were the aboriginal people of Australia viewed detrimentally when compared to the Europeans; in Darwinian terms, Australia's indigenous population was regarded as occupying the lowest rung of the evolutionary ladder when compared to other indigenous peoples.³⁸

4.4 The cleansing of African values through the repugnancy clause³⁹

The denial of philosophic status to the African thought system laid the ground for the domination of African law by Western law in South Africa. The various repugnancy provisos enacted by the pre-Union British colonies and Boer Republics, were consolidated in section 11(1) of the Black Administration Act (BAA),⁴⁰ so that the policy could be applied universally and uniformly throughout South Africa as part of the decision to deprive the African population of the right to enjoy their own culture. Section 11(1) of the BAA reads:

Notwithstanding the provisions of any other law, it shall be in the discretion of the Commissioners' Courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black law applying to such customs except in so far [as] it shall have been repealed or modified: provided that such Black law shall not be opposed to the principles of public policy or natural justice: provided further that it shall not be lawful for any court to declare that the custom of *lobolo* or *bogadi* or other similar custom is repugnant to such principles.

The sub-text underlying the policy to exclude African values by subjecting them "to the principles of public policy or natural justice", was that the only cultural and normative values that were worthy of consideration, were those with their roots in Western

³⁷ *Idem* 262.

³⁸ See Ruru *op cit* 264.

³⁹ See Steward J "Why I can't teach customary law" in Eekelaar J and Nhlapo T (eds) *The changing family: International perspectives on the family and family law* (1998) 18 at 18-28.

⁴⁰ See Act 38 of 1927.

jurisprudence. This was done in total disregard of the fact that received Western law and African law are two different legal systems, each with its own background rules and regulations for enforcing order in society. The imposition of the European metaphysical life-world on areas that ordinarily fell to be regulated by African culture proved that the true objective of colonial policy was the subjection of African law to the values of Roman-Dutch law.

The effect of the colonial and apartheid legal frameworks was that African law had to be consistent with the Western-oriented principles of public policy or natural justice, before it could be applied. This ensured the subordination of the indigenous value system to common law. In this regard, it is instructive that the BAA framework was known as the Black Administration Act; a suitable term for a law that consolidated colonial power to administer the Africans as colonial subjects and not to uphold the African value system.

Indeed what was opposed to the principles of public policy and natural justice was what Western jurisprudence classified as such; even when the practice concerned proved quite consistent with African standards of morality.⁴¹ In order to institutionalise and implement the exclusion of Africans from the mainstream justice system, the BAA established an exclusive statutory framework for a separate ministry, a separate administration and a separate court system that targeted black South Africans for the delivery of inferior justice.

The BAA established special Commissioners' Courts manned by white officials with a discretion to apply African law to black South Africans. The real purpose of establishing these courts was the imposition of Western values on African people through the repugnancy clause. This is borne out by the fact that the stated objective of the clause was to confer a discretion on presiding commissioners to apply African law subject to the proviso that it was not opposed to the principles of public policy and natural justice. Consequently, an entire dispensation was created to promote the separate social, political and legal "needs" of black people by a parliament in which they were not represented.

⁴¹ See Nwabueze *op cit* 179.

In this way, the policy of racial exclusion ensured that Africans were not served by the courts which served the rest of the population. This predicament induced Deveaux to make the following observation:

Under apartheid, administrators had an interest in reinforcing the cultural differences of different African groups. Traditional African leaders were wooed by apartheid administrators, who in turn shored up and underwrote the chief's power and authority in return for guarantees of loyalty. This system was made easy by the adoption of the Black Administration Act No 38 of 1927.⁴²

In the following dictum, McLaughlin P also captures the history of the unequal treatment of Western and African law thus:

The attitude of the legislature towards natives and Native Law in the Transvaal is clearly shown by the survey of the history of legislation on the subject since the early Republican days. The natives were placed in a category separate from the Europeans and they were permitted no equality either in the system of law applied to them nor in regard to the courts to which they were accorded access in civil matters ... It is the Shepstonian conception of legal segregation successfully adopted in Natal and imported into the Transvaal on annexation in 1877.⁴³

It is gratifying that the presiding officer saw the colonial application of African law and the channelling of Africans to a separate system of customary law courts for what it was – a form of racial inequality. Of course, inequality did not flow from the application of African law to Africans; it resulted from entrusting cultural outsiders with the application of African law, and subjecting customary law to the repugnancy clause. The latter became so unpopular among Africans that parliament was forced to exempt the custom of *lobolo* or *bogadi* from the courts' jurisdiction.

Dlamini exposes the paradox of exempting the custom of *lobolo* or *bogadi* from the courts' repugnancy jurisdiction whilst leaving African marriage itself outside the exemption as a fallacy indeed.⁴⁴ The policy's anomaly arises from the possibility that a

⁴² See Deveaux M "Liberal constitutions and traditional cultures: The South African law debate" (2003) 7/2 *Citizenship Studies* 161.

⁴³ See *Matsheng v Dhlamini and Another* 1937 NAC (N&T) 89 at 91.

⁴⁴ See Dlamini CRM "The clash between customary law and universal human rights" (2002) 1/1 *Speculum Juris* 26 at 34.

court could, in theory, declare a customary marriage to be contrary to the principles of public policy and natural justice, and strike it down, whilst upholding the *lobolo/bogadi* undergirding that very marriage. This policy exposes the prevailing legislative mind-set as so naive as to suggest that African law could be applied to certain African legal institutions – such as *lobolo/bogadi* – outside of their value system. This colonial complacency appears to have accepted that an African custom could survive in an alien environment regulated only by Western jurisprudential principles even after ruling the cultural context underpinning it repugnant to good morals.

By staffing the blacks-only Commissioners' Courts with white presiding officials who were not tutored in African cultural practices, the BAA institutionalised this skewed interpretation of African law. Moreover, these were the only courts in the country which had first instance jurisdiction over African law apart from the courts of traditional leaders that had limited customary law jurisdiction. Through the repugnancy clause, the Commissioners' Courts fulfilled a "cultural cleansing" role in that they ensured the striking down of genuine African law whenever it conflicted with Western conceptions of justice and morality. In *Tshabalala v Estate Tunzi*, Marsberg P endorsed this judicial policy in exercising the repugnancy jurisdiction in the following terms:

According to pure Native law no woman can own property, but the Native Appeal Court has held that the widow is entitled to retain in her own right to property earned by her after her husband's death; the Court was aware that this is in conflict with Native Custom, but when Native Custom is repugnant to justice and equity it must go.⁴⁵

In the *Tshabalala* case, the court looked at African law through a Western lens as required by the repugnancy policy. Contrary to the African values of group solidarity and shared belonging, in terms of which the whole of the widow's marital family has a collective interest in the land, the court treated her individual interest in property separately as if it were dealing with a common law matter. By individualising the widow's interest and separating it from its communal cultural context, the court clearly arrived at a result that was acceptable to Western justice and equity.

⁴⁵ 1950 NAC 46 (C) at 48.

Moreover, the court was motivated purely by the Western concept of justice, which preferred the protection of the individual over the communal unity of the family. The outcome was the imposition of a value system that distorted African norms by setting the individual against the group which was the real guarantor of her property rights in indigenous law.⁴⁶ Yet African law recognised widow's interests in property, but unlike common law, it did so through the values of shared belonging and collective solidarity with other family members.⁴⁷ Like everyone else in the family the widow's property interest affected and was affected by the communal interest of the collective.

When the court treated the widow as an individual, it removed her from the scale of values espoused by her customary security system. It therefore distorted her cultural relations in her own community.⁴⁸ This result exposes the objective of the repugnancy clause as seeking to subject African law to Western standards of morality. That the court was not referring to African justice and equity appears from its interpretation of the widow's rights as though it was a right under common law.

The repugnancy clause as entrenched in section 230 of the Natal Code of Zulu Law presented itself as an instrument for trumping African values which conflicted with Western values in *Tshiliza v Ntshongweni* where the court held:

I quite agree that under unmodified Native Law such a transaction as the one alleged might have been allowed. But the Code [of Zulu law] attempts to elevate the standard of morality among the Natives and Section 230 was evidently framed with such an end in view ... Even long established custom has to give way before statute law, and therefore this custom must give way before section 230.⁴⁹

As can be observed the colonial/apartheid courts applied the repugnancy clause to trump African values by promoting Western moral standards; something that persisted until the end of apartheid. Moreover, the prevailing principle of legislative sovereignty, which placed statute law above custom, bolstered the administration of cultural imperialism for Africans.

⁴⁶ See Ngcobo J in *Bhe-Shibi* par 173 where he explains the protection afforded by group rights.

⁴⁷ *Ibid.*

⁴⁸ See also *MEC for Education: KwaZulu-Natal v Pillay* 2006 (101) BC LR 1237 (N) par 53.

⁴⁹ 1908 NHC 10 at 11.

As *Tshiliza's* case shows, any conflict between African law and statutory law had to be resolved in favour of the latter. This enhanced status given to colonial/apartheid statutes, also raises questions about their legitimacy as they were applied with a view to disenfranchising Africans and so preventing them from developing their own African system. African culture, however, recognised customary law-makers as the only authentic authors of this system.⁵⁰

When the Hoexter Commission evaluated the application of African law in South Africa in 1986, it created a positive expectation that the period of full recognition for the African value system had eventually arrived.⁵¹ Subsequent to the report of the Hoexter Commission, the Magistrates Courts Amendment Act 32 of 1988 was enacted to implement its recommendations. Section 54A(1) of the Act abolished the Commissioners' Courts which had previously enjoyed the monopoly in applying African law. The amendment extended the application of African law to all South African courts whenever the system was applicable. This provision was further amended in the same year by section 1(1) of the Law of Evidence Amendment Act 45 of 1988 which reads:

Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

The retention of the repugnancy clause and the equation of African law with foreign law are indications that the era of non-recognition of African values and cultural imperialism was not yet over. This much appears from the scathing remarks elicited by Hlophe JP when he held as follows in *Mabuza v Mbatha*:

In conclusion the test is not, in my view, whether or not African Customary Law is repugnant to the principles of public policy or natural justice in any given case ... The

⁵⁰ Bennett TW "R e-introducing African customary law to the South African legal system " (2009) 57 *The American Journal of Comparative Law* 1 at 2 says: "Any question about the legitimacy of customs can be laid to rest by an assumption that all members of the community concerned participated in the creation". See also Allott AN "What is to be done with African customary law? The experience of problems and reforms in Anglophone Africa from 1950" (1984) 28/1-2 *JAL* 56 at 59-60.

⁵¹ See the Fifth Report of the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts 1986, also discussed by Bennett TW *Customary law in South Africa* (2004) 141.

former approach which only recognises African law to the extent that it is not repugnant to the principles of public policy or natural justice is flawed. It is unconstitutional.⁵²

The case of *Sigcau v Sigcau*⁵³ is a classic example of the distortive application of African law by the colonial/apartheid judiciary. The dispute between two half-brothers, Nelson Sigcau, the plaintiff, and Botha Sigcau, the defendant, was triggered by the death of their father, King Marelane Sigcau of Eastern Pondoland in 1921, without an heir in the Great House. The parties contested the position of heir to the royal estate, generally known as Qaukeni Estate, the palace of the Kingdom of Eastern Pondoland.

The interference of cultural outsiders in African culture emerged when the Union government separated what were essentially inseparable issues by approaching the matter from the perspective of the Western concept of justice as an inheritance rather than a leadership contest. The dispute regarding the kingship position was handled separately as an administrative matter whilst the dispute about succession to the royal estate was handled judicially, although the two issues belonged together and should never have been separated.⁵⁴

The potential for prejudice was apparent when the administrative dispute was resolved in favour of the defendant while the judicial contest was still pending before the courts. Counsel for the defendant was tempted to argue that the latter's appointment as a traditional leader under section 23 of the BAA, served to settle the matter of the estate in his favour. This provoked the following retort from Chief Justice Watermeyer:

The Government in making an appointment is not bound to appoint the man who would be chief according to Native Custom, and it could not be seriously suggested that a

⁵² See Hlophe JP in *Mabuza v Mbatha* 2003 (7) BC LR 743 (C) par 32.

⁵³ See *Sigcau v Sigcau* 1941 C PD 334 and *Sigcau v Sigcau* 1944 AD 67. The background facts to the *Sigcau* cases are that a dispute arose between two princes, Botha Sigcau and Nelson Sigcau, both sons of the late King Marelane Sigcau of the Qaukeni Kingdom (Eastern Pondoland), who died in 1921. Each prince claimed both the chieftainship and the property of the Qaukeni Estate, which was the palace for the kingdom. In his succession plan the king had left at least four wives:

- the Great Wife (*indlovukazi*), Mankosinani, who unfortunately had no surviving male child;
- the Right Hand Wife, Mapakati, mother of Botha Sigcau (the defendant/respondent);
- the Qadi (supportive) Wife to the Great House, Mamtshibeni, mother of Nelson Sigcau (the plaintiff/appellant) and Maneli;
- and another Qadi Wife to the Great Wife Maqinebe, mother of Mandlonke, who was later adopted as the son of the Great Wife, and therefore the successor to his father's position, in an effort to diffuse the divisive contest between Botha and Nelson.

⁵⁴ See Mqhayi SEK *Ityala lamawele* (1914) 1-24 where the twins' case was handled as a single dispute.

custom has grown since 1927 of giving the property of the man who would be Chief by Native Custom to the Chief appointed by the Government if they were not one and the same person.⁵⁵

Hence the separation of the issues came close to prejudicing the matter in favour of the defendant before it had been finalised by the court because the latter was designated paramount chief (statutory king created by the BAA) even while the parties were still arguing the ownership of the royal estate in the courts. Under African law an appointment as the king would automatically settle the dispute as to succession to the royal estate. The latter procedure would be in line with the indigenous one followed in the twins' case where the succession dispute was handled as a seniority contest, the resolution of which would automatically settle both succession to the status of family headship and the position of the trustee of the family estate as these functions are inseparable.

Indeed the judges involved in the *Sigcau* case realised their ontological and epistemological shortcomings as Western trained lawyers who were not steeped in African culture. Evidence of lack of African cultural orientation appears from the following dictum of Davis J in the Cape Provincial Division:

I wish that the Court could decide [this question] now, yet as it involves native law and custom of which without evidence it necessarily knows nothing, it seems manifest that it cannot do so. Evidence must be led, for instance, as to exactly of what the Qaukeni Estate consists and what are the rights of the Chief in relation thereto, of how native law and custom bind it to the Chieftainship, whether there can be more than one Chief, what precisely is meant by the "Great House", and so on.⁵⁶

This was echoed on appeal by Watermeyer CJ who issued similar lamentations:

This Court is faced with a difficult problem. Pondo law and custom is a body of unwritten law save for certain decisions of the Native Appeal Court and statements as to Native Law and Custom made by native assessors which are recorded in the reports of the Native Appeal Court, and save for certain passages in books dealing with native custom. But even such records as there are little more than records of traditions, records of what someone at some time said the custom was. In the reported cases the

⁵⁵ See *Sigcau v Sigcau* 1944 AD 67 at 75.

⁵⁶ See *Sigcau v Sigcau* 1941 C PD 334 at 342.

recorded opinions of assessors naturally harden into law, and certain books are to some extent accepted as accurately stating what native custom is. But apart from making what use is possible of these scanty records, the only way in which the Court can determine a disputed point, which has to be decided according to native custom, is to hear evidence as to that custom from those best qualified to give it and to decide the dispute in accordance with such evidence as appears in the circumstances to be to be most probably correct.⁵⁷

Both the problems regarding the nature of African law experienced by Davis J and those regarding its ascertainment and sources confirmed by Watermeyer CJ could not have arisen in the traditional African law court. The Western frame of reference that occupied the judicial life-world in the *Sigcau* dispute was not amenable to the traditional resolution of the relevant issues.

The *Sigcau* contest belonged to the same indigenous cosmology that provided the paradigm of discourse underpinning the pre-colonial case of the twins; and it deserved to be handled likewise. The difference between the two cases was cultural orientation, namely, whilst the twins' case was handled in a traditional court operating under the indigenous value system, the *Sigcau* matter was heard by ontologically and epistemologically handicapped colonial cultural outsiders guided by the Western worldview.

The reality is that the supposedly difficult questions of law which both the *Sigcau* judges raised were in fact so peripheral that an indigenous forum would have taken them for granted. Indeed such questions betrayed the judges' social disorientation which led them to treat African values as exotic matters. The *Sigcau* case reveals the awkwardness of employing extra-culturally trained lawyers to resolve culturally-sensitive disputes founded on indigenous norms. Unlike the twins' case in which the indigenous normative values of group solidarity, communal interest, collective ownership and a shared belonging characterised the conduct of the proceedings,⁵⁸ the handling of the *Sigcau* matter reflects a value system that was undergirded by values of individualism, private ownership and self-centredness.⁵⁹

⁵⁷ See *Sigcau v Sigcau* 1944 AD 67 at 76.

⁵⁸ See Mqhayi *Ityala op cit* 22 where King Hintsu spoke in the name of the *inkundlallekgotla* (court) and instructed both Babini and Wele to work together in managing the affairs of their family and its resources.

⁵⁹ See *Sigcau v Sigcau* 1944 AD 67 at 79 where the "winner" was given the powers of a private owner over a communal family estate.

The reasons for this are clear. The *Sigcau* matter came to court framed as a divisive adversarial common law dispute founded on the non-customary concept of individual ownership of a family home. The adversaries were selfish half-brothers who alienated themselves from their community by embroiling themselves in a conflict that was completely devoid of any features of the African value system. Under pre-colonial African law, however, the *Sigcau* dispute would have been formulated as a seniority dispute based on the royal status and rank of the parties; an issue that would have attracted the interest of the whole community as happened in the twins' case. However, the dispute itself was distorted by being couched in Western jurisprudential terms, in which private persons, assisted by Western-trained lawyers,⁶⁰ claimed – contrary to African notions of justice – personal ownership of a palace, which by definition belonged to the community.⁶¹

The matter was aggravated by the fact that the *Sigcau* lawyers apparently conceived their brief through their own (Western) understanding of the nature and purpose of the law of property and succession, and made no effort to conceptualise the matter in its own indigenous cultural context. In the end the Chief Justice pronounced the winner, Botha Sigcau the personal owner of the royal estate and its assets,⁶² thus creating a cultural monstrosity that could have been avoided had Botha been declared the head of the family and successor to his father's kingship position as custom required.

Such distortions would never have happened before an indigenous tribunal.⁶³ The resolution of the seniority question would have rendered the individual property claims redundant, since, in African law, family headship goes together with the trusteeship of the estate. If the forum had been rooted in the indigenous worldview, it would have been able to read the Sigcau family structure, wearing lenses that were capable of viewing the dispute in its proper cultural perspective, and would have understood the message conveyed by the accompanying structural institutions. The matter would have

⁶⁰ Appellant's (Nelson Sigcau's) attorneys were Fuller, De Klerk and Osler, Cape Town; MacIntyre and Watkeys, Bloemfontein. Respondent's (Botha Sigcau's) attorneys were Findlay and Tait, Cape Town; Lovius and Shtein, Bloemfontein.

⁶¹ See Bennett "Re-introducing" *op cit* 6.

⁶² See *Sigcau v Sigcau* 1944 AD 67 at 79.

⁶³ *Ibid.*

been handled as a seniority dispute intended to resolve the question of family headship and the administration of its property.

The Chief Justice's opening sentence in which he introduced the matter as "a dispute as to who is the rightful heir to the property of the Great House of the Paramount Chief of Eastern Pondoland" distorted the nature and character of African law in a number of ways. The message conveyed by this statement is totally repugnant to African cultural norms.

First, house property is by definition collectively owned. Therefore the concept of the "rightful heir to the property" of a house is alien to the notion of house property which in African law has connotations of property that belongs to the collective membership of that house under the leadership or management or even trusteeship of the head.⁶⁴ The repugnancy of the concept of individual ownership is aggravated by the fact that the estate concerned was also a palace.

As the palace of the Kingdom of Eastern Pondoland,⁶⁵ the Qauken Estate (the property of the Great House) was public property which served as the centre of governance for

⁶⁴ See *Sigcau v Sigcau* 1944 AD *supra* 73 where the Chief Justice acknowledges that: "it is customary for a husband to allot to each wife a separate status and a separate establishment. This establishment is referred to as a house, it centres round the wife, and children born to the wife belong to such house". This acknowledgement alone shows that there is a unit of people to whom the house belongs. No one can, therefore, claim its ownership according to African law. Only the right to control the members of the house can be in issue. Notions such "a son of the Qadi attached to the Great House inherits the vacant property of the Great House" would offend the sensibilities of the adherents of African law because house property is the home of people who belong to that house, not just the son. No one can therefore refer to it as being "vacant property". As Ngcobo J held in *Bhe-Shibi supra* par 180 the successor does not inherit family property in the sense in which that term is understood in common law.

⁶⁵ See also Ndima DD "The African law of the 21st century in South Africa" (2003) XXXVII/3 *CILSA* 325 at 333 note 24 where he says: "Watermeyer C J unfortunately, fell into this trap in *Sigcau v Sigcau* 1944 AD 67 at 79 when he held: '... and the defendant was found, according to the evidence produced in the case, to be entitled to the ownership ... of the property ...'. This is especially unfortunate since this particular estate is a palace for the people of Eastern Pondoland as a whole. The estate does not only belong to the Sigcau home and family, as would have been the case if the deceased was a commoner, it is the centre of governance for the whole community. Nobody could ever own it personally because the community needs it for legislative, administrative, judicial and even civic matters." This is especially unfortunate since this particular estate is a palace for the people of Eastern Pondoland as a whole. The estate does not only belong to the Sigcau home and family, as would have been the case if the deceased was a commoner, it is the centre of governance for the whole community. Nobody could ever own it personally because the community needs it for legislative, administrative, judicial and even civic matters."

the kingdom. It was therefore not open to private ownership under African law. Its distortion as private property betrays the extra-cultural pedigree of the court's sources of reference which saddled it with the burden of illegitimacy. Notwithstanding the African context of the dispute, the court failed to vacate its Western intellectual comfort zone.

Instead of operating as an institution that applied African law, the court subjected the latter system to the status of a sub-system of the common law. In other words, while the dispute involved African law institutions, concepts, principles, rules and doctrines, the cosmic order in which the trial sought to resolve it was Western and therefore alien both to the nature of the cause, and to the parties involved, including the entire community of the Kingdom of Eastern Pondoland. The whole process, and indeed the judgment, resulted in a total travesty of African culture and its institutions.

The passage quoted from Watermeyer CJ's judgment shows how African law's normal characteristics such as its unwritten nature, were viewed as problematic by the colonial judiciary. As the twins' case illustrates, the oral tradition did not pose any problems to the adherents of the African system. On the other hand, the *Sigcau* case reveals the contradictions inherent in trying to resolve a dispute arising from an oral tradition, in a court functioning according to a competing written tradition.

Indeed Davis J's concession that the court knew nothing about the basic features of African jurisprudence, especially the oral tradition on which it is based was an indictment on his judicial competence in customary law. The court blamed African law for not having written records; instead of decrying the policy of entrusting extra-cultural colonial legal professionals with the administration of African culture.

Such personnel consisted of legislators, judges, lawyers and scholars who followed Western techniques such as judicial precedent, the rule against hearsay and the sub judice rule. These concepts were all cultural monstrosities which contributed to the distortion of African law by changing the system's texture and complexion to suit Western standards of justice and morality. With the assistance of the repugnancy policy this approach produced the "official" version of African law, which was a clone of

common law and bore little resemblance to either the original pre-colonial indigenous law, or its current “living” version used by the contemporary customary communities in their current social transactions. Consequently, African law lost its indigenous characteristics of flexibility and adaptability and assumed new features of consolidation and petrification.

Meanwhile, the “official” version remained fossilised in the hands of Western-trained lawyers and officials who interpreted African law’s protective tendencies towards women as evidence of male domination. To the Western mind the traditional bias towards cultural cohesion through the male agency amounted to male chauvinism, which was seen as no more than an excuse for gender domination. Such a skewed conceptualisation of the purpose of African law manifested itself in the enactment of official codes and statutes in a way which served to reduce women to complete legal outcasts as “official” African law increasingly portrayed men as oppressors of their own mothers, wives and daughters.

The deleterious effects of applying alien values that undermined the distinctiveness of African law extended to the law of succession and administration of deceased estates, where statutes paved the way for judgments appointing heads of families as owners of family property, to the exclusion of the rest of the share-holding collective. This had its origins in section 23 of the BAA which provided for the application of African law in the administration of the deceased estates of Africans.

If African law was applied within its own life-world such a provision would promote the implementation of indigenous norms and values. However, in the environment of the Roman-Dutch “official” African law undergirded by Western normative standards what should have been construed as the mandate to re-indigenise the system was distorted to mean the opposite. In the process, the primogeniture rule was “cleansed” of its inclusive and collective qualities by being presented as a principle for designating senior males for appointment as owners of family resources in their own names.

In “official” African law senior males were not defined as nominal managers who shared the administration of family property together with the collective. As owner of these resources the heir’s only duty was to maintain the deceased’s dependents. Recent cases, however, show that he often neglected to do so.⁶⁶ In the case of *Mthembu v Letsela*,⁶⁷ both the High Court and the Supreme Court of Appeal confirmed a magistrate’s appointment of the father of a deceased husband as his son’s heir in his personal capacity as the owner of the estate. The deceased’s dependants lost, not only their indigenous rights as share-holders, but also their “official” law right to be maintained. In *Bhe*,⁶⁸ such a designation by the magistrate was reversed by the High Court, while in *Shibi*,⁶⁹ the magistrate designated the deceased’s male cousin as the owner of the deceased estate. In all three cases the appointed heirs vowed to exclude the dependents of the deceased from the benefits.

The effect of the Roman-Dutching influence was the loss of African values and the emergence of an irreparably corrupted “official” version of the law in which the designation of ownership of family resources lured more and more senior males to opportunistically support the official relaxation of their communal responsibilities to the detriment of junior males, women, children and other vulnerable family members. Armed with legal impunity, such unscrupulous family heads, started depleting family estates for personal and selfish purposes under the cloak of ownership. An example of such a case is *Mthembu v Letsela*⁷⁰ where the family head evicted his son’s widow and daughter from the family home. Regrettably South Africa’s constitutional institutions present the distorted “official” version as proof that African law is in conflict with the Constitution. In *Bhe-Shibi* the Constitutional Court struck down the primogeniture rule instead of holding that it was its misuse by family who exploited it contrary to the African tradition that was unconstitutional.⁷¹

After the most hallowed African institutions and practices such as marriage and *lobolo*

⁶⁶ See *Mbekushe v Dumiso* 1941 NAC (C &O) 57.

⁶⁷ 2000 (3) SA 867 (SC A).

⁶⁸ See *Bhe and Others v Magistrate Khayelitsha and Others* 2004 (2) SA 544 (C).

⁶⁹ See case 7292/01 (unreported).

⁷⁰ 2000 (3) SA 867 (SCA).

⁷¹ See *Bhe-Shibi supra* par 109.

or *bogadi* were targeted for ridicule by the colonial/apartheid establishment,⁷² two parallel versions of African law emerged. State institutions, the legal profession, and academics applied the “official” version, which they subjected to the repugnancy clause to ensure its Western cloning. In *Bhe-Shibi* the Constitutional Court warned against the gratuitous use of “official customary law as it exists in text books and in the Act [and which] is generally a poor reflection, if not a distortion of the true customary law”.⁷³ This version has been consistently condemned by the Constitutional Court as can be seen in *Alexkor*⁷⁴ and *Shilubana*⁷⁵ where this caution was emphasised.

In the process the very essence of the protective unit termed a “house” in African law, which in indigenous law is an essentially communal institution whose property could not be claimed by an individual has been distorted. Grant reflects a more proper understanding of the nature of the African law of property and succession, in the following terms:

The primary purpose of succession was to ensure the maintenance of the family unit by keeping family property in the family ... Recast in terms of the concepts of Roman-Dutch law, however, succession became mere inheritance, the concept of family property was abandoned and any obligation of support was cast off. What is more, the fact that by its very nature customary law is different from Roman-Dutch law or English common law is misunderstood. While Western systems are based on written sources the validity of which depends on formal legal tests, customary law was originally unwritten. Its validity remains a question of social practice, to be tested by social observation. Customary law itself, and the culture in which it is based, is neither static nor uniform.⁷⁶

4.5 How African law became a clone of the common law

As a result of colonial and apartheid policies African law was forced through the repugnancy clause to adopt a Roman-Dutch prism⁷⁷ that rendered its normative values

⁷² See Van Niekerk GJ “Legal pluralism ” in Bekker JC, Rautenbach C and Goolam NMI (eds) *Introduction to legal pluralism in South Africa* (2006) 3 at 7.

⁷³ See *Bhe-Shibi supra* par 86.

⁷⁴ See *Alexkor v Richtersveld Community and Others* 2003 (12) BC LR 1301 (CC) par 54 where the court held “indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it.”

⁷⁵ *Idem* par 44.

⁷⁶ See Grant E “Human Rights, cultural diversity and customary law in South Africa” (2006) 50/1 *JAL* 1 *op cit* 16.

⁷⁷ See Stewart *op cit* 18.

contrary to the principles of good conscience. When seen through such a Roman-Dutch lens, African law emerged in an “official” version which differed from the indigenous one. The features and values of “official” African law became a clone of Western jurisprudence which was devoid of indigenous values.

As a clone of Roman-Dutch law, the “official” version of African law emerged as a distorted construction of African tradition undergirded by a Western frame of reference. The sources of law from which “official” African law derives its authority betray its Roman-Dutch origins. Statutes, judgments, executive decisions and academic writing are all based on Western jurisprudence and are in stark contrast to the indigenous narratives, traditions and folklore that guided African decision-makers before colonisation.⁷⁸

Pre-colonial precedents and sources were not recognised as “official” African law and were not regarded as binding during the application of this version.⁷⁹ Being a clone of a foreign system “official” African law lost respect for intra-cultural experts such as Khulile Majeke whose sagacity helped elucidate the cultural challenges in the famous twins’ case. As their expertise was underpinned by indigenous values these sages lost their prestige and could no longer be consulted as the paradigm of discourse had shifted to favour Roman-Dutch values.

As the clone of the common law; the “official” version of African law bore little resemblance to either the original pre-colonial indigenous law or its current “living” version used by the contemporary customary communities in their current social transactions. Instead, it gained the Roman-Dutch characteristics of universality, rigidity, consolidation, petrification, and certainty in conformity with the precedent system.⁸⁰ Inevitably, the “living” law systematically sacrificed its indigenous features of flexibility and adaptability, which had made its practice malleable and adaptable.⁸¹

For this reason, the colonial/apartheid periods represent the dark winter of African law

⁷⁸ See Bennett *Customary law op cit* 4.

⁷⁹ *Ibid.*

⁸⁰ See Gumede *supra* par 20.

⁸¹ Abiodun *op cit* 77.

under the Roman-Dutch cloned “official” version. This is the era in which this version was used in the administration of the so-called “uncivilised natives” who did not qualify to be exempted from the supposedly primitive indigenous culture.⁸² In order to “raise” the standard of morality, Western notions of justice were imposed on African law by “cleansing” it through the repugnancy clause. Ebo ventures the following reasons for the cloning of African law:

The argument that is usually given in support of this [Westernisation] is that modern social realities do not offer any great hope for substantive rules of customary law as an important legal rule in contemporary African states ... that the village communities are no longer existent, the traditional institutions have been bastardized, and the economic conditions of the then traditional Africa [are no longer] as they were. For these reasons, the conclusion is quickly made that the needs of today's Africans are different; the social challenges are more enormous and as a result only the alien legal system can meet up with these challenges.⁸³

This passage shows how foreign values were imposed for reasons that nothing to do with African law itself. This is also confirmed by the discussion of the *Sigcau* cases⁸⁴ which exemplifies the cloning of African law through the creation of distorted traditions geared towards statutory and judicial denigration of the indigenous institutions. Section 23 of the BAA downgraded the position of the “king” to that of a “paramount chief”, and transformed the indigenous custom of identifying a successor to traditional leadership, from the primogeniture system – which had worked smoothly for centuries in defining royalty – to a statutory appointment which allowed the coronation of commoners by the government.⁸⁵

The height of the marginalisation of African law was reached when common law was made the law for everyone to be enforced as a matter of obligation in all cases, whilst the courts had a mere discretion in the application of African law in certain cases only.⁸⁶ The then Appellate Division finally endorsed this relationship of inequality when Schreiner JA stressed that the BAA obliges presiding officers to apply the common law

⁸² See *Bhe-Shibi supra* par 67 for Langa DC J's condemnation of this practice.

⁸³ Abiodun *op cit* 77-78.

⁸⁴ See *Sigcau v Sigcau* 1941 C PD 334 and *Sigcau v Sigcau* 1944 AD 67.

⁸⁵ See section 23 of the BAA.

⁸⁶ *Ex parte Minister of Native Affairs - In re Yako v Beyi* 1948 (1) SA 388 (A).

as the primary system in all cases involving Africans in South Africa. The court reiterated that all South Africans had primary access to the common law, as the sole law of the land.⁸⁷

Schreiner JA enjoined judicial officers, in appropriate cases, to always use their own sense of justice in deciding whether to apply the common law or African law, bearing in mind the best interests of the litigants. When they chose to apply African law, they were bound by legislation to take judicial notice of “official” African law because that version was readily ascertainable from text records and judicial precedents.⁸⁸ The unwritten “living” African law was disqualified as it could not be readily ascertained.

This ruling came in handy to presiding judicial officers and lawyers who needed little encouragement in this regard as they were trained exclusively in the common law tradition. In any event when dealing with African law, the legal personnel were accustomed to apply Western standards of morality under the repugnancy dispensation. In terms of the *Yako* judgment, the old order courts were encouraged to trump African law with the common law as the latter was the sole law of the land. African law was only applied subject to its consistency with the judicial officers’ perceptions of the common law notions of natural justice and public policy.

The unique characteristics of the African marriage made it a good candidate for non-recognition because of the centrality of the *lobolo* arrangements in its definition. The fact that it entailed a transfer of marriage goods, originally in the form of cattle, from the husband’s family to that of the wife, before the proceedings could be completed, was the basis for colonial scepticism as to its acceptability. To the colonial mind, the woman was being “sold”.⁸⁹ As a result of this attitude, the relations between the colonial administration and the African population deteriorated to such an extent that the courts had to be statutorily forbidden from perpetuating the insult of declaring that the institutions of *lobola* or *bogadi* were contrary to the principles of public policy and natural justice.

⁸⁷ *Ibid.*

⁸⁸ See section 1(1) Act 45 of 1988.

⁸⁹ See Van Niekerk *op cit* 5; and Soga TB *Intlalo kaXhosa* (translation – the Xhosa tradition) (1935) 76.

As a form of resistance to this cultural cleansing, the adherents of African law continued to apply the “living” version that observed indigenous values in their daily transactions. Devoid of the in-built manipulative features which cushioned its patriarchal tendencies in the indigenous environment, the precedents emanating from the colonial/apartheid courts retarded African law’s development and exaggerated its sexist tendencies. The dichotomy between the “official” and the “living” versions of African law resulted in the stunting of the development of African law in general, and the “official” version, in particular, despite the latter’s resource and institutional support from the colonial/apartheid establishment.

Ironically, the “living” law benefited from the official exclusion and neglect because its adherents took advantage of the narrow space they still had to arrange their affairs in the environment of its normative values. “Living” law could then respond to the changing socio-political challenges to which the disenfranchised adherents of African law endeavoured to adjust themselves as the struggle against apartheid fostered new democratic values, including the equality of women.

The indigenous African communal tradition was inclined towards the welfare of vulnerable members, and it was the responsibility of the head to use the family assets for the benefit of the collective. To achieve this, the institution of manhood was an instrument of distributive justice, and was not a symbol of domination.

4.6 Chapter conclusion

The imposition of Roman-Dutch law over African law meant that the law of the original inhabitants of South Africa⁹⁰ was subordinated to Roman-Dutch law of European origin through the imperialist policies of dispossession, disenfranchisement and cultural non-recognition. These policies had their origins in anthropological studies that demonised African law and culture. In effect, the policies “cleansed” African law of its values, and cloned it into an “official” version of African law that was devoid of its indigenous norms. By assuming the moral standards of Roman-Dutch law African law was reduced to a mere sub-system of the former system whose values it had to uphold. In its cloned

⁹⁰ See Van Niekerk “Legal pluralism ” *op cit* 4.

“official” condition African law lost its indigenous normative underpinnings to the extent that some dismayed scholars compared its status to that of a stepchild in the family of Roman-Dutch law within the South African legal order.⁹¹

The colonial intention in creating the “official” version was to subordinate African law to Roman-Dutch law through legislation which empowered the courts to strike down those customs that resonated with African values. The consequences of this approach were so ghastly that the jurisprudence generated by the Roman-Dutching processes assumed the categories, classification, and divisions of the latter system.⁹² The appellation “official version” was no more than a euphemism for the fact that cloning had transformed African law into a complete distortion of the indigenous worldview and was anchored in an alien frame of reference and disoriented metaphysics. The “official” version was a reflection of the fact that the power to enact, repeal and modify it lay in the hands of extra-cultural authorities who handled the system with borrowed eyes.

The adherents of African law saw the “official” version as a misrepresentation of their culture with which they could not identify. Moreover this distorted version contradicted the “living” customary law that embodied the aspirations of the Africans and was current in social practice. Yet those who lived and produced African law as customary law makers had no power to influence the official enactment, repeal or modification of their system and had to stand by and watch it being distorted by cultural outsiders.

The impact of the colonial/apartheid administrations was the emergence of dualism in the South African legal system in terms of which Roman-Dutch law applied to all, whilst African law applied only to black people. In addition to this, a dichotomy emerged between the “official” version of African law, which was applied by state officials, and the “living” version that was used by African law adherents in social practice.

The application of the “official” version led to the observance of Western judicial techniques and sources of reference that were superimposed on the indigenous value

⁹¹ See Visser D “Cultural forces in the making of mixed legal systems” (2003-4) 13 *TULLR* 74.

⁹² See Roederer C “Traditional Chinese jurisprudence and its relevance to South African legal thought” in Roederer and Moellendorf *op cit* 499-531.

system. This was in accordance with the former's pedigree which demanded consistency with Western moral standards. This distortion bastardised the indigenous value system as South African legal professionals, practitioners and courts began to view African law through the common law lens.

The emergence of the "official" version of African law was made possible by the deployment of the repugnancy clause to induce loyalty to Western jurisprudence, and sow contempt for the African thought system, which was to be discouraged for its alleged inferiority. The resultant version of "official" African law was consequently distorted, and sought to construe the indigenous rules, principles, concepts and doctrines in conformity with the Western value system.

As a clone of the latter system, the distorted version operated as a sub-system of common law, and had no distinct existence independent of this "mother system". Distortions emerged because the implementation of the repugnancy approach demanded cultural consistency and ignored the reality that the Western and African normative systems belonged to two distinct backgrounds that reflect different intellectual life-worlds. The resultant "official" version of African law was a colonial/apartheid construct, not an African system, and was created to alienate itself from the pristine pre-colonial indigenous reality which reflected the African metaphysical life-world in the field of law.

In order to succeed in demonising African law as a credible thought system, the natural discordance between Western and African values was portrayed as the repugnance of the African culture to civilised standards. Two objectives had to be achieved to rectify this situation, namely, Africans had to be "rescued" from the "oppressive and primitive" indigenous system; and everyone had to be treated "equally" by bringing the duality in the application of Roman-Dutch law and African law to an end.

These machinations did not disclose the reality that the two systems were equally and mutually repugnant to one another's moral values. According to Ruru, a Maori professor, the idea was to preach that "[p]rovidence ... intended that [the colonists] and

their institutions should dominate Indigenous people in their countries”.⁹³ Consequently, the colonists spread the view that the repugnancy of African values to the Western worldview was proof that the former system was still at a primitive stage of social development. This justified the implementation of a “rescue” plan, by infusing African law with a dose of Westernisation of its value system so as to “elevate” it to “acceptable standards of morality”.⁹⁴

Ultimately, the colonial actions subordinating African law weakened its grip on the moral fibre of its adherents and resulted in the consolidation of colonial power over the affairs of the Africans. Indeed, the whole idea of giving the power to adjudicate African law disputes to extra-cultural colonial officials was a conscious expansion of Western imperialism. At the end of apartheid official customary law had deviated so much from the version that was used by its adherents in social practice that the in-coming South African constitutional framework had to make adequate provision to assist its institutions in their endeavour to resurrect the system.

⁹³ Ruru *op cit* 262.

⁹⁴ See *Tshiliza v Tshongweni* 1908 NHC 10.

CHAPTER 5

THE ROLE OF THE LEGISLATURE IN INSTITUTIONALISING THE CONSTITUTIONAL INJUNCTION TO AFFIRM AFRICAN LAW

5.1 Introduction

The task of chapter 6 is to demonstrate parliament's responsibility towards African law in view of the constitutional injunction to generate a version that is founded on indigenous values and infused with the objects of the Bill of Rights. Such a mandate is implied in the constitutional recognition of African law which is circumscribed by applicable legislation that must be responsive to the indigenous value system. The legislature has therefore the task of mainstreaming African culture in the process of harmonising it with international human rights as entrenched in the Constitution.

As the recognition provision section 211 of the Constitution confronts parliament with an urgency in resurrecting African law in view of the fact that it is a system which regulates the lives of millions of the newly re-enfranchised black majority. The latter's demand from the legislature is nothing less than a re-indigenisation of their legal system on the model of their social practices and national aspirations.¹ This legislative obligation is placed on parliament in terms of its constitutional position. Section 43 of the Constitution vests the authority to make law in the national sphere of government in parliament.² The centrality of the institution of parliament makes it the focal point in the transformation of African law because its jurisdiction transcends the entire diversity of South African cultures. This chapter examines post-apartheid legislation transforming the African law of marriage, succession and traditional leadership against parliament's imperative to produce a version that blends indigenous values with the objects of the Bill of Rights.

¹ In *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC). (hereafter *Richtersveld Community*) par 51, the Constitutional Court emphasised the need for an indigenous approach towards the application of African law.

² Section 43 – Legislative authority of the Republic – reads:
In the Republic, the legislative authority –
of the national sphere of government is vested in Parliament, as set out in section 44;
of the provincial sphere of government is vested in the provincial legislature as set out in section 104;
Of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

5.2 The Recognition of Customary Marriages Act³

Parliament has indeed come up with a transformative legislative scheme transcending all the cultural and jurisprudential ills affecting African law. The aim of these reforms is to address the challenges of African law so as to facilitate the emergence of its envisioned renaissance. To this end the Recognition Act was adopted to restore full marriage status to customary marriages, equal to the civil marriages as regulated by the Marriage Act of 1961.⁴ The objective was to bring the history of non-recognition of African law and its consequent under-development to an end.

The background to the enactment of this legislation is that the institution of African marriage was historically used by the colonial/apartheid authorities as the site for discriminating unfairly between both races and sexes.⁵ This institution was denied the status of marriage, and was instead derogatorily referred to by the “lowly rubric of a customary union”.⁶ The significance of the Recognition of Customary Marriages Act is expressed by Moseneke DCJ in *Gumede* as follows:

It represents 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. Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary “unions”.⁷

To achieve its objectives the Recognition of Customary Marriages Act was enacted to:

- make provision for the recognition of customary marriages;
- specify the requirements for a valid customary marriage;
- regulate the registration of customary marriages;
- provide for equal status to spouses in customary marriages;
- regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; and regulate the dissolution of customary marriages.⁸

³ See Act 120 of 1998 (hereafter the Recognition Act).

⁴ See Act 25 of 1961 (hereafter the Marriage Act).

⁵ See *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC).

⁶ *Idem* para 16.

⁷ *Ibid.*

⁸ See long title to the Recognition Act.

As its title suggests, section 2 of the Recognition Act recognises customary marriages as follows:

- a marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.
- a customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.
- if a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.
- if a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.

Section 3(1) of the Recognition Act prescribes the requirements for valid customary marriages entered into after the date of its commencement on 15 November 2000. Both spouses must be above the age of eighteen years,⁹ and must consent to be married to each other under customary law.¹⁰ Interestingly, if the applicable customary law so requires, the first wife's consent to the second customary marriage of her husband to the other woman must be obtained, before the second wife's marriage can be valid.¹¹ In addition to these requirements, the marriage must be negotiated and entered into or celebrated in accordance with customary law.¹²

The Act then sets out to prohibit spouses to a customary marriage from contracting civil marriages,¹³ provide for parental consent to a customary marriage¹⁴ and official

⁹ See section 3(1)(a)(i) of the Recognition Act.

¹⁰ *Idem* section 3(1)(a)(ii).

¹¹ *Mayelane v Ngwenyama and Another* 2013 (8) BC LR 918 (CC).

¹² *Idem* section 3(1)(b). See also the *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAG PHC 129 (9 April 2008) (unreported) *supra* pars 8-16 for a discussion of the requirement of "must be negotiated and entered into or celebrated in accordance with customary law".

¹³ See section 3(2) of the Recognition Act. Section 2 of the Recognition of Customary Marriages Amendment Bill 2009 proposes to amend this subsection by extending this protection to civil partnerships entered into under the Civil Union Act 17 of 2006. In other words, whilst the Marriage Act which regulates civil marriages and the Civil Union Act do not even refer to the Recognition Act or customary law, the latter Act expressly prohibits those married under customary law from also

permission¹⁵ to a minor's marriage. It also provides for the prohibition of a marriage on account of relationship by blood or affinity.¹⁶

Section 4(1) of the Recognition Act provides that both spouses have a duty to ensure that their post-recognition marriages are registered within three months after the marriage has taken place. All pre-recognition marriages had, however, to be registered within a period of twelve months after the commencement of the Act.

However, "failure to register a customary marriage does not affect the validity of that marriage".¹⁷ Section 5 regulates the procedure for determining the age of the minor before the registering officer may decide whether or not to register a minor's marriage. Of great significance, section 6 of the Recognition Act provides for the equal status of the wife and the husband married under customary law. This includes full status and "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".

The original section 7(2) of the Recognition Act introduced community of property in respect of post-recognition marriages only. In terms of the original section 7(1) pre-recognition marriages remained subject to the discriminatory provisions of the "official" customary law.¹⁸ This translated into a reinforcement of patriarchy that "has always been a feature of indigenous society, [and] which fostered a particularly crude and gendered form of inequality, [which] ... left women and children singularly marginalised and vulnerable".¹⁹ The Constitutional Court has, however, found that this differentiation

marrying under the two former statutes.

¹⁴ According to section 3(a) of the Recognition Act both parents of a prospective spouse who is a minor must consent to the impending marriage. If any such spouse does not have parents, his or her guardian must consent.

¹⁵ Section 3(4) provides that permission may be given by the minister or an official authorised by him to a minor to marry if they consider such marriage desirable.

¹⁶ Section 3(6) of the Recognition Act reads: "The prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law".

¹⁷ See section 4(9) of the Recognition Act.

¹⁸ Section 7 of the Recognition Act reads:

(1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law;

(2) 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 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.

¹⁹ See Gumede *supra* par 17.

between the two sets of marriages is unfair and declared the impugned section unconstitutional.²⁰ Moseneke DCJ held in this regard:

I hold that the following provisions [of the Recognition Act] are inconsistent with the Constitution and invalid because each of them unfairly discriminates against the applicant on the ground of gender:

section 7(1) of the Recognition Act insofar as it provides that the proprietary consequences of a marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.

section 7(2) of the Recognition Act, insofar as it distinguishes between a customary marriage entered into after and before the commencement of the Recognition Act, by virtue of the inclusion of the words “entered into after the commencement of this Act.”²¹

The court concluded that all customary marriages entered into without the exclusion of the community of property in an ante-nuptial contract, are marriages in community of property. Pursuant to this decision parliament proposed to align the statute book with this judgment through a legislative repeal of the distinction between pre- and post-recognition customary marriages with regard to community of property. The aim was to bring community of property to all monogamous customary marriages in South Africa. Section 6 of the proposed Recognition of Customary Marriages Amendment Bill of 2009 reads:²²

Section 7 of the principal Act is hereby amended by:

- (1) (a) the deletion of subsection (1); and
- (b) the substitution for subsection (2) of the following subsection:
- (2) a customary marriage in which a spouse is not a partner in any existing customary marriage, is 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 ante-nuptial contract which regulates the matrimonial property system of their marriage.

The Recognition Act and its proposed amendment are a manifestation that the

²⁰ *Idem* par 34 where Moseneke DCJ writes: “And within the class of women married under customary law, the legislation differentiates between a woman who is a party to an ‘old’ or pre-recognition customary marriage as against a woman who is a party to a ‘new’ or post-recognition customary marriage. This differentiation is unfairly discriminatory.”

²¹ See Gumede *supra* par 49.

²²

legislature has failed to find or develop a method for fashioning an indigenous way of regulating African family law. This is reflected in the use of the common law and its enforcement legislation as the sources for borrowing materials for reforming African law. The Recognition Act borrowed all the provisions relating to age, consent, community of property, registration and judicial dissolution of customary marriages from the Marriage Act²³ that is designed to regulate common law marriages.

Sections 3(2), 3(3)(b), 3(5), 10(1), and 10(4) of the Recognition Act make express reference to the common law-based Marriage Act; while sections 8(3), (4), (5) and 9 import the common-law based provisions of the Matrimonial Property Act²⁴ as a way of ameliorating the condition of the African law of marriage. This method has excluded the African value system as the metaphysical lens through which to view African family law, and disqualified the African frame of reference as the means by which to define the indigenous concept of marriage.

The reason for the continued marginalisation of the African value system is that the provisions which parliament borrowed from common law expose the legislature's frame of reference in defining the African concept of marriage to reflect Eurocentric views of the concept of marriage. There is therefore no doubt that parliament chose to seek its inspiration more from the common law marriage regime that aims at maximising individual autonomy than from the cohesive spirit of the communal indigenous culture that is based on a shared existence.

This is also evident from the way the Recognition Act prescribes the requirements for a valid customary marriage in section 3(1)(a) and (b). Section 3(1) of the Recognition Act reads:

for a customary marriage entered into after the commencement of this Act to be valid

–

- (a) the prospective spouses –
 - (i) must both be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law; and

²³ See Act 25 of 1961.

²⁴ See Act 84 of 1988.

- (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

In this section the requirement of *lobolo* by which the customary marriage is defined in actual social practice, and which distinguishes it from other forms of marriage is not directly prescribed. Yet Jansen stresses the continued popularity of *lobolo* which for many Africans remains an essential constituent of a valid marriage.²⁵ In his view, this popularity persists despite changes in the life-styles of African communities.²⁶

Indeed Africans will not regard the relationship as a marriage if no commitments have been reached for the delivery of *lobolo*, notwithstanding full compliance with the prescribed requirements of a valid marriage. Jansen concludes that “*lobolo* therefore embodies and expresses the views and convictions of the African community in terms of the distinction between a real and binding marriage and an informal relationship”.²⁷

Expanding on the meaning and purpose of the *lobolo* custom Soga offers this explanation:

The practice of *lobolo* is an old tradition that was inherited from the ancestors; it requires the husband to deliver cattle before the wife can belong to him in terms of law and custom. Indeed the source of dignity for an [African] wife was the *lobolo* covenant. This was what gave the wife dignity and grounds for claiming inheritance at her marriage home. *Lobolo* also entitled her to claim clothing from her maiden people. Without the *lobolo* covenant the woman had no respectability and no family member took her seriously. *Lobolo* also enhanced the status of the wife’s progeny among their maternal relatives because of the proceeds derived from their mother’s *lobolo* covenant. On her husband’s demise she could return to her maiden relatives as their child, where hospitable treatment and care would await her.²⁸

Yet the Recognition Act indirectly acknowledges the *lobolo* institution by prescribing that “the marriage must be negotiated and entered into or celebrated in accordance with customary law”.²⁹ This provision does not reveal this plethora of material and spiritual

²⁵ See Jansen RM “Family law” in Bekker JC , Rautenbach C and Goolam NMI (eds) *Introduction to legal pluralism in southern Africa* (2006) 29 at 41.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Soga *op cit* 71-78.

²⁹ Section 3(1)(b) Act 120 of 1998.

benefits that the *lobolo* custom entails. At most this section saves *lobolo* from complete abolition by leaving room for accommodating its negotiation and celebration by those who wish to practice it.

However, the prominence of *lobolo* in African marriage makes this term conspicuous by its absence in section 3 which is devoted to the requirements for the validity of the African marriage. As Church argues, “[f]amily groups are also intimately involved in the marriage of their members and the giving of marriage goods (*lobola/ikhazilbogadi*) by the group of the prospective husband to that of the bride is an essential incident of marriage”.³⁰

In addition, section 8 of the Recognition Act regulates the dissolution of customary marriages, and imports the concept of “irretrievably breakdown” as the requirement. This has clearly been borrowed from the civil marriage. This concept is not an appropriate ground for determining the dissolution of an African marriage as the institution is negotiated by family groups, not individuals. Copying a remedy from such a disparate civilisation as the common law that conceptualises the institution of marriage differently is to distort the institution.

As if this were not enough of a distortion, the Recognition of Customary Marriages Amendment Bill takes the Westernisation of the African marriage still further by adding the “death of one of the spouses” as one of the means of dissolving a customary marriage.³¹ This is contrary to the rule of African law that death does not dissolve the marriage.³² The concept of marriage as an institution which brings two families together is a depiction of the institution of marriage as permanent and communal. To suggest that the death of a spouse dissolves it is to individualise the African marriage and to reduce it to a transaction between the husband and the wife only.

Individualism is an un-African view of life that operates on the basis of social exclusion and negates all the features of *ubuntu* and social cohesion that manifest in group

³⁰ See Church *op cit* 100.

³¹ See the Recognition of Customary Marriages Amendment Bill.

³² See Bennett TW *Customary law in South Africa* (2004) at 345.

solidarity, communal living and shared belonging.³³ The ravages of individualism also negate the philosophy that a person is a person because of others by contrasting it with its converse that sees communal cohesion as a threat to individual freedom. Whilst it must be conceded that some elements of individualism are immanent in today's socio-economic environment, the altruistic reality in the life-world of many adherents of African law deserve to be taken into account by legal interpreters in their endeavour to capture the version envisioned by the Constitution.

The individualisation of the marriage relationship in the Recognition Act and its Amendment Bill is inconsistent with the communal character of the indigenous culture where the ethos of a common and shared belonging incorporates the wife into the husband's agnatic family from the time of the marriage. The object of the negotiated *lobolo* covenant is to cushion such tragic pain as the death of the husband by absorbing it into the family collective.

This *lobolo* covenant gave the wife a secure and permanent family membership among her marital people. Therefore, the Amendment Bill, by allowing for the dissolution of the African marriage on the basis of the death of a spouse, amounts to yet another distortion of African law based on a failure to grasp the depth of the socio-religious notions of marriage and family relations within African cosmology.

There is no doubt that the impact of dissolving the marriage simply because of the death of the husband will exacerbate the position of millions of widows in traditional communities whose social security is predicated on the permanence of their membership of the marital agnatic family. To say a husband's death dissolves her marriage is to deny the security of the widow's security system, leaving her desperate and destitute. Only an extra-cultural conception of customary marriage, can fail to grasp the connotation of the binding commitments involved in the *lobolo* institution.

It is only when one does not understand the role of *lobolo* in marriage that one could regard the distortion that the death of one or even both of the spouses has the effect

³³ See Ade Ajayi JF "Social justice in traditional African societies" in Falola T (ed) *Tradition and change in Africa* (2002) 3 at 4.

of dissolving the marriage, as sensible.³⁴ The durability of the African marriage derives from the fact that every marriage establishes a house, whose permanence endures beyond the lives of the members of this family unit.³⁵ The procreation of children prolongs the existence of a house and ensures its continuing identity.³⁶ In fulfilling its function as an important building block of the family and the community the marriage must survive beyond the short lives of the spouses, and preserve its identity through their children.

The customary marriage has been subordinated to the civil marriage. Section 10 of the Recognition Act as amended by section 9 of the Recognition of Customary Marriages Amendment Bill facilitates the conversion of a customary marriage into a civil union or a civil marriage. Section 9 of this Bill reads:

- (1) a man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Civil Union Act or Marriage Act if neither of them is a spouse in a subsisting customary marriage with any other person
- ...
- (4) despite subsection (1), no spouse of a marriage entered into under the Civil Union Act or Marriage Act, is, during the subsistence of such marriage, competent to enter into any other marriage.

However, the Act does not provide for the conversion of these forms of marriage into customary marriages. This means that the latter two forms of marriage are regarded as superior to the customary marriage. Moreover section 9 of the Amendment Bill is in fact defective. How can “a man and a woman” between whom “a customary marriage subsists”, be “competent to contract a marriage with each other under the Civil Union Act”? Surely a man and a woman who are in a customary marriage which is a heterosexual union cannot convert their marriage to a civil union which is by definition a homosexual union.

By sanctioning customary marriage’s inferiority, the Amendment Bill has lost the opportunity to provide South Africa with the African family law that the Constitution

³⁴ Bennett *Customary law op cit* 345 writes: “Hence, a man’s death does not necessarily terminate his marriage”.

³⁵ See Bekker JC *Seymour’s customary law* (1989)127.

³⁶ See Abiodun BO “Towards an African concept of law” (2007) *African Journal of Legal Theory* 71 at 74.

envisions for a post-apartheid democracy. One has to wonder whether this legislative subjection of the customary marriage to other forms of family partnerships can stand constitutional scrutiny.

This is, however, not to say that the legislature should not borrow from the tradition when indigenous law has nothing to offer or when required by international law. For example, section 9 of the Recognition Act as amended by section 8 of its Amendment Bill extends to customary law the provisions of the Children's Act³⁷ which fix the age of majority at eighteen years. Although it is a tradition to fix the age of majority, the incorporation of this provision into African law has become inevitable in view of the state's national and international obligations to protect children. It is also compatible with the adaptable nature of African law as it seeks to prevent social ills that threaten the security of children today.

5.3 Traditional Leadership and Governance Framework Act³⁸

In the public law sphere, the legislature has enacted the Traditional Leadership and Governance Framework Act to define the nature of traditional leadership in the post-1994 era, with a stated aim of reforming the historically patriarchal institution. The aim was to accommodate the structural and gender imperatives of constitutional democracy in African law. The aims and objectives of the Traditional Leadership Act in so far as they impact on the reform of customary law and traditional leadership are stated as:

to provide for the recognition of traditional communities; to provide for the establishment and recognition of traditional councils; to provide a statutory framework for leadership positions within the institution of traditional leadership, the recognition of traditional leaders and the removal from office of traditional leaders; to provide for houses of traditional leaders; to provide for the functions and roles of traditional leaders; to provide for dispute resolution and the establishment of the Commission on Traditional Leadership Disputes and Claims; to provide for a code of conduct ...³⁹

As the long title indicates, the Traditional Leadership and Governance Framework Act seeks to provide a national framework for the recognition and governance of the

³⁷ See Act 38 of 2005.

³⁸ See Act 41 of 2003 (hereafter Traditional Leadership Act).

³⁹ *Idem* the long title.

institution of traditional leadership in South Africa's constitutional democracy. To this end, chapter 2 of the Traditional Leadership Act provides certain criteria for the recognition of traditional communities,⁴⁰ as well as for the withdrawal of such recognition.⁴¹

The Act establishes a framework for the recognition of traditional councils⁴² and formulates the functions of such councils.⁴³ Chapter 3 provides for the recognition and appointment of traditional leaders⁴⁴ and their removal from office.⁴⁵ In other words, the legislature has clearly expressed its concern for the so-called democratisation of the traditional leadership institution in South Africa.

Chapter 4 establishes Houses of Traditional Leaders and prescribes their functions.⁴⁶ Chapter 5 is devoted to functions and roles of traditional leaders as established by provincial and national governments.⁴⁷ It also deals with the interaction between traditional leadership institutions and organs of state.

Chapter 6 establishes the Commission on Traditional Leadership Disputes and Claims,⁴⁸ the appointment of its members,⁴⁹ its powers and dispute resolution functions. It is significant that these reforms posit traditional leadership as an agent of the dominant Western liberal democracy and make it a partner in the latter's local government institutions whilst African culture is totally overlooked.

The enactment of the Traditional Leadership Act was clearly motivated by the

⁴⁰ *Idem* section 2.

⁴¹ *Idem* section 7.

⁴² *Idem* section 3.

⁴³ *Idem* section 4.

⁴⁴ *Idem* section 8 lists the recognised positions of traditional leaders as the kingship, senior traditional leadership and headmanship/headwomanship. Section 9 provides for the appointment of kings and queens.

⁴⁵ *Idem* section 10 deals with the procedure for the removal of kings and queens from office, whilst section 12 outlines the process for the removal of senior traditional leaders and headmen/headwomen.

⁴⁶ *Idem* section 16(a) establishes a national House of Traditional Leaders and section 16(b) establishes local houses.

⁴⁷ *Idem* sections 19 and 20.

⁴⁸ *Idem* section 22.

⁴⁹ *Idem* section 23.

constitutional recognition of both customary law and traditional leadership.⁵⁰ The Act seeks to transform the institution of traditional leadership. Indeed, the role of the royal family and its institutions that were supplanted by the BAA under apartheid has been restored. Consequently it is now the royal family that identifies the new traditional leader to be appointed, not the government as was the case under the old order. To this end section 9(1) of the Traditional Leadership Act reads:

Whenever the position of a king or a queen is to be filled, the following process must be followed:

- (a) the royal family must, within a reasonable time after the need arises for the position of a king or a queen to be filled, and with regard to the applicable customary law –
 - (i) identify a person who qualifies in terms of customary law to assume the position of a king or a queen, as the case may be, after taking into account whether any of the grounds referred to in section 10(1)(a), (b) and (d) apply to that person.

In this way the possibility of illegitimate traditional leaders being appointed to the throne has been greatly reduced.

Unfortunately, nothing indigenous in the nature of institution of traditional leadership has been recognised. The provisions of the Act betray that the law-maker's focus was not on ensuring traditional leadership was aligned with indigenous culture and its value system in the light of its new status as a recognised institution under the Constitution. Rather, the Traditional Leadership Act focuses on transforming the traditional leadership institution to fit into the dominant Western-style governmental framework in South Africa. The following preamble to the Act bears testimony to this:

WHEREAS the state, in accordance with the Constitution, seeks –

To set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance;

To transform the institution in line with constitutional imperatives;

AND WHEREAS the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that –

democratic governance and values of an open and democratic society may be

⁵⁰ See section 211 of the Constitution.

promoted; and gender equality within the institution of traditional leadership may progressively be advanced ...

A glance at the Act reveals a defective conceptualisation of the idea of constitutional transformation on the part of the legislature as its notion of democratisation seems to coincide with Westernisation. This is despite the reassurances given elsewhere in the preamble that the Act seeks “to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and its practices”. The Traditional Leadership Act in fact transforms the traditional leadership institution into a Western liberal democratic institution without infusing the African communal values of a shared sovereignty into its organisation.⁵¹

The Traditional Courts Bill⁵² is not dealt with in depth in this chapter as it has been serving before parliament since 2008 and is still being opposed by a long list of civil society organisations opposed to traditional leadership and traditional institutions. The *Pretoria News* has captured the controversy surrounding this Bill by listing its opponents as follows:

- the Alliance for Rural Democracy,
- the University of Cape Town’s Law, Race and Gender Research Unit;
- the Rural Women’s Movement;
- the Rural People’s Movement;
- Sonke Gender Justice;
- the Women’s Legal Centre;
- the University of the Western Cape’s Community Law Centre;
- Section 27;
- the Treatment Action Campaign; and
- other bodies said to be working with rural residents.⁵³

However, the Bill correlates with the other statutes relating to the so-called improvement

⁵¹ See Mahao NL “O se re ho morwa ‘morwa towel’ – African jurisprudence exhumed” (2010) XLIII/3 *CILSA* 317 at 328.

⁵² See *Government Gazette* 30902 of 27 March 2008.

⁵³ See *Pretoria News* Thursday 7 April 2012 at 2.

of the institution of traditional leadership.⁵⁴ It “aspires to provide a framework for the effective operation of the traditional justice system”⁵⁵ and the effective resolution of disputes by promoting fairness and efficiency. The Bill seeks to involve traditional leaders in affording access to speedy restorative justice to millions of the rural poor in a flexible, familiar, conciliatory, participatory and inexpensive manner.

The strength of the Bill lies in its quest to integrate elements of the traditional justice system with those of the dominant Western justice system.⁵⁶ More importantly, the Bill addresses what is constantly perceived as the worst weakness of the traditional justice system, namely, affirming gender equality and assuring the dignity of women as required by the Traditional Leadership and Governance Framework Act.⁵⁷

This notwithstanding, the Traditional Courts Bill suffers from chronic defects in that it persists in subjecting traditional justice to the appeal and review processes of the Magistrates Courts which are premised on Western jurisprudence.⁵⁸ It also fails to introduce an indigenous appellate hierarchy to afford a culturally-focused application of African jurisprudence.⁵⁹ The Bill is modelled on its apartheid antecedents which targeted only the “homelands” as its areas of jurisdiction instead of addressing customary law matters throughout urban and rural South Africa.⁶⁰

5.4 Promotion of Equality and Prevention of Unfair Discrimination Act⁶¹

In an effort to remedy the unequal treatment of the diverse components of South African law, parliament adopted the Equality Act to address this historic legacy as follows:

- to prevent and prohibit unfair discrimination and harassment;
- to promote equality and eliminate unfair discrimination;

⁵⁴ See Ntlama N and Ndima DD “The significance of South Africa’s Traditional Courts Bill to the challenge of promoting African traditional justice system (2009) 4/1 *International Journal of African Renaissance Studies* 6 at 17.

⁵⁵ *Ibid.*

⁵⁶ See section 10(d) of the Bill.

⁵⁷ See Ntlama and Ndima *op cit* 16 at 18.

⁵⁸ *Idem* 20.

⁵⁹ *Ibid.*

⁶⁰ *Idem* 21.

⁶¹ See Act 4 of 2000 (hereafter Equality Act).

- to prevent and prohibit hate speech; and
- to provide for matters connected therewith.

This layout presents the Equality Act as a timely instrument to thrust the notion of equality to the centre of post-apartheid jurisprudence and to abolish unfair discrimination in all fronts through the:

consolidation of democracy in our country [which] requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people.⁶²

By targeting the consolidation of democracy and the eradication of social and economic inequalities, the Act presents itself as a timely intervention aimed at removing the effects of pain and suffering visited on the great majority of the people of South Africa by colonialism and apartheid.

The preamble to the Act captures its role as the antidote for counteracting⁶³ the pain of inequality caused by the trilogy of curses that befell the people of South Africa in the past, namely, colonialism, apartheid and patriarchy.

Indeed the Act is a handy instrument for the implementation of the Constitution's section 9 (equality) provisions. It therefore occupies centre stage in the statutory business of affirming the measures for eradicating the lingering social and socio-economic maladies bedevilling the achievement of democracy in South Africa and brings hope to the nation's aspiration to overcome the historical inequalities in the treatment of humans and their cultures.

In Ntlama's observation "the importance of the Promotion of Equality and Prevention of Unfair Discrimination Act lies in its express aim to prevent unfair discrimination and promote equality through the use of special legal and other measures".⁶⁴ The adoption

⁶² See the preamble to the Equality Act.

⁶³ See the long title to the Equality Act.

⁶⁴ See Ntlama N "The Equality Act: Enhancing the capacity of the law to generate social change for the promotion of gender equality" (2007) 21/1 *Speculum Juris* 113-114.

of the Act aims to breathe life into section 9 of the Constitution which provides as follows:

- 1 everyone is equal before the law and has the right to equal protection and benefit of the law; equality includes the full and equal enjoyment of all rights and freedoms.
- 2 to promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantage by unfair discrimination may be taken.
- 3 the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- 4 no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 3. National legislation must be enacted to prevent or prohibit unfair discrimination.
- 5 discrimination on one or more of the grounds listed in subsection 3 is unfair unless it is established that the discrimination is fair.

It is clear that the adoption of the Equality Act affirms section 9 of the Constitution which, as has been stated above, entrenches the right of equality of everyone before the law. Indeed the failure to find or develop an indigenous solution to customary law succession problems, and the consequent borrowing from common law, are clearly behind the adoption of the Equality Act. The Act's unequivocal rejection of colonisation, apartheid and patriarchy should be enough to warn the legislature and the judiciary of the Constitution's disapproval of unequal treatment of humans and cultures.

The Equality Act is, however, not perfect. Although it has been hailed as the landmark legislation in addressing the legacy of inequalities and discrimination, it is flawed in some respects. Like the other pieces of legislation that it seeks to guide, the Equality Act makes no effort to refer to any African notions of equality where emphasis is placed on equitable treatment in the sense that each person gets his or fair share of the bargain. This would contribute to the resolution of disputes relating to customary law *vis-à-vis* common law. As the Act aims at redressing the inequalities of the past it should have specifically addressed the historical marginalisation of African law under the repugnancy clause.

However, the Equality Act can be counted among the statutes whose impact is contributing to the on-going crusade to eliminate African law. Characteristically section 8 of the Equality Act assumes that African law as such, not merely the “official” version, discriminates unfairly against women and girl children; it prevents them from inheriting family property; it impairs their dignity and unfairly limits their access to land rights, finance and resources. Subject to section 6, section 8 provides that no person may unfairly discriminate against any other person on the ground of gender, including:

- 1 (a) ...
- 2 (b) ...
- 3 (c) the system of preventing women from inheriting family property;
- 4 (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and wellbeing of the girl child;
- 5 (e) any policy or conduct that unfairly limits access of women to land rights, finance and other resources...

No doubt the Equality Act was enacted as a reaction to the *Mthembu* cases, and a sequel to the embarrassing judicial endorsement of the “official” version of the primogeniture principle, that was interpreted to mean that the male heir was the owner of the family property left behind by the deceased.⁶⁵ This interpretation excluded all other family shareholders, including women and children from the benefit. Instead of venting its wrath at the “official” version which fails to state that family property is communally owned by family members, section 8 condemns customary law as a system. This creates the impression that the whole of African law, including its “living” version, oppresses the very people who generate it.

In indigenous law proprietary interests of both males and women are distributed according to the demands of social practice where such interests are placed under the trusteeship of the family head who manages the property on behalf of all the customary shareholders. The rules that his conduct are part of customary law because they are conditioned by the behaviour of its adherents. On the contrary, the “official” version of African law is based on legislative statutes as interpreted by the courts, not on the customary conditions of its adherents.

⁶⁵ 2000 (3) SA 867 (SCA).

This was the case with the *Sigcau* cases which were followed in the *Mthembu* cases where the version of African law that was accepted was not the customary practice of the community, but the product of state institutions. The latter have thus distorted the nature of African family property as capable of being individually inherited or owned by the heir, instead of presenting him/her as its manager, acting on behalf of the real owners, the family collective.

5.5 The Reform of Customary Law of Succession and Regulation of Related Matters Act⁶⁶

The post-apartheid parliament has enacted the Reform of Customary Law of Succession Act to introduce far reaching gender reforms to the African law of succession. This Act spells out its aims in its long title as:

- to modify the customary law of succession so as,
- to provide for the devolution of certain property in terms of the law of intestate succession;
- to clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law; and
- to amend certain laws in this regard; and
- to provide for matters connected therewith.

The legislature's stated purpose in enacting the Reform of Customary law of Succession Act was to transform the customary law of succession so as to ensure equal treatment to all the beneficiaries to deceased estates and to provide adequate protection for widows and children born out of wedlock. These reforms were necessitated by the fact that the practice of customary law in the past had resulted in an irreconcilable conflict between the "official" version of the primogeniture rule and the notions of equality and human dignity in the Bill of Rights. This was aggravated by the controversy provoked by the *Mthembu* cases⁶⁷ where the primogeniture rule was interpreted to exclude the widow and her daughter, as women, from inheriting from her husband and her father respectively.

⁶⁶ See Act 11 of 2009 (hereafter the Reform of Customary Law of Succession Act).

⁶⁷ See *Mthembu v Letsela and Another* 1997 (2) SA 936 (T) (hereafter *Mthembu* 1); 1998 (2) SA 695 (T) (hereafter *Mthembu* 2); 200 (3) SA 867 (SC A) (hereafter *Mthembu* 3).

The “official” version of the primogeniture rule was endorsed in its pre-constitutional interpretation that preferred males to females for the purposes of inheritance. In the absence of a son, the father of the deceased inherited ahead of the widow and her daughter. The primogeniture rule was confirmed after the court deemed it to have sufficient redeeming features that saved African culture from constitutional invalidity because the male heir was obliged to maintain and sustain the women and children.

This judgment provoked a serious debate around the protection of women and girl children in the new dispensation. The perception that the *Mthembu* judgment ignored the gender equality clause of the interim Constitution prompted the legislature’s speedy reaction. Yet the fact that such interpretation also took no account of the principle of collective ownership in African law, which entitled women and children to their customary shares as communal beneficiaries, was not even explored.

As will be seen below, the transformation of customary law under the Constitution was further scrutinised in the combined case of *Bhe-Shibi* when the Constitutional Court moved swiftly to strike down the “official” rule of primogeniture as unconstitutional.⁶⁸ This was after the magistrates had followed the *Mthembu* cases which had preferred males to women for appointment as heirs to the women’s deceased father and brother respectively. The Constitutional Court’s judgment confirmed the judgments of the Cape High Court⁶⁹ and North Gauteng High Court⁷⁰ which had deviated from the *Mthembu* cases, and enforced the equality clause by reversing the magistrates’ determinations. This explains the appointment of the deceased’s daughters in the *Bhe* matter, and the deceased’s sister in the *Shibi* one. Notwithstanding the fact that African law was vehemently canvassed, the Constitutional Court saw fit to apply the common-law based Intestate Succession Act,⁷¹ and awarded child portions to the beneficiaries.⁷²

The Reform of Customary Law of Succession Act⁷³ is the legislative implementation of

⁶⁸ 2005 (1) BC LR 580 (CC).

⁶⁹ See *Bhe v The Magistrate Khayelitsha* 1998 (3) 2004 (1) BC LR 27 (C) (hereafter *Bhe*).

⁷⁰ *Shibi v Mantabeni and Others* Case 7292/01 (unreported).

⁷¹ See Act 81 of 1987.

⁷² See *Bhe v The Magistrate Khayelitsha*; *Shibi v Sithole*; *Human Rights Commission v President of Republic of South Africa* 2005 (1) BC LR 580 (CC) (hereafter *Bhe-Shibi*) par 136.

⁷³ See Act 11 of 2009.

this judgment. Although the *Bhe-Shibi* judgment emphasised the temporary nature of its application, the Act imports the Intestate Succession Act⁷⁴ wholesale and permanently into the African law of succession. Section 2(1) of this Act provides:

The estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act.

The preamble to the Reform of the Customary of Succession Act reads:

Since a widow in a customary marriage whose husband dies intestate does not enjoy adequate protection and benefit under the customary law of succession; and since certain children born out of a customary marriage do not enjoy adequate protection under customary law;

and since section 9 of the Constitution provides that everyone has the right to equal protection and benefit of the law;

and since social circumstances have so changed that the customary law of succession no longer provides adequately for the welfare of family members;

and since the Constitutional Court has declared that the principle of male primogeniture, as applied in customary law of succession, cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of rights ...

The characterisation of customary law as a system that does not provide adequate security to customary marriage widows, is based on the prejudices of the "official" version of customary law, which holds that family property benefits males only.⁷⁵ This is a distortion of the communal nature of African property law where both males and females participate as collective beneficiaries.⁷⁶ The legislature operates from the Western liberal paradigm that the individual needs protection from the rest of the family. By so doing, the legislature has made the "official" version the yardstick by which to measure the validity of African law.

⁷⁴ See Act 81 of 1987.

⁷⁵ See Bekker *Seymour's' customary law op cit* 273.

⁷⁶ See Ndima DD "The place of customary law in the general law of South Africa" (2002) 1/2 *Speculum Juris* 233 at 239.

Treating the widow separately from her group is inappropriate because the *lobolo* institution cements the permanence of marriage within the African ontological cosmos.⁷⁷ For social security purposes the families of the husband and wife remain bonded together to ensure the survival of the widow should the husband die. The permanence of the relationship is bolstered by the procreation of children which strengthens the existing bonds of affinity.

The preamble to the Reform of the Customary Law of Succession Act should have demonstrated an appreciation of this culture by enacting this provision as “since certain widows do not enjoy adequate protection”, rather than presenting the problem as a consequence of widowhood in African culture. Had the qualification here proposed been included, the position of the majority of the widows who are adequately protected by customary law would not be affected by the generalisation.

In its response to judicial distortions such as happened in *Mthembu*, parliament should have pointed out, in the Reform of Customary Law of Succession and Regulation of Related Matters Act, that ownership of family property was collective as the assets belonged to the corporate home. The position of the male trustee who was chosen by the primogeniture rule, should then have been explained as nothing more than an estate manager with a mandate to ensure social security for the present and future generations.⁷⁸

Parliament was therefore well placed to point out that collective ownership of family property was intended to benefit vulnerable members of the family, including girl children, so that those whose future marriages would not be successful, would be able to return to their maiden homes and survive through the *lobolo* system.⁷⁹ It was the duty of the legislature, therefore, to deconstruct the distorted rule that provided that males

⁷⁷ See Soga *op cit* 71 where he writes: “Ngesiko um fazi uzekelw a ukuzalela um zi wakhe ... ” (author’s translation – “According to tradition a wife was married to procreate children for her marriage household ...”). See also Bennett *Customary law op cit* 309 saying: “*Lobolo* is the critical factor, because it signifies the transfer of a woman’s childbearing capacity to her husband and his patriline”.

⁷⁸ See Dlamini CRM “The clash between customary law and universal human rights” (2002) 1/1 *Speculum Juris* 26 at 42. See also Ndima DD “The African law of the 21st century” (2003) XXXVI/1 *CILSA* 332, and Kenyatta *Facing Mount Kenya* (1938) at 22 and Lehnert W “The Role of the courts in the conflict between African customary law and Human Rights” (2005) 21 *SAJHR* 241 at 258.

⁷⁹ See Soga *op cit* 71-73.

owned property, and to explain that the senior male did not own the family property, but only managed it to ensure social security and perpetuity of resources. Once the rule's ontological position was clarified as serving merely to appoint an estate manager, the gender limitation would not be necessary as the appointment of women would be accommodated within the principle of primogeniture.

In the *Bhe-Shibi* case Ngcobo J's opinion proposes the abolition of the reference to maleness in the primogeniture rule so that the eldest daughter can also be appointed as the successor to her father's estate for the purposes of management.⁸⁰ In this way, the constitutional issue would be resolved by extending rather than abolishing, the principle of primogeniture. It would also not be necessary to substitute common law for African law in the manner proposed by Langa DCJ.⁸¹

Indeed parliament repealed the "official" version of the primogeniture rule, and pointed out that it was this principle, as applied in the customary law of succession, which could not be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. However, as a responsive institution it failed to replace this male rule, with a non-sexist "living" version, although Ngcobo J's judgment in the *Bhe-Shibi* case provides clear guidelines on how to achieve this solution within the system of African law.⁸²

However, parliament blurred the distinction between the "official" version of customary law which has been criticised by courts, and the "living" version, which has not been explored, by removing all reference to customary law. The Reform of the Law of Succession and Regulation of Related Matters Act which parliament adopted, imports the common-law oriented Intestate Succession Act instead.

For example, items 1, 2 and 4 of the preamble to the Reform of the Law of Succession and Regulation of Related Matters Act, create the impression that it is the customary law as such, not merely its distorted "official" version, which raises constitutional

⁸⁰ See *Bhe-Shibi supra* par 222.

⁸¹ *Idem* par 139.

⁸² According to the Constitutional Court, therefore, the "living" version was not targeted for repeal.

difficulties. Item 5 of the preamble clearly indicates that the problematic “official” version was declared unconstitutional by the Constitutional Court.

This set the stage for the affirmation of the “living” version of African law. But section 2 of the Reform of the Customary Law of Succession and Regulation of Related Matters Act, abolished all reference to African law, and failed to save the “living” version from oblivion. Section 2 assumes that the “living” version also died when the unconstitutional “official” version was struck down. Yet the court specifically held that it was the “official” framework in section 23 of the BAA that it was abolishing.⁸³

Just as the Constitutional Court handled the *Bhe-Shibi* case, so too section 2 of the Act declares that “[t]he estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person’s will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act ...”.

The question arising is why would South Africa’s transformative parliament, which is entrusted with the affirmation of African law, abolish the entire system simply because its colonially corrupted “official” version is unconstitutional? One would have thought that parliament’s task was to remove this distortion from African law, so as to rid the system of the discredited colonial version.

Section 2 of the Reform of Customary law of Succession and Regulation of Related Matters Act, implements the *Bhe-Shibi* judgment which, after abolishing the primogeniture rule, introduced the division of African estates into child portions, as laid down in the Intestate Succession Act. This provision disregards the unique nature of the devolution of rural family homes that are unsuited to division into child portions because of the communal life-style of rural village constituencies. It also fails to resolve the problems that have arisen in the courts regarding the identification of the “living” law. If anything, it complicates them because the Constitution recognises the “living” version on the basis of its social currency and its potential human rights compliance.

⁸³ See *Bhe-Shibi supra* par 136.

In this sense, the legislative reforms fail to capture the constitutional injunction for the recognition of African law. At the same time the adoption of the Intestate Succession Act into customary law is a non-progressive measure as it encourages the application of common law, contrary to the Constitution's sections 211(3), 31 and the section 39(2) cultural imperative, as well as the Constitutional Court's decision in the *Alexkor v Richtersveld Community*⁸⁴ case, which decries the use of common law as a lens for looking at customary law.

This is despite the fact that the Constitutional Court has criticised the BAA for

differentiating between those Africans who fell under that Act's ambit, and those that were treated as if they were Europeans.⁸⁵ However, it would appear that both the Constitutional Court and parliament are now doing just that – instead of looking for an indigenous solution to resolve African law matters in their own context, both institutions have simply imported the common law solution as codified in the Intestate Succession Act.

Unwittingly, parliament and the Constitutional Court have in fact treated Africans “as though they were Europeans” – an action which the court has criticised as an affront to the dignity of those people.⁸⁶ After repealing the “official” version,⁸⁶ parliament and the Constitutional Court should have affirmed the “living” version as the constitutionally recognised African law, by applying it preference to borrowing from a competing culture.

The following extract from the *Bhe-Shibi* judgment emphasises the place occupied by customary law in the South African legal system, and raises the expectation that solutions would be sought from within its normative culture. Langa DCJ held:

It is important to appreciate the distinction between the legal framework based on section 23 of the Act [the BAA] and the place occupied by customary law in our constitutional system. Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be

⁸⁴ 2003 (12) BC LR 1301 (CC).

⁸⁵ In *Bhe-Shibi* Langa DCJ held at par 67: “The racist provenance of the provision is illustrated in the reference in the regulations to the distinction drawn between estates that must devolve in terms of ‘Black law and custom’ and those that devolve as though the deceased ‘had been an European’”.

⁸⁶ *Ibid.*

accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.⁸⁷

No one could have expected that these powerful affirmations of the position of customary law would not be supported by a commensurate respect for the promised cultural diversity. In the same breath, the Deputy Chief Justice refused to accommodate African law by importing a common law solution. And if that was not enough, this denial was confirmed in the ensuing culturally unresponsive legislative reforms in the Reform of Customary Law of Succession and Regulation of Related Matters Act, where the imported common law rule was made a permanent feature of African law. One can only wonder whether the promised place of customary law in the post-1994 constitutional system is not perhaps a mere mirage.

The lack of commitment to the application of African culture, evokes the fear that the new legislative reforms could S like their apartheid predecessors – be destined to be condemned to the dusty shelves of the “official” records, In other words, the currently fully enfranchised customary law-makers recognised by the Constitution, will like their predecessors under apartheid, probably refrain from applying state law in social practice.

The final item in the preamble to the Reform of Customary Law of Succession Act, attests to its origins in *Bhe-Shibi*.⁸⁸ It reads:

AND SINCE the Constitutional Court has declared that the principle of male primogeniture, as applied in customary law of succession, cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of rights ...

Parliament’s admission of abdication⁸⁹ of its legislative powers is unfortunate as, although the notion of legislative adoption of judicial decisions is not unknown, legislatures do not as a rule genuflect openly to judicial injunctions when legislating.

⁸⁷ See *Bhe-Shibi supra* par 41.

⁸⁸ Paragraph 95 of the *Bhe-Shibi* judgment reads: “The primogeniture rule as applied to customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centre-piece of the customary law system of succession, the rule violates the equality rights of women and is an affront to their dignity.”

⁸⁹ See M ailula D “Abdication of judicial responsibility, cultural self-determination and the development of customary law: Lessons from *Shilubana*” (2008) 23 *SAPR/PL* 215.

This unnecessary admission of abdication of constitutional responsibility reveals that, whilst the Constitutional Court identified parliament as the institution that was more qualified to effect the reforms, the latter bowed uncritically to the court's advice.⁹⁰

The Constitutional Court had conceded that its solution was an interim measure, and that it was for parliament to work out a permanent resolution of the matter. Langa DCJ held:

I accordingly have serious doubts that leaving the vexed position of customary law of succession to the courts to develop piecemeal would be sufficient to guarantee the constitutional protection of the rights of women and children in the evolution of intestate estates ... I consider, nevertheless, that the legislature is in the best position to deal with the situation and to safeguard the rights that have been violated by the impugned provisions. It is the appropriate forum to make the adjustments needed to rectify the defects identified in the customary law of succession ... Any order by this Court should be regarded by the legislature as an interim measure. It would be undesirable if the order were to be regarded as a permanent fixture of the customary law of succession.⁹¹

Surprisingly parliament embraced the interim measure and made it permanent. In so doing, it relied on the fact that the court had declared the male primogeniture rule unconstitutional and confirmed this. Both the Constitutional Court and parliament should have realised that the uncritical adoption of the common law method of succession must necessarily distort the African law tradition. Distortion is bound to occur when constitutional institutions swop solutions which reflect disparate civilisations.⁹²

The common law solution stems from the Euro-Western tradition which favours the liquidation of estate assets to facilitate the allocation of individual portions of the estate to the existing heirs. Customary law, in contrast, demands the consolidation of the family estate under a single asset manager for the benefit of both present and future

⁹⁰ This is evident from the wholesale adoption of the *Bhe* order in section 2 of the Reform of Customary Law of Succession Act. Like the court order, this section adopts the Intestate Act as part of the customary law of succession, and similarly, it places customary law spouses in the position of children for the purposes of receiving a child's share from the proceeds of their spouses' estates.

⁹¹ See *Bhe-Shibi supra* pars 113-116.

⁹² See Okafor F "From praxis to theory: A discourse on the philosophy of African Law" (2006) 37 *Cambrian LR* 37.

generations of collective beneficiaries.⁹³ This is in accordance with the values of collective solidarity which recognise communal interest as the basis of all group-based socio-economic transactions and politico-legal arrangements in African law.

The Western concept of a child-portion that is being introduced to African estates has the tendency to individualise property interests. For this reason it will not find favour with the majority of rural Africans for whom family property is group-based and inalienable. This legislative approach undermines the constitutional protection of South Africa's diverse cultures as required by section 31 and continues to disadvantage rather than promote the African value system. In this regard the Constitutional Court made the following observation in *Prinsloo v Van den Linde*:⁹⁴

Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the arrival of the new constitutional order. It is the majority, and not the minority, which has suffered from this legal separateness and disadvantage.⁹⁵

5.6 Chapter conclusion

The above analysis of legislative enactments reveals that parliament has adopted a faint-hearted approach in its implementation of the new dispensation regarding the affirmation of African law and culture. For example, parliament is an institution that had the opportunity to access the real meaning of indigenous law through research before enacting post-apartheid statutes. It is in the best position to ensure that the legislation of the new order is firmly reconnected and re-grounded to its indigenous value system. Yet all the African law statutes discussed in this chapter are a monument to the demise of African culture in that they are not rooted in indigenous African values, but draw their inspiration from the Western frame of reference.

The post-1994 statutory reforms are reminiscent of their apartheid counterparts whose application produced the distorted "official" African law which bears no relation to the

⁹³ See Ndima "The place of customary law" *op cit* 238.

⁹⁴ 1997 (6) BCLR 759 par 20.

⁹⁵ *Ibid.*

indigenous value system. Consequently the defects that afflicted the application of family law, the law of succession, and the law regulating traditional leadership in the past continue to portray these institutions differently from how they are understood and lived in social practice.

In enacting the Equality Act and the Reform of Customary law of Succession Act, parliament was acting under pressure to align African law with human rights by removing the stigma of sexism that the courts were perceived to have endorsed in cases such as *Mthembu*. In the process, parliament failed to respond directly to the offensive “official” version applied in those cases. Instead, it uncritically rendered permanent what the Constitutional Court had offered as a temporary solution issued in the *Bhe-Shibi* case when it adopted the common-law based Intestate Succession Act as the substitute for the African law of succession. This is not to deny that the legislature took responsive steps in enacting transformative laws in the areas of customary marriage, traditional leadership and the instrument for promoting equality, all of which were necessary to mark the advent of the democratic dispensation. However, the legislature lost the plot by relapsing to the old culture of underpinning its conceptual framework by the Western value system.

CHAPTER 6

THE ROLE OF THE COURTS IN INSTITUTIONALISING THE CONSTITUTIONAL INJUNCTION TO AFFIRM AFRICAN LAW

6.1 Introduction

Chapter 6 is a comprehensive analysis of judicial efforts to institutionalise the Constitution's injunction to affirm African law. To this end the African law principles under the spotlight are those which have presented themselves for adoption at the highest echelons of the judiciary in the post-apartheid era. A selected number of cases which presented the courts with the opportunity to translate the constitutional injunction to fashion the envisioned version of African law¹ in line with both indigenous values as espoused in current social practice of the system's adherents² and the Bill of Rights are examined.³ In doing so the chapter analyses the extent to which the court's efforts to affirm African values are reflected in their application of indigenous principles which the Constitution envisions for the post-apartheid African jurisprudence.

The extent to which the courts execute their constitutional mandate to re-indigenise African culture⁴ in their enforcement of its principles is a measure of their compliance with the injunction to apply African law in matters regulated by it.⁵ To achieve this constitutional objective the court must ascertain the version of the relevant African law rule and give it the full force of the law in its own context.

6.2 The principle that African family property belongs to the corporate home and that members are shareholders under the leadership of the head

6.2(i) *Ownership of family assets in African law*

This section examines the principle that in African law property ownership is communal in the sense that the assets of the family are collectively owned by all the members of

¹ See section 211(3) of the Constitution.

² See sections 30 and 31 of the Constitution.

³ See section 39(2) of the Constitution.

⁴ See sections 30 and 31 of the Constitution.

⁵ See section 211(3) of the Constitution.

the family as customary shareholders. In chapter 2 above, this fact was alluded to with reference to the communal nature of the concept of ownership as family members, including the head, refer to their cattle as *iinkomo zakuthi*,⁶ which disavows any exclusive individual claims to family property.

The family head has the responsibility to administer the assets of the family on behalf of, and together with, the other members. Unfortunately colonial and apartheid courts interpreted the position of the family head as someone who enjoys personal ownership of the family estate.⁷ Consequently other family members, especially women and children, were severely impoverished by this distorted interpretation of family property relations.

The restoration of the status of African law under the democratic Constitution, provided the various judges who considered the primogeniture rule in the case of *Mthembu v Letsela*,⁸ with the opportunity to pronounce authoritatively on the nature and meaning of this rule. In this case the son of the Letsela family died leaving a wife, daughters, parents and siblings in a house that he had acquired through his personal efforts. The importance of the case lies in the fact that it is the first major post-apartheid judgment to have the opportunity freely to restore the indigenous import of the relationship between the successor and other family members without being shackled by apartheid legalism.

The death of the deceased elicited intractable tensions between his father and his widow (father-in-law and daughter-in-law, respectively). The two locked horns in a battle for the ownership of the family house and other movable assets acquired by the deceased through his own efforts.⁹ The father-in-law who framed his claim in terms of the “official” version of African law claimed that the principle of primogeniture entitled him to the estate as he was the most senior male relative of the deceased. He denied

⁶ See Ndima DD “The place of customary law in the general law of South Africa” (2002) 1/2 *Speculum Juris* 233 at 335.

⁷ See *Sigcau v Sigcau* 1944 AD 67 at 79.

⁸ 1997 (2) SA 936 (T) (hereafter *Mthembu* 1); 1998 (2) SA 675 (T) (hereafter *Mthembu* 2); 2000 (3) SA 867 (SC A) (hereafter *Mthembu* 3).

⁹ See Rautenbach C “South African common and customary law of intestate succession: A question of harmonisation, integration or abolition” (2008) 12/1 *EJCL* 1 at 8.

that a valid customary marriage existed between his deceased son and the widow. On this basis he issued an eviction order against the widow and her daughters.

As a black woman, married under the so-called customary union, the widow faced serious legal disabilities imposed on her by the BAA in proving her claim to the estate of her deceased husband and in resisting the eviction order. The widow's difficulties started when the magistrate in Boksburg determined, in the best tradition of section 23(10) of the BAA read with Regulation 2(e) of the Regulations for the Administration and Distribution of Black Estates framed thereunder, that the estate of the deceased, an African, fell to be administered in accordance with the "official" version of African law as applied in the courts.

Officially interpreted, this provision meant that intestate African estates devolved in terms of the primogeniture rule, which preferred senior males for heirship to family estates, to the exclusion of women, junior men and children. In terms of this version, widows married according to customary law and their daughters could not inherit from their deceased husbands' and father's estates respectively.

Upon realising that the father of the deceased, as the latter's most senior surviving male relative, would be appointed as the heir to the deceased's estate, the widow took her claim to the then Transvaal High Court for the declaration of her rights in the estate of her deceased husband. This realisation caused the widow to substitute her daughter, Tembi, as the claimant because under section 1 of the Intestate Succession Act,¹⁰ a daughter could inherit from her parent as a descendant of the deceased. However, a more serious hurdle awaited her as Tembi was herself a black South African female person. The reality of being black and being female placed Tembi in an invidious statutory position which excluded her from inheriting from her deceased father because "official" African law preferred males.

6.2(ii) The African law of succession in terms of colonial and apartheid legislation

The BAA that catered for the legal needs of black people, preferred only males, whilst

¹⁰ See Act 81 of 1987.

the Intestate Succession Act which catered for the needs of the other races, did not accommodate blacks. In terms of section 1(4)(b) of the Intestate Succession Act an “intestate estate includes any part of the estate in respect of which section 23 of the Black Administration Act does not apply”. As Tembi’s father’s estate belonged to a black person it fell outside the ambit of section 1(4)(b) of the Intestate Succession Act.

As such this estate fell into the category governed by section 23(10) of the BAA and its regulations. In terms of section 1(4)(b) of the Intestate Succession Act this was therefore, not an estate to be administered under section 1 of that Act. As a female Tembi was obviously not the most senior male surviving relative of the deceased as required by the BAA. The only two avenues offered by the administration of estates in South Africa were the males only door in the BAA and the whites only door in the Intestate Succession Act. Both doors were closed to Tembi who was neither a black male nor a white person.

As if this were not enough, in the papers before the High Court, the deceased’s father denied that the widow was ever married to his deceased son according to African law. This proved to be another hurdle in the way of the widow and Tembi because if he succeeded in disputing the existence of the customary marriage, the deceased’s daughter would, in addition to the curses of being female and black, be illegitimate. She would, in terms of “official” customary law have no inheritance rights to her father’s estate.

In terms of the “official” African law Tembi would not be able to inherit from her deceased father’s estate, as that system located her inheritance rights in her mother’s maiden family. The widow, however, insisted that she was in fact married according to African law, and demonstrated that some *lobolo* had been paid. The determination of this issue was, however, postponed *sine die* and deferred for a decision at a later inquiry that would be held independently.

Meanwhile, the widow proceeded to assist Tembi by attacking the constitutional validity of section 23 of the BAA, and Regulation 2(e) of the Regulations for the Administration

and Distribution of Black Estates framed thereunder, on the basis that they sanctioned the sexist “official” version of the primogeniture rule. These pieces of legislation excluded black women from inheriting under African law; and were operationalised by section 1(4) (b) of the Intestate Succession Act, which referred all black estates to be administered by the offensive provisions of the BAA. She asked the court to strike these provisions down so that her womanhood, blackness and alleged illegitimacy would not be barriers to her rights of inheritance.

6.2(iii) *African law of succession in the eyes of the Transvaal (now Gauteng) High Court*

Le Roux J observed that the primogeniture rule has been recognised by section 23 of the BAA, and found that the rule presented no difficulty in the context of the Constitution. In fact he observed that it worked well in rural areas where it had its supporting structures. Relying on academic opinion,¹¹ the judge upheld the primogeniture rule, holding that it was saved from the stigma of unconstitutionality by its redeeming features that obliged the heir to shelter, maintain, and sustain vulnerable family members, including women and children.¹² The judge found justification for his decision in the constitutional protection of culture and held that it was not proper to apply the Constitution in a manner that trumped that protection.

Eventually, the application regarding the existence of the customary marriage which was postponed *sine die* reappeared before Mynhardt J where none of the parties adduced evidence on the issue of the validity of the marriage. The judge accordingly

¹¹ Le Roux J relied on Bennett TW *A source book of African customary law for southern Africa* (1991).

¹² In *Mthembu 1 supra* at 945 Le Roux J held: “It is common cause that in rural areas where this rule most frequently finds its application, the devolution of the deceased’s property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom he was married by customary law, and of the children procreated under that system and belonging to a particular house. It is clear from Bennett’s opinion attached to the respondent’s heads of argument that a widow in particular, may remain at the deceased’s homestead and continue to use the estate property, and that the heir may not eject her at whim. He quotes numerous decisions of the Native Appeal Court in support of this proposition, and submits that accordingly, the customary law rule cannot be said to discriminate unfairly against women. This view of the rule relating to succession has much to commend it. If one accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture, a feature which has been called ‘one of the most hallowed principles of customary law’ – see Bennett TW *A source book of African customary law for southern Africa* (1991) 400), I find it difficult to equate this form of differentiation between men and women with the concept of ‘unfair discrimination’ as used in section 8 of the Constitution.”

dismissed the application on that ground. No marriage between the widow and the deceased was found to have existed. Consequently, Tembi was found to be illegitimate; a determination that would eventually be detrimental to Tembi's application for the inheritance rights as her parents were not married to each other under African law.

The judgment implied that Tembi was not only female and black, but she was also born out of wedlock. In the face of this the judge rejected the widow's claim to sustenance and maintenance from the heir, holding that the rule that the heir inherited the status of the deceased and stepped into his shoes and acquires the obligation to provide for and maintain the widow related to circumstances where there was a valid customary marriage. In the result Mynardt J concluded:

In the present case the applicant and the deceased were not married to each other. It would therefore follow that according to African customary law, the applicant and Tembi have no right to continue to live in the house at 822 Ditopi Street in Vosloorus, Boksburg ...¹³

In terms of "official" African law, Tembi could therefore not be regarded as her father's heir. Instead, the primogeniture rule as entrenched in the BAA designated the deceased's father as his son's heir. On Tembi's behalf, the widow appealed to the SCA which dismissed the appeal, relying on the absence of a customary marriage between the appellant and the deceased.

6.2(iv) The African law of succession in the eyes of the Supreme Court of Appeal

Mpati AJA wrote the SCA's unanimous judgment confirming the High Court's finding that Tembi was illegitimate and had no inheritance rights to her father's estate. Further, being illegitimate, her inheritance rights resided with her mother's maiden family. After referring to the proceedings of the two High Court decisions in the matter, Mpati AJA sealed Tembi's fate as follows:

In casu, it is common cause that no customary union existed between the appellant and the deceased when Tembi was born. It is also common cause that no customary union was entered into subsequent to her birth. It follows that, although part of the

¹³ See *Mthembu 2 supra* at 680.

bridewealth was paid, without a customary union between her parents, Tembi was not legitimised. Mynhardt J was accordingly correct in holding that Tembi is illegitimate.¹⁴

The SCA rejected any suggestion that its decision involved the fact that Tembi was female. According to the SCA, even if she had been a boy, Tembi would not have inherited from her father as she was illegitimate. The fact that illegitimacy no longer prevented beneficiaries who were not black from inheriting from their parents does not seem to have bothered the SCA. In addition the High Court had rejected the application of the interim Constitution to the case. It held that the Constitution did not apply retrospectively¹⁵ – the deceased died on 13 August 1993, before the interim Constitution came into effect on 27 April 1994.

However, the court held that even had the interim Constitution applied to the case, illegitimacy, and not gender discrimination was the reason for disinheriting Tembi. The aftermath of the judgment attracted a hue and cry in human rights and social circles because it left the impression that the African law of the new South Africa as expounded in the *Mthembu* cases was that its colonial/apartheid-era version continued to apply unaltered.¹⁶

Starting with an analysis of the role of the *Mthembu* judgments in institutionalising the injunction of the Constitution regarding African law, it is noteworthy that Judge le Roux defended the primogeniture rule as an African culture right, against the Euro-Western onslaught waged by the abolitionists who claimed that it was contrary to the principles of natural justice and civilisation.

To his credit, Judge le Roux referred to the features that redeemed the primogeniture

¹⁴ See *Mthembu* 3 *supra* par 18.

¹⁵ *Idem* par 35.

¹⁶ Grant E “Human Rights, cultural diversity and customary law in South Africa” (2006) 50/1 *JAL* 2 at 10 writes: “Prior to the decision in *Bhe*, a parallel system of intestate succession operated in South Africa, governed by two statutes – the Intestate Succession Act, 1987 and the Black Administration Act, 1927. Section 23 of the Black Administration Act applied to deceased intestate estates of Africans. In turn, the Intestate Succession Act specifically excluded those estates from its application. The system of intestate succession regulated by section 23 purported to give effect to the customary law of succession, or in the words of the statute, ‘black law and custom’. Regulations made in terms of section 23(10) provided a number of exceptions to the application of customary law, in particular excluding the estates of Africans who had been married according to South African civil law and the estates of those Africans who had been granted an exemption.”

rule as those that impose the duty on the heir to maintain, sustain and shelter vulnerable family members.¹⁷ He noted that the reality of communal living among extended families makes the rural areas the exemplary environment for the contextual application of the primogeniture rule.¹⁸ Whilst Le Roux J's efforts to defend African values against Euro-centrism are commendable, his failure to locate their context within a communal indigenous frame of reference that would reflect them as distinct and original, however, vitiated his responsiveness. Le Roux J's refusal to strike down the "official" primogeniture rule was based on his experience of its application in apartheid adjudication. This orientation led him to defend apartheid culture as African culture.

The court's dilemma arose from its reliance on the apartheid legal framework as codified in section 23 of the BAA which defines family property as individually owned by the heir. As was to be expected, the court did not draw its inspiration from the indigenous version which provides that such property is collectively owned by the home, under the management of the head.¹⁹ Consequently, the *Mthembu* judgment left the newly enfranchised black citizens living in the supposedly democratic South Africa suffering the same deprivations they had under apartheid.

This judgment can be criticised on the ground that the judge failed to recognise the marriage of the deceased and the woman with whom he resided as husband and wife under the watch of the deceased's father who stayed with them in the same house. The marriage had been negotiated according to African law and some *lobolo/bogadi* goods had been delivered. The court was under the false impression that if *lobolo/bogadi* had not been paid in full, this was enough reason to rule against the existence of the marriage. In doing so the court overlooked other factors that would have persuaded it to lean towards upholding the existence of the marriage. In this case there was evidence of marriage negotiation and delivery of marriage goods followed by co-habitation in the family house, together with other family members, including the head, and there was progeny from the marital arrangement.

¹⁷ *Mthembu* 1 *supra* 944.

¹⁸ *Ibid.*

¹⁹ See Ndima "The place of customary law" *op cit* 239.

Consequently, the court ruled that the marriage was invalid and that Tembi was illegitimate. Pursuant to this ruling the court refused to install the widow and her daughter as traditional communal shareholders in family goods, which would have made them holders of the real right to participate in the family estate and not to depend on the generosity of the male heir for maintenance, sustenance and shelter. As a result of the failure of the courts to recognise the right of customary shareholders as a real right, vulnerable members of the family were still not able to access the right to their shares in the estate in their own right, as guaranteed by African law, but continued to depend on the generosity of the male heir who was designated as the owner of the estate and had the duty to support them.²⁰

Furthermore, no effort was made to investigate the possible existence of a non-sexist “living” version of the primogeniture rule currently applied in social practice. Consequently, the court did not know whether in social practice African law offered a solution to Tembi’s claim. Such an investigation was important because of the flexibility and adaptability of African law which could have developed a provision that Tembi was entitled to be appointed heir to her father’s estate, notwithstanding her being female. Instead, the court relied on the “official” version that consists of legislation, judgments, text books and academic opinion which are not grounded in African tradition and social practice.

It sadly did not occur to the court that the mandate to affirm African culture as part of the Constitution’s transformational goals might require it to investigate the version of African law that was currently enforced by the system’s adherents as opposed to the codified colonial culture. Consequently, instead of affirming African culture, the court actually legitimised the colonial/apartheid legacy of patriarchy as the valid law of the new South Africa. This was an opportunity lost.

The matter was aggravated by Mynhardt J in the second *Mthembu* judgment when he ruled that the marriage between the deceased and the widow had not been proved notwithstanding that *lobolo* had been partly paid, and cohabitation had been proved. In

²⁰ See Lehnert W “The role of the courts in the conflict between African customary law and Human Rights” (2005) 21 *SAJHR* 241 at 257.

African law the concept of *lobolo* has never been about the quantity of goods delivered. In fact *lobolo* was rarely, if it ever, fully paid. African custom never fixed the amount of *lobolo*. That is why it was always negotiated.

During *lobolo* negotiations a number of cattle were always allowed to “sleep” so to speak and did not have to be delivered, as an “insurance” against the abuse of the wife by the husband and/or his family. This is evidenced by the institution of *ukuthelaka*²¹ whereby the wife’s maiden family gave her protective custody against her abusive husband who was required to apologise and undertake to keep peace. This custom was enforced during the *ukuphuthuma*²² proceedings. The latter entailed the duty of the husband to negotiate the wife’s return after she had fled to her maiden home for protection. During these negotiations the “sleeping” cattle would be “awakened” by demanding delivery thereof as a pre-condition for allowing him access to his wife.

In the *Mthembu* matter, not even the fact that a child was not only born, but was brought up by its parents living together with the extended family until it was 11 years old, persuaded the court to uphold the institution of marriage. This was despite the fact that in the absence of any further evidence to the contrary, the judge had an obligation to find in favour of upholding the institution of marriage rather than settle on a decision that turned the widow into a concubine and the child into a bastard.

Mynhardt J, however, misconstrued counsel’s advice to have regard to community values which are the authoritative sources of African law. Instead, he dismissed such a suggestion as an attempt to subject the court to public opinion, which the Constitutional Court had discouraged in the *S v Makwanyane* judgment outlawing the death penalty.²³ The judge concluded that the legislature was the appropriate institution to consider whether public opinion favoured a development of the primogeniture rule to accommodate the appointment of women as customary heirs.

²¹ See Koyana DS “Resilience of the repugnancy clause in the customary law of South Africa” in Osode PC and Glover G (eds) *Law and transformative justice in post-Apartheid South Africa* (2010) 491 at 502.

²² *Ibid.*

²³ 1995 (6) BCLR 665 (CC).

When the matter proceeded on appeal to the SCA, Mpati AJA, as he then was, had a golden opportunity to review the two *Mthembu* High Court judgments against the Constitution's protection of culture and gender equality. Unfortunately, the SCA missed that opportunity. Not only did the acting judge of appeal fail to hold the deceased's father to his traditional obligations of ensuring equitable access by vulnerable family members to the resources he shared collectively with them he tragically allowed the deceased's father to deny the existence of his son's marriage.

This was despite the father's admission that he had stayed together with the deceased, his widow and their child in the same house for over a decade before his son's death. This admission alone was enough for the court to hold the deceased's father to his customary commitments as he had based his claim on African law, which did not allow the head of the family to condone cohabitation in the family house. The deceased's father should have been estopped from claiming that a woman who had stayed at the house of which he was the head, as his daughter-in-law, was in fact not so; whilst he relied on African culture's primogeniture rule as the basis of his title.

As a credible African head of the family, the deceased's father should have been required to explain whether African culture allowed him to permit his son to cohabit with an unmarried woman in the family house where he also resided.²⁴ Such is the abhorrence for cohabitation in African culture, that the head of the family bears the responsibility to pay *lobolo/bogadi* for his son as a way of legitimising the consort. Estoppel would also have prevented the head of the family from denying the existence of a marriage that was negotiated by two families, in which *lobolo* was paid and consortium practiced until a child was born and grew for eleven years.

Viewed from the African perspective, the deceased's father acted contrary to African culture and against the interests of his own dependants in disowning them and seeking to evict them from the house when in fact he had an obligation to protect them. His own actions therefore disqualified him from being appointed as heir in that they amounted to a repudiation of that very position. The court's approval of the deceased's father's

²⁴ See Dlodlo J in *Fanti v Boto and Others* 2008 (5) SA 405 (C).

repudiation of the deceased's marriage led to Tembi being disinherited, bearing in mind she was rejected both by section 1(4)(b) of the Intestate Succession Act²⁵ and section 23 of the BAA from inheriting her deceased father's estate.

Tembi was excluded from inheriting from her father's estate for no reasons other than that she was a black person and a woman. That Mpati AJA allowed such an unconstitutional provision to stand is unfortunate indeed! The SCA should have discredited the apartheid legislation by invalidating it, so opening the way for Tembi to inherit from her deceased father.

The only reasons for disinheriting Tembi that were relied upon by the High Court and approved by the SCA were that she was black and a woman, and therefore fell under section 23(10)(a)(e) of the Black Administration Act,²⁶ read with Regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks and that she was illegitimate. This was despite the fact that section 1 of the Intestate Succession Act had ended illegitimacy as a disability to inheritance for all children born out of wedlock except the children of Africans.

Mpati AJA expressed the SCA's complacency about the plight of black women when he approved the apartheid legislation's sub-human treatment of *Tembi* in the following dictum:

In my opinion, the present is not a case where the recognition and respecting of previously acquired rights would be so grossly unjust and abhorrent, in the light of the present constitutional order, that they cannot be countenanced; nor is this an appropriate case, on the facts, to entertain an invitation to develop the rule. In any event, we would be ill-equipped to develop the rule for lack of relevant information. Any development of the rule would be better left to the Legislature after a process of full investigation and consultation, such as is currently being undertaken by the Law Commission.²⁷

It is difficult to imagine how the SCA felt obliged to find that the racist and sexist framework established by section 23(10)(a)(e) of the Black Administration Act, read with

²⁵ 26 See Act 81 of 1987.

²⁶ See Act 38 of 1927.

²⁷ See *Mthembu* 3 par 40.

Regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks,²⁸ and section 1(4)(b) of the Intestate Succession Act were not “so grossly unjust and abhorrent in the light of the present constitutional order” in a non-racial and non-sexist, free, and democratic South Africa characterised by human dignity, equality, and social justice.²⁹

The real tragedy here was that the court followed an anachronistic approach which led it to draw its inspiration from an oppressive apartheid statutory framework under the guise of transforming the African law of the newly enfranchised citizens of South Africa. What makes the SCA’s finding so shocking is the fact that the BAA which was enacted to enforce “native” administration was viewed by the Constitutional Court as “an egregious Apartheid law which anachronistically has survived our transition to a non-racial democracy”³⁰ and “a piece of obnoxious legislation not befitting a democratic society based on human dignity, equality and freedom”.³¹ Surely, these descriptions must mean that the patriarchal rights conferred by this legislation were “so grossly unjust and abhorrent, in the light of the present constitutional order, that they cannot be countenanced”.³²

Instead of investigating the possible existence of a non-sexist primogeniture rule regulating succession in actual social practice in the democratic South Africa, the SCA preferred to extend the application of apartheid jurisprudence into the new constitutional order. In this way, the achievement of the envisioned African jurisprudence for the democratic South Africa was jeopardised. That being the case, the *Mthembu* courts must take responsibility for their part in frustrating the constitutional injunction for the affirmation of African law. They assumed that the distorted “official” version of the impugned primogeniture rule, which designated one senior male as the owner of family property, and excluded women from inheriting such property, continued in force, notwithstanding the advent of the new constitutional dispensation.

²⁸ Government Notice R 200 of 1987.

²⁹ *Ibid.*

³⁰ See Ngcobo J in *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North-West Provincial Government and Another* 2001 (1) SA 500 (CC) par 1.

³¹ *Idem* para 93 per Madala J.

³² See *Mthembu* 3 par 40.

In their interpretation of the rule the *Mthembu* trilogy of judgments maintained the status quo by incorporating apartheid legalism into South Africa's post-apartheid jurisprudence. In other words the High Court and the SCA conceptualised the role and status of African law in the democratic South Africa as unaffected by the demise of the old order despite the possibilities created by the Constitution that reflected the waves of social re-alignment that had occurred in the communities leading up to the end of apartheid. As part of the struggle to end apartheid, women, men and children cooperated in the fight against injustice and earned social recognition proportionate to their contributions rather than their gender.

For that reason the SCA should have realised that the constitutional recognition of African law meant that a continuation of the unfair discrimination based on race, gender, age, and birth was so abhorrent that it could not be countenanced in the new South African dispensation. This was particularly so because, at the time of the *Mthembu* cases, the old perceptions of men, women and children had so changed in social practice, that people had begun to realise that gender did not play a role in determining the skills required to resolve the socio-political impasse in the country.

The SCA's assumption that the reign of the old-order over African jurisprudence and gender equality, was immune from the political change, ignores the cultural influence of change resulting from increased urbanisation, education and participation by women and children in the democratisation processes that produced the Constitution. The metaphysics underlying the *Mthembu* cases is that the racially and sexually discriminatory BAA legal framework had survived the demise of the apartheid dispensation that it sought to buttress, and continued to perpetuate the inferiority of African women after 1994.

Instead of ditching the discredited "official", male-oriented version of the primogeniture rule, the *Mthembu* courts legitimised the racist and sexist BAA legal framework that was created to enforce apartheid as valid law in the new South Africa. The end result was the extension of the hurtful perpetual minority of African women as mandated by

apartheid legislation into the law of the new South Africa.³³ Regrettably the *Mthembu* judgments have simply served to extend the reign of the old order as if the new constitutional dispensation has not yet taken root.

6.3 The principle that indigenous rights must be determined in terms of African law

6.3(i) The rule that pre-colonial indigenous law rights in land survive colonisation

In every legal system the courts are required to apply their law to resolve disputes between litigants. Consequently pre-colonial courts used African law in all judicial proceedings in South Africa.³⁴ This principle was abandoned during colonial times after African law was superseded by common law which became the primary legal system for the country.³⁵ African law could only be applied at the discretion of the court and in the interests of justice.³⁶ This persisted until the Constitution restored African law to its rightful position as the primary source of law in all matters governed by it.³⁷

In the case of *Alexkor Ltd and Another v Richtersveld Community*³⁸ which involved a dispute over the ownership of mineral rights by the indigenous Richtersveld community the SCA laid firm jurisprudential foundations for restoring the prism of indigenous law as the lens for viewing the operation of the latter system's principles. The latter had enjoyed undisturbed access to these rights under pre-colonial indigenous law. The other party to the dispute, the mining company Alexkor Limited, had been granted rights to these minerals under colonial legislation.

In one of its most seminal judgments the SCA ruled that the rights of indigenous people to their land must be determined according to indigenous law, as opposed to the common law, and that such rights must prevail in the absence of legislation that

³³ Bekker JC *Seymour's customary law of southern Africa* (1989)110 writes: "In original customary law a woman never ceased to 'belong'; before her marriage she 'belonged' to her guardian, after her marriage to her husband".

³⁴ See Mqhayi SEK *Ityala lamawele* (1914) where an intractable succession dispute between twins was resolved according to African law.

³⁵ See Bennett *Customary law op cit* 373.

³⁶ See *Ex parte: Minister of Native Affairs – In re Yako v Beyi* 1948 (1) SA 388 (A).

³⁷ See section 211 of the Constitution.

³⁸ 2003 (6) BCLR 583 (SCA) (hereafter *Richtersveld Community*).

specifically divests such people of such rights.³⁹ On appeal the Constitutional Court endorsed this judgment and reiterated the importance of construing African law in accordance with its own norms and values.⁴⁰ The principle established by the judgment is that African law is the primary legal system in matters falling within its ambit.⁴¹

The transformative effect of the *Richtersveld Community* decision is that the earlier approach – laid down in *Yako v Beyi*⁴² – of trumping indigenous law by superimposing the omnipotent common law in the event of a clash between the interests protected by these two systems, has been laid to rest. The *Richtersveld Community* case has since become the pace setter for defining the rights of the adherents of African law in relation to indigenous rights and entitlements in post-apartheid South Africa.

This has provided subsequent courts with a platform from which to expand on the primacy of African law in resolving indigenous disputes. This is particularly the case because the *Richtersveld Community* judgment also authoritatively discredited the previous judicial preference for the “official” version of African law, and so resolved the perennial debate on the primacy of the “official” and the “living” versions of African law in favour of the latter.

Moreover the need for African law to stand on its own normative features as it draws its inspiration not from the common law as was the case in the past, but only from the Constitution, was emphasised. The lesson that the Constitutional Court delivered was that there is a need to recognise the reality that Western and African metaphysics are founded on different ontological backgrounds;⁴³ each of which must independently comply with the Constitution.

Therefore the *Richtersveld Community*⁴⁴ judgment sets the stage for asserting the status of African law *vis-a-vis* that of the common law under the Constitution by

³⁹ *Ibid.*

⁴⁰ 2003 (12) BCLR 1301 (CC) par 51.

⁴¹ See *Richtersveld Community supra* par 51.

⁴² See *Ex parte: Minister of Native Affairs – In re Yako v Beyi supra.*

⁴³ See Abiodun BO “Towards an African concept of law” (2007) *African Journal of Legal Theory* 71 at 74.

⁴⁴ See *Richtersveld Community* par 51.

expressing the court's abhorrence for the previous "official" state culture which viewed the indigenous system through a Western metaphysical prism.⁴⁵ In order to give credence to the judicial mandate to apply African values in terms of section 211 of the Constitution, the Constitutional Court has often referred to its *Richtersveld Community* judgment in its subsequent decisions.⁴⁶

6.3(ii) *The role of post-apartheid courts in the adjudication of African law*

This background explains that the courts of the new South Africa are entrusted with the normative articulation of African values, which they are enjoined to enforce as part of the right to culture entrenched in the Bill of Rights. To achieve this, the courts are mandated to acknowledge the customary communities as a legitimate legislator for enacting customary law, which must be respected as such.⁴⁷ Hlophe JP has expressed his view of the constitutional injunction regarding African law as follows:

If one accepts that African Customary Law is recognised in terms of the Constitution and relevant legislation to give effect to the Constitution, such as the Recognition of Customary Marriages Act No120 of 1998 referred to above, there is no reason, in my view, why the Courts should be slow at developing African Customary Law. Unfortunately, one still finds dicta referring to the notorious repugnancy clause as though one were still dealing with a pre-1994 situation. Such dicta, in my view, are unfortunate. The proper approach is to accept that the Constitution is the supreme law of the Republic. Thus any custom which is inconsistent with the Constitution cannot stand constitutional scrutiny. In line with this approach, my view is that it is not necessary at all to say African Law should not be opposed to the principles of public policy and natural justice.⁴⁸

This dictum lays the ground against which judicial contributions should be examined as the courts strive to institutionalise the constitutional injunction to promote African jurisprudence on an African ontological basis in a human rights environment. However,

⁴⁵ *Ibid.*

⁴⁶ See *Bhe v The Magistrate Khayelitsha*; *Shibi v Sithole*; *Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC) (hereafter *Bhe-Shibi*) par 43; *Gumede v President of the Republic of South Africa and Others* 2009 (3) BCLR 243 (CC) par 21; *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC) (hereafter *Shilubana 2*) par 43.

⁴⁷ See Lehnert *op cit* 171. In *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) par 30, the court said "[t]o say that [African law must not be opposed to the principles of public policy and natural justice] is fundamentally flawed as it reduces African Law which is practised by the vast majority in this country) to foreign law – in Africa".

⁴⁸ See *Mabuza v Mbatha supra* par 30.

an examination of some of the most important post-apartheid judgments with a view to assessing the extent of success of the judicial mandate to balance the democratic reforms with the cultural imperatives in shaping the envisioned African law reveals disappointing levels of judicial complacency.

These are the challenges that faced the post-apartheid courts in their endeavour to manage the on-going tension between the Bill of Rights and the primogeniture rule in the context of the prevalence of a legal culture that tended to view the communal nature of African culture from the perspective of an individualised alien lens. The position of the primogeniture rule as the centrepiece for the application of the African law of succession brings this concept to the fore in the further analysis. The opportunity presented itself in the *Bhe*⁴⁹ and *Shibi*⁵⁰ cases which raised the sensitive issue of the correct balance to be struck between African culture and human rights.

These cases were heard together as a single case during confirmation proceedings before the Constitutional Court.⁵¹ The latter court had to take the lead in deciding how to resolve the perennial tension between African cultural values and equality rights – both of which are protected by the Constitution. The court had the opportunity to unpack the place of the primogeniture rule within African law as it sought to demarcate the boundary between the indigenous law rights and the rights in the Bill of Rights.

In the first case, Ms Bhe and the deceased had an extra-marital relationship from which two surviving minor daughters were born. The deceased died intestate leaving his two minor daughters but no male heir. In *Shibi*'s case the applicant lost her unmarried brother, who died intestate and without issue in 1995. The magistrates of Khayelitsha and Wonderboom had respectively appointed senior male relatives of the deceased persons, as representatives of the estates in terms of section 23(10)(a), (c) and (e) of the Black Administration Act 38 of 1927 (the BAA), read with regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks (the Regulations), published under *Government Gazette* 10601 of 6 February 1987.

⁴⁹ *Bhe and Others v Magistrate Khayelitsha* (hereafter *Bhe*) 1998 (3) 2004 (1) BCLR 27 (C).

⁵⁰ *Shibi v Sithole and Others* (hereafter *Shibi*) Gauteng Case 7292/01 dated 19 November 2003 (unreported).

⁵¹ See *Bhe-Shibi supra*.

The two cases, which originated separately in the Cape Provincial Division and the Transvaal Provincial Division respectively, came to the Constitutional Court in the form of confirmation proceedings in terms of section 172(2) of the Constitution following declarations of constitutional invalidity in the High Courts. These orders concerned section 23(10)(a), (c) and (e) of the BAA, read with Regulation 2(e) of the Regulations, and section 1(4)(b) of the Intestate Succession Act 81 of 1987 (the Intestate Act), as well as that of the primogeniture principle as practised in the customary law of succession.

On behalf of her two minor daughters born in 1994 and 2001 respectively, Ms Bhe brought an application before the Cape Provincial Division in which she sought relief declaring the impugned statutory provisions unconstitutional and invalid and appointing the girls sole heirs to their late father's estate. The court granted the relief as prayed and declared that "until the afore-going defects are corrected by a competent legislature, the distribution of intestate black estates is governed by section 1 of the Intestate Succession Act 81 of 1987", and that the two daughters "are the only heirs in the estate" of their deceased father.

In the *Shibi* matter, the magistrate instituted an inquiry in terms of regulation 3(2) of the Regulations, in order to determine the rightful heir(s) to the deceased estate. He, however, did not complete the inquiry but adjourned it pending the outcome of "a challenge to the constitutional validity of the customary law rule of primogeniture and section 23 of the Act" in the *Mthembu* case that was being handled by the Pretoria High Court at the time.⁵² In due course the High Court dismissed the *Mthembu* challenge, thus confirming the validity of the impugned provisions. Thereupon the magistrate abandoned the inquiry as there was no longer any doubt in his mind as to the constitutional validity of the impugned provisions.

The *Shibi* matter involved the estate of a black person. In terms of section 23 of the BAA and regulation 2(e) of the Regulations, required it to be administered and "distributed according to custom".⁵³ As she was a woman Ms *Shibi* was, according to

⁵² The case was later reported as *Mthembu 2 supra*.

⁵³ See *Bhe-Shibi supra* par 25.

the magistrate's understanding of the High Court ruling in *Mthembu* precluded from inheriting the estate of her deceased brother. Instead, these provisions required the closest senior male relative of the deceased to be appointed as the representative of the estate.

Following upon the reaffirmed primogeniture rule in *Mthembu*, the magistrate appointed her (Shibi's) cousin brother, Mantabeni Sithole, as the representative of the estate, as he was the more senior of her two cousin brothers. Ms Shibi then approached the Pretoria High Court in which she challenged Sithole's appointment and sought an order declaring her the sole heir to her deceased brother's estate.

The High Court deviated from its own previous *Mthembu* judgment, and declared section 23(10)(a), (c) and (e) of the BAA, and regulation 2(e) of the Regulations which demanded the application of the primogeniture rule to all intestate black estates unconstitutional and invalid. It also struck down section 1(4)(b) of the Intestate Succession Act 81 of 1987 which precluded blacks from being treated like other South Africans and set aside Mantabeni Sithole's appointment by the magistrate. In terms of section 1 of the Intestate Succession Act Ms Shibi was declared the sole heir to her deceased brother's estate.

In addition to the applications for confirmation of the orders granted by the Cape High Court (*Bhe*) and the Pretoria High Court (*Shibi*), the matter also involved a third application for which direct access had already been granted by the Constitutional Court. It had been brought by the South African Human Rights Commission and the Women's Legal Centre Trust, in their own interest, in the public interest or in the interest of a class of people.⁵⁴ The court found that it was in the interests of justice to grant the application for direct access and allowed the applicants to join the proceedings.⁵⁵

⁵⁴ See section 38(c) of the Constitution.

⁵⁵ 56 At par 32 of *Bhe-Shibi* Langa DCJ held: "T his Court will grant direct access in exceptional circumstances only", citing *S v Zuma and Others* 1995 (2) SA 642 (CC) par 11; *Brink v Kitshoff* NO 1996 (4) SA 197 (CC) par 3; *Minister o f Justice v Ntuli* 1997 (3) SA 772 (CC) par 4; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) par 4; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC) par 4; *Moseneke and Others v The M aster and Another* 2001 (2) SA 18 (CC) par 19; *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) par 29; *Van der Spuy v General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society*

The applicants sought the removal from the statute book of the whole of section 23 of the BAA, alternatively its subsections (1), (2), and (6) which were inconsistent with the equality provisions in section 9 of the Constitution. The applicants averred that the impugned provisions impacted negatively on African women, children and junior males living under customary law. This legal regime, therefore, affected people who were arguably among the most vulnerable groups in society and needed relief urgently. The court then proceeded to consider this three-pronged case by drawing a distinction between the apartheid legal scheme laid down by section 23 of the BAA and current African law under the Constitution.

6.3(iii) Post-apartheid African law in the eyes of the Bhe-Shibi majority judgment

Langa DCJ observed that in order to understand the place envisaged for African law under the Constitution, the apartheid legal scheme must be distinguished from the current African law of South Africa. In other words, the “official” customary law which the courts of the old order applied, and the “living” African law which today’s courts must apply have disparate features, and should not be confused.⁵⁶ This is because the Constitution envisages a place for African law within the South African legal system by clearly stating that it must be accommodated, not merely tolerated, subject to compliance with the Constitution.⁵⁷

This accommodation is quite distinct from the jurisprudence of section 23 of the BAA of the old order. As evidence of the imperative to apply African law, Justice Langa refers to sections 30 and 31 as provisions demanding respect for cultural diversity; and section 39(2) as fostering judicial alignment of African law with the Bill of Rights. In other words, the provisions of the Constitution that demand the application, protection and development of customary law do not belong to the defunct legal framework generated by section 23 of the BAA in the past, which had produced the “official” distortions under which the *Mthembu* cases were decided.

of South Africa Intervening) 2002 (5) SA 392 (CC) par 7; *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC) par 6.

⁵⁶ See *Bhe-Shibi supra* par 41.

⁵⁷ *Ibid.*

The Deputy Chief Justice then pointed out that the approach outlined above corrects previous judicial mistakes resulting from the failure to interpret African law in its own setting, but through the use of the common law prism. He blames African law's subsequent fossilisation, codification, marginalisation and stagnation on this approach.⁵⁸ To reverse this situation the court points to the constitutional mandate to adjust, develop and change African law through legislation as a necessary condition for its recognition.⁵⁹

According to the Constitutional Court, African law's flexibility and consensus-seeking nature; its usefulness in dispute resolution; in unifying families and fostering cooperation; in fomenting a sense of responsibility towards people and nurturing healthy communitarian traditions such as *ubuntu* were the positive features that justified its recognition.⁶⁰ The learned Deputy Chief Justice, however, emphasised the need for consistency with the Constitution.

After observing that the impugned provisions of the BAA were challenged for violating sections 10 (right to human dignity),⁶¹ 9 (right to equality)⁶² and 28 (rights of children), the Constitutional Court found that such provisions indeed violated the victims' rights to human dignity and equality as well as rights of children, all of which are protected by the Constitution and international law. The court then held:

This Court has often expressed its abhorrence of discriminatory legislation and practices which are the feature of our harmful and racist past and which are fundamentally inconsistent with the constitutional guarantee of equality. Section 23

⁵⁸ *Idem* par 43.

⁵⁹ *Idem* par 44.

⁶⁰ *Idem* para 45.

⁶¹ In *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) par 35; *Makwanyane supra* par 144; *National Coalition for Gays and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) par 28; *S v Mamabolo (eTV and Others Intervening)* 2001 (3) SA 409 (CC) par 41, the Constitutional Court has stressed the importance of human dignity as a value and a right protected in South Africa's constitutional order, since it is the source of all other rights. It has also been used to acknowledge the value and worth of other people, as well as a means of reversing the traditions of racism the country inherited from its past policies.

⁶² In *Frazer v Children's Court, Pretoria North, and Others* 1997 (2) SA 261(CC) par 20, Mahomed DP (as he then was) held: "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a '... need to create a new order ... in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'...".

cannot escape the context in which it was conceived. It is part of an Act which was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of “European” descent. The Act was part of a comprehensive exclusionary system of administration imposed on Africans, ostensibly to avoid exposing them to a result which, “to the Native mind”, would be “both startling and unjust”.⁶³

The Constitutional Court proceeded to observe that what the BAA in fact achieved was to become a cornerstone of racial oppression, division and conflict in South Africa. The legacy of which will take many more years to eradicate completely. The proponents of the policy of apartheid were able, with comparative ease to build on the provisions of the BAA and to perfect a system of racial division and oppression that caused untold suffering to millions of South Africans. Some parts of the BAA have now been repealed and modified. Most of section 23 however remains and still serves to haunt many of those Africans subject to the parallel regime of intestate succession which it creates.

The BAA has earned deserved criticism which must be seen in the light of the origins of its provisions.⁶⁴ Citing its previous decisions, the court traced the origins of the BAA to notions of separation and inequality between the South African races.⁶⁵ It noted that the BAA has been described as “a piece of obnoxious legislation not befitting a democratic society based on human dignity, equality and freedom”,⁶⁶ and “an egregious Apartheid law which anachronistically has survived our transition to a non-racial democracy”.⁶⁷ Ngcobo J (as he then was) described the apartheid dispensation regulated by the BAA in the following terms:

a demeaning and racist system⁶⁸ ...The Native Administration Act 38 of 1927 appointed the Governor-General ... as supreme chief of all Africans. It gave him power to govern Africans by Proclamation. The powers given to him were absolute. He could

⁶³ See *Bhe-Shibi supra* par 60.

⁶⁴ *Idem* par 60-62.

⁶⁵ See *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC).

⁶⁶ *Idem* par 93 per Madala J.

⁶⁷ *Idem* par 1 per Ngcobo J (as he then was). See also Sachs J in *Moseneke supra* par 21 saying: “It is painful that the Acts still survives at all. The concepts on which it was based, the memories it evokes, the language it continues to employ and the division it still enforces are antithetical to the society envisaged by the Constitution. It is an affront to all of us that people are still treated as ‘blacks’ rather than as ordinary persons seeking to wind up a deceased estate, and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin or skin colour.”

⁶⁸ *Idem* par 2.

order the removal of an entire African community from one place to another. The Native Administration Act became the most powerful tool in the implementation of forced removals of Africans from the so-called “white areas” into the areas reserved for them. These removals resulted in untold suffering. This geographical plan of segregation was described as forming part of “a colossal social experiment” and a long term policy.⁶⁹

Appalled by the nefarious nature of the origins, conception, and objectives of the BAA, the court had no doubt about the unconstitutionality of the impugned provisions. Moreover, the way in which such provisions limited the rights of vulnerable Africans were not reasonable and justifiable in South Africa’s open and democratic society based on human dignity, equality and freedom, as required by section 36 of the Constitution.⁷⁰ The importance of the violated rights was assessed with reference to South Africa’s constitutional scheme which seeks to reverse the “past history of inequality and hurtful discrimination on grounds that include race and gender”. On this basis, the court found the impugned provisions offensive to the new constitutional values and accordingly struck them down.⁷¹ In so doing Langa DCJ held:

The racist provenance of the provision is illustrated in the reference in the regulations to the distinction drawn between estates that must devolve in terms of “Black law and custom” and those that devolve as though the deceased “had been a European”. The purported exemption of certain Africans – who qualify – from the operation of “Black law and custom” to the status of a “European” is not only demeaning, it is overtly racist. This provision is to be found in the regulations, not in the statute itself. It nevertheless provides a contextual indicator of the purpose and intent of the overall scheme contemplated by section 23 and the regulations.⁷²

The court noted that section 23 of the BAA indeed acknowledged the pluralistic nature of the South African society by recognising customary law. However, the court concluded that this was not its dominant purpose or effect. Its real purpose was to

⁶⁹ *Idem* par 42.

⁷⁰ In *S v Manamela and Another* (Director-General of Justice Intervening) 2000 (3) SA 1 (CC) par 32 the Constitutional Court laid down the rules for handling the section 36 inquiry as follows: “... the Court must engage in a balancing exercise and arrive at a global judgment on proportionality ... As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.”

⁷¹ In *Bhe-Shibi supra* per Langa DCJ at par 68.

⁷² *Idem* par 67.

promote the programme of entrenching division and subordination the effect of which was to ossify African law. This purpose and its effect rendered the provision unjustifiable in an open and democratic society.⁷³

In the result, the court held that the impugned section 23 of the BAA and its regulations, when construed in the light of their history and context, were indeed invalid and declared them unconstitutional in terms of section 172(1)(a) of the Constitution. The court held that the effect of the invalidation of the impugned provisions was that the rules of African law governing succession became applicable.⁷⁴ In conclusion Langa DCJ held:

I conclude, then, that construed in the light of its history and context, section 23 of the Act and its regulations are manifestly discriminatory and in breach of section 9(3) of our Constitution. The discrimination they perpetuate touches a raw nerve in most South Africans. It is a relic of our racist and painful past. This Court has, on a number of occasions, expressed the need to purge the statute book of such harmful and hurtful provisions.⁷⁵

The Constitutional Court's disquiet at the continued application of the BAA and its jurisprudence is clear from the above dictum. Langa DCJ proceeded to hold that "section 23 [of the BAA] was enacted as part of a racist programme intent on entrenching division and subordination". He concluded that the effect of this racist legislation has been to ossify customary law. In the light of its destructive purposes and effect, it could not be justified in an open and democratic society.⁷⁶ The court next turned to an attack launched by Ms Bhe and Ms Shibi on the African law rule of primogeniture, and noted that historically the rule was part of a system of law that fitted a community's way of life by ensuring fairness in the context of entitlements, duties and responsibilities. These rules preserved cohesion, stability and discipline in the

⁷³ *Idem* par 72.

⁷⁴ *Idem* par 74.

⁷⁵ *Idem* par 68.

⁷⁶ See *Bhe-Shibi supra* par 72. See also Ngcobo J in the same case at par 141: "Section 23 must be understood in the context of the scheme of the Act [the BAA]. As its name suggests, the Act is aimed at regulating all aspects of life of African people. The Act was one of the pillars of Apartheid legal order, and together with other racially based statutes, it was part of the edifice of the Apartheid legal order. The Act has been described as an 'egregious Apartheid law' that anachronistically has survived our transition to a non-racial democracy."

community, where men, women and children contributed to the common good and welfare through their roles.⁷⁷ The court explained the position of the heir in African law thus:

The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. The members of the family under the guardianship of the deceased fell under the guardianship of his heir. The latter, in turn, acquired the duty to maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.⁷⁸

In African law the duties of the heir could not be transmitted to women, who consequently did not have the obligation to look after the members of the family. In the absence of a male descendant the function was fulfilled by a male relative.⁷⁹ According to the court, the exclusion of women from inheriting property "was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of their fathers, husbands or the head of the extended family".⁸⁰

The court noted that the context in which the rule of primogeniture operated has now changed, since modern urban communities no longer live according to traditional lines. Significantly, succession to a deceased estate is no longer accompanied by the traditional social implications. The heir no longer necessarily lives with the members of the extended family as nuclear families have largely taken over. As the heir no longer

⁷⁷ *Idem* par 75.

⁷⁸ *Idem* par 76.

⁷⁹ *Idem* par 77.

⁸⁰ *Idem* par 78. This view of African law clearly does not take into account the African metaphysical reality where the community concentrated on protecting women and children from the ravages of the outside world.

assumes any of the deceased's responsibilities, succession does not correspond to an enforceable responsibility to provide support to the deceased's family.⁸¹ The reason for this is that African law rules, which were captured in books and statutes, did not keep pace with the changing social contexts of the society they were meant to serve, in particular people who live in urban areas.⁸²

The court observed that when applied in circumstances that are vastly different from their traditional setting African law causes hardship, and concluded that the "official rules of customary law of succession are no longer universally observed", since the customary law in the "text books and in the Act is generally a poor reflection, if not a distortion of the true customary law". The latter should acknowledge the changes which take place on a continual basis.

However, changes did take place in social practice, leaving African law in the books fossilised. As a result, the rule of primogeniture could not be reconciled with the notions of the right to equality, to human dignity and the rights of children, which are protected in the Bill of Rights.⁸³ The court concluded that "the official system of customary law of succession is incompatible with the Bill of Rights. It cannot, in its present form, survive constitutional scrutiny".⁸⁴

Having declared both impugned provisions invalid, the court noted that it would not suffice to leave the matter there. It proceeded to consider the remedy which it would apply in the light of the following challenges:⁸⁵

- 1 the customary law of succession needed "to be regulated in terms of an appropriate norm",⁸⁶ that would replace the removed framework;

⁸¹ *Idem* par 80.

⁸² *Idem* par 82.

⁸³ The court held at par 95: "As the centrepiece of the customary law system of succession, the rule violates the equality rights of women and is an affront to their dignity. In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom."

⁸⁴ *Idem* par 97.

⁸⁵ *Idem* pars 107-115.

⁸⁶ *Idem* par 107.

- 2 due to the urgency of the matter, the declaration of invalidity could not be suspended to a future date leaving the impugned framework [in place] pending rectification by Parliament;⁸⁷
- 3 the court was not in a position to develop the rule of primogeniture as that effort involves determining the “true content of customary law as it is today”;⁸⁸
- 4 it would be inappropriate to use the “living” law as a remedy in this case as that entails a case by case development of customary law;⁸⁹
- 5 such a development would be slow, prolong uncertainties regarding the real rules of customary law, resulting in different solutions for similar problems;
- 6 such a lack of uniformity and the uncertainties it causes has already happened as some magistrates have resorted to the common law of intestate succession or formal rules of customary law;
- 7 the court had serious doubts that leaving the development of the “customary law of succession to the courts to develop piecemeal would be sufficient to guarantee the constitutional protection of the rights of women and children in the devolution of intestate estates”;⁹⁰
- 8 in the court’s view more direct action was required to save rights;⁹¹
- 9 the court concluded that the legislature was the appropriate forum to make the required adjustments needed to rectify the defects identified in the customary law of succession;⁹²
- 10 in conclusion the court adopted section 1 of the Intestate Act to avoid discrimination against extra-marital children, women, and all children.⁹³

⁸⁷ *Idem* par 108.

⁸⁸ *Idem* par 109.

⁸⁹ *Idem* par 112.

⁹⁰ *Idem* par 113.

⁹¹ *Ibid.*

⁹² *Idem* par 115

⁹³ *Idem* par 125.

The court proceeded to consider the advisability of applying the common-law based Intestate Succession Act⁹⁴ as the applicable remedy to replace the impugned legal framework. It noted the arguments that had been advanced against such an approach, which included the fact that the Intestate Succession Act was premised on the nuclear family model, and would not accommodate the extended families of customary law. It was argued that the adoption of the Intestate Succession Act was undesirable in view of the new status of African law as it would obliterate its system of succession.⁹⁵

To justify its decision to import the Intestate Succession Act, the court referred to the Law Reform Commission's recommendation that the Act, suitably modified, would be the appropriate remedy for the African law of intestate succession.⁹⁶ The court issued an order that it believed modified the Intestate Succession Act to African cultural contexts.

The effect of the decision was that the two Bhe daughters inherited child portions as the sole heirs to their deceased father's estate; and Ms Shibi inherited as the sole heir to her deceased brother's estate. However, as all this was achieved by reverting to common law, it does smack of jumping from the frying pan into the fire.

Due, possibly, to collective juristic amnesia,⁹⁷ the court applied common law despite the rule that it must apply customary law⁹⁸ and without first recording that African law was no longer applicable in the case before it. In other words, the court crossed over to common law whilst it was still bound by the section 211(3) imperative to apply African law as the applicable system. The only way the court could have freed itself from the obligation to apply African law, was to first enter a finding in the record of proceedings that African law was no longer applicable to the matter before it; and then to proceed according to the common law.

Unfortunately, both the majority and the minority judgments in the *Bhe-Shibi* matter

⁹⁴ Act 81 of 1987.

⁹⁵ *Bhe-Shibi* par 118.

⁹⁶ *Idem* par 120.

⁹⁷ See Ramose MB "The King as memory and symbol of African customary law" in Hinz MO and Patemann HK (eds) *The shade of new leaves: Governance in traditional authority – a southern African perspective* at 366.

⁹⁸ See section 211(3) of the Constitution.

refused to consider the possible existence of the new practice in the community. Instead, Langa DCJ held:

I have found that the primogeniture rule as applied in customary law is inconsistent with the constitutional guarantee of equality. The question whether the Court was in a position to develop that rule in a manner which would “promote the spirit, purport and objects of the Bill of Rights” evoked considerable discussion during argument. In order to do so, the Court would first have to determine the true content of customary law as it is today and to give effect to it in its order. There is however insufficient evidence and material to enable the Court to do this. The difficulty lies not so much in the acceptance of the notion of “living” customary law as distinct from “official” customary law, but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights.⁹⁹

From this dictum it is clear that Langa DCJ appreciates that the court had to determine the existence of the “living” law, before developing it to accord with the dictates of the Bill of Rights.¹⁰⁰ Yet this is the exercise he rejected as he found it difficult to engage with. Evidence on the status of a “living” version of the primogeniture rule could have enabled the court at least to hold that the “living” law did not exist, before choosing the common law course – despite suggestions that developing the rule would help the court to remove those aspects of primogeniture which made it unconstitutional. The court’s reasons for refusing to investigate the position in “living” customary law, and to develop it if necessary, amounted to a judicial repudiation of the injunction to apply and/or develop African law in its cultural context.¹⁰¹

The court’s refusal to comply with its constitutional mandate on this ground, amounts to second-guessing the wisdom of the drafters of the Constitution in enacting section 39(2) which appoints the court, not parliament, as the institution that must develop customary law. The judicial method was probably chosen because it possesses professional resources for tracing the various ways in which African law was gradually “Roman-Dutched” by legal interpretation. The judiciary was, therefore, in a position to fashion appropriate measures to restore genuine indigenous ways of doing justice.¹⁰²

⁹⁹ *Bhe-Shibi supra* par 109.

¹⁰⁰ *Idem* par 215 Ngcobo J says: “And what is more, the rule may already have been adapted to the ever-changing circumstances in which it operates”.

¹⁰¹ See section 211(3), 31 and 39(2) of the Constitution.

¹⁰² In *Bhe-Shibi supra* par 114 Langa DCJ acknowledges that there had been inordinate delays in the legislative efforts to reform customary law.

However, Langa DCJ issued the following statement which comes close to questioning the wisdom of the Constitution itself:

Changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there may well be different solutions to similar problems (par 112)
... I accordingly have serious doubts that leaving the vexed position of customary law of succession to the courts to develop piecemeal would be sufficient to guarantee the constitutional protection of the rights of women and children in the devolution of intestate estates. What is required, in my view, is more direct action to safeguard the important rights that have been identified (par 113)
... I consider, nevertheless, that the legislature is in the best position to deal with the situation and to safeguard the rights that have been violated by the impugned provisions. It is the appropriate forum to make the adjustments needed to rectify the defects identified in the customary law of succession.¹⁰³

6.3(iv) *Post-apartheid African law in the eyes of the Bhe-Shibi minority judgment*

Ngcobo J's minority judgment also found it inconvenient to embark on the identification of the "living" version of African law because it was not appropriate to do so where the issue before the court was the impact of the "official" rule on its victims. The judge opted to develop the impugned "official" rule to accommodate both men and women. Compared with the majority judgment, Ngcobo J's opinion goes a long way towards achieving the constitutional injunction to apply African law because it suggests a development of the primogeniture rule in line with the Bill of Rights.¹⁰⁴ In this way women could also be included to play the role of family headship previously reserved by the "official" version for the monopoly of senior males.¹⁰⁵

Ngcobo J suggests two ways of developing African law in terms of section 39(2) of the Constitution. The first is a judicial development of African law in terms of which the rule must be adjusted to meet the ever-changing needs of the community, as was done in the case of *Mabena v Letsoalo*.¹⁰⁶ In such a case there is, according to the judge, a need to identify the applicable "living" law, which must then be brought into line with the Bill of Rights.¹⁰⁷

¹⁰³ *Idem* par 115.

¹⁰⁴ In par 139 Ngcobo J says: "In my view the rule of male primogeniture should be developed to bring it in line with the rights in the Bill of Rights".

¹⁰⁵ *Ibid.*

¹⁰⁶ 1998 (2) SA 1068 (T).

¹⁰⁷ See *Bhe-Shibi supra* par 216.

Alternatively, he says, the other instance involves cases such as those that arose in the *Bhe-Shibi* matter, where the dispute involves the constitutionality of a rule that is being impugned for violating the victims' constitutional rights. In the latter event, Ngcobo J reasons that the "living" law is not involved, and there is no need to embark on its identification.

All that the court needed to do was to invalidate the impugned rule after finding it unconstitutional. Thereafter, it must develop the rule, to bring it in line with the Bill of Rights as was done in *Carmichele*.¹⁰⁸ In this regard Ngcobo J argues:

We are concerned with the development of the rule of male primogeniture so as to bring it in line with the right to equality. We are not concerned with the law actually lived by the people. The problem of identifying living indigenous law therefore does not arise. At issue here is the rule of male primogeniture which was applied in the *Bhe* and *Shibi* matters. It is that rule which must be tested against the right of equality, and if found deficient, as I have found, it must be developed so as to remove such deficiency.¹⁰⁹

Unfortunately, the minority judgment seems to be concerned with developing the existing "official" African law rule. The irony is that Ngcobo J is already aware of the possibility that a new rule may have developed in the community.¹¹⁰ On that basis he should have striven to find the new "living" African law rule from the binding habits of the customary law-making community and applied it if it was compliant with the Bill of Rights. However, Ngcobo J suggests that the impugned old apartheid rule must be developed without checking the existence of the "living", non-sexist version of the rule in social practice – which he suspects may exist.

The danger in Ngcobo J's approach is that it may lead to an anomalous situation where two rules apply simultaneously – the one growing from the popular habits of the community; and the other developed by the courts. Which one of the two rules would prevail as the law? In this scenario, the dichotomy between the "living" and the "official" versions would continue and would enjoy judicial approval.

¹⁰⁸ *Idem* par 218.

¹⁰⁹ *Ibid.*

¹¹⁰ *Idem* par 221.

What would happen in future, if people wished to enforce a “living” non-sexist version of the primogeniture rule, which could have recently grown from their binding practices and needed only to be identified and adopted by the court? Would the rule, suggested by Ngcobo J, developed by the judiciary from the old order “official” African law not amount to creating a second rule, which would place the court in competition with the customary law makers? Can the court afford to compete in the law-making process with the “fourth actor to the trio of the legislature, executive and judiciary – the people or communities who live by and create customary law”.¹¹¹

That Ngcobo J acknowledges the possible existence of a living rule, appears from his dictum. He says “many women are de facto heads of their families. They support themselves and their children by their own efforts. Many contribute to the acquisition of family assets”.¹¹² The “official” version of the primogeniture rule does not therefore reflect or accommodate the constitutional changes needed.¹¹³ This fact, together with Ngcobo J’s acceptance that some developments had occurred in social practice, should have persuaded him to opt for identifying the possibility of the existence of a “living” rule rather than developing the one he had just struck down.

The judge would then have checked its compliance with the Bill of Rights and effected whatever adjustments would be appropriate in terms of section 39(2). In this way, the court would have succeeded in complying with the constitutional imperative and also have closed the gap between official and social practice in African law. If it is accepted that social practice had evolved to the extent acknowledged by the judge to accommodate women to perform roles that traditional official regulation previously reserved for males, it is difficult to understand why it should not be possible to imagine the extent of that evolution in so far as issues of succession are concerned.

¹¹¹ Lenhert *op cit* 27.

¹¹² See par 221.

¹¹³ *Ibid.* However, the changes that have been found by the judge to have taken place are sufficient indication that a non-sexist “living” rule of primogeniture has evolved, and needed to be identified. In that event there could have been no need to develop one from the “official” rule that had already been found to be unconstitutional. Interestingly, the learned judge acknowledges that the current condition of women as confirmed in *Mabena* evidences the emergence of a new rule of “living” law.

Evidence could have been found, as was done in *Mabena v Letsoalo*,¹¹⁴ to establish whether any of the women whom the judge acknowledges as “*de facto* heads of families” got those positions through succession to family estates. For instance Ngcobo J could have confirmed his suspicion that some communities out there may already have a non-sexist “living” rule in place just awaiting judicial recognition and implementation.

The judge needed only to appreciate the trauma that would have to be endured by the adherents of African law, who had to continue being officially governed under a “developed” apartheid rule, whilst in fact living under their own “living” version in social practice. That appreciation would have convinced him that the option he chose was not the best way to re-indigenise a system that had been gravely distorted by Euro-Western application of the repugnancy clause during the previous centuries.¹¹⁵

Yet it is understandable that Ngcobo J chose to develop the dead “official” rule after realising that, in view of the cultural imperative to apply African law in the context of its normative values, the common law of intestate succession preferred by the court’s majority, was not a viable alternative.

His only alternative, therefore, was to propose the resuscitation of the “official” primogeniture rule that the court had just nullified for its sexism and racism and to develop it so that daughters and sons would be equally eligible for appointment as heirs. With respect, Ngcobo J thereby unwittingly lost sight of his constitutional mandate as he found himself transforming the apartheid primogeniture rule, instead of developing the version that is current in African culture, as required by the Constitution.

In the result, both the majority and the minority judgments in the *Bhe-Shibi* case fall far short of fulfilling the injunction to develop the version of African law envisioned by the Constitution. However, the difference between the two judgments is a matter of degree rather than substance. Ngcobo J’s minority judgment at least did not attempt to find a

¹¹⁴ See *Mabena v Letsoalo supra*.

¹¹⁵ See generally Mbatha L “Reforming the customary law of succession” (2002)18 *SAJHR* 259 and Lehnert *op cit* 241.

solution outside of African law. It picked up the rule that had just been nullified resuscitated and developed it, to become a non-sexist rule that accommodated both males and females. On the other hand, the majority of the court ignored the constitutional injunction completely and simply imported common law to trump African law.

In term of this analysis, the Constitutional Court has not always demonstrated as much commitment to the promotion of African values as it had promised in the *Alexkor* judgment. What seems to have worried the Constitutional Court more was the apparent approval of the unequal treatment of men and women shown in the *Mthembu* set of cases rather than the failure to affirm “living” African law in those same cases.

In doing so the Constitutional Court created the impression that it was more sensitive to the violation of gender equality than African culture. This espouses a liberal metaphysics which inclines towards affording the equality provisions (section 9), greater protection than the culture provisions (sections 30 and 31) of the same Bill of Rights. The judges were eager to “salvage” the image of the judiciary by overruling the “embarrassing” inferiority of African women endorsed in the *Mthembu* set of cases.

In the final analysis, the Constitutional Court set out to choose between two constitutional injunctions; namely, to ensure that African women and children were treated equally to their counterparts from other race groups; and to ensure that African values were affirmed. It chose the former at the expense of the latter. To conclude, it can be said that although in the *Bhe-Shibi* matter the distorted “official” legal framework based on section 23 of the Black Administration Act was dismantled, the court fell short of achieving the envisaged post-1994 African law of succession.

In fact the mischief of “Roman-Dutching” African law, which the section 211(3) application clause seeks to discourage, was actually promoted by allowing Roman-Dutch law to interpose in an African law matter. Moreover both the *Mthembu* and the *Bhe-Shibi* courts did not consider holding the heirs to their traditional responsibilities under African values, in terms of which the heirs must demonstrate their communal

commitment to their family members before they could be awarded their customary titles.¹¹⁶

6.4 The principle that African custom is the source of the powers of traditional authorities

The maxim *morena ke morena ka batho* (Sesotho)/*inkosi yinkosi ngabantu* (isiXhosa/isiZulu) circumscribes public power to the will of the people as manifested by social practice.¹¹⁷ In terms of this principle public authorities have no power to act contrary to custom unless the people have taken a resolution in a properly constituted assembly to amend that custom. The Constitution recognises this principle by providing that traditional authorities must function according to African law.¹¹⁸ In *Shilubana v Nwamitwa*¹¹⁹ the Constitutional Court was presented with a golden opportunity to demonstrate the court's commitment to enforcing the constitutional recognition of this custom.

The background to the *Shilubana* case is that Hosi (Chief) Fofeza Nwamitwa of the Valoyi Traditional Community died in 1968, leaving no male issue. The appellant, Ms Shilubana, was his only daughter and child. She was not eligible to succeed him because of the laws of 1968 which did not permit women to succeed. The application of the primogeniture rule which regulated matters of succession required the appointment of the most senior male relative of the deceased. Consequently, the deceased's brother, Richard Nwamitwa was appointed hosi. Hosi Richard Nwamitwa, in turn, died in 2001 and was survived by his son, Sidwell Nwamitwa, who expected to succeed him.

¹¹⁶ See Bronstein V "Reconceptualizing the customary law debate in South Africa" (1988) 14 *SAJHR* 388.

¹¹⁷ See Mahao NL "O se re ho m orwa 'm orwa towe!' – African jurisprudence exhumed" (2010) *XLIII/3 CILSA* 317 at 322.

¹¹⁸ Section 211(1) of the Constitution reads:

The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

See also section 212 which provides –

(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law-

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders.

¹¹⁹ 2008 (9) *BCLR* 914 (CC) (hereafter *Shilubana 2*).

Meanwhile, in 1996 and 1997, during the life-time and with the cooperation of Hosi Richard Nwamitwa, the Valoyi Royal Family passed certain resolutions through the Tribal Council and the Royal Council, accepting Ms Shilubana as the successor to Hosi Richard Nwamitwa as the hosi of the Valoyi Traditional Community, on the basis that she was now eligible to be appointed as the traditional leader as males and females are equal under the Constitution.

After the death of Hosi Richard Nwamitwa in 2001, the Limpopo Provincial Government proceeded with arrangements to install Ms Shilubana in terms of these resolutions. Sidwell Nwamitwa, however, obtained an interdict from the Pretoria High Court against Ms Shilubana, the Traditional Council and the government, alleging that Ms Shilubana and the authorities had acted unlawfully.

According to Sidwell, his status as the customary successor to Hosi Richard Nwamitwa's position could not be lawfully altered by appointing Ms Shilubana as hosi. Thereupon the High Court issued a declaratory order,¹²⁰ approved by the Supreme Court of Appeal (SCA),¹²¹ confirming that Sidwell was the rightful successor to Hosi Richard Nwamitwa, as the hosi of the Valoyi Traditional Community. Neither court disputed that under certain circumstances customary law allowed women to succeed to traditional leadership.

The High Court¹²² and the SCA held that Sidwell Nwamitwa, the eldest child of the previous hosi was the rightful successor, because in 1968 the ruling lineage was moved from that of Hosi Fofozwa Nwamitwa, to that of Hosi Richard Nwamitwa. This change was validly effected according to the law applicable in 1968 which could not be reviewed under the Constitution. According to these courts their decision that Sidwell Nwamitwa was the rightful successor was based on lineage and had nothing to do with gender discrimination.

Ms Shilubana took the matter on appeal to the Constitutional Court, where Van der

¹²⁰ See *Nwamitwa v Philia and Others* 2005 (3) SA 536 (T).

¹²¹ See *Shilubana and Others v Nwamitwa* 2007(2) SA 432 (SCA) (hereafter *Shilubana 1*).

¹²² See *Nwamitwa v Philia and Others* 2005 (3) SA 536 (T).

Westhuizen J blamed both the High Court and the SCA for undermining the ability of the traditional authorities to develop their African law.¹²³ Whilst the judge emphasised the need for the courts to recognise the African law practised by a community, he acknowledged the difficulty of determining African law but pointed out that section 211 of the Constitution was the starting point.¹²⁴ In so doing, he agreed with Langa DCJ in the *Bhe-Shibi* case that the import of this section is that African law “is protected by and subject to the Constitution in its own right”.¹²⁵

He stressed that African law, like any other law must accord with the Constitution; that its status requires respect; that it must be recognised as an “integral part of our law” and constitutes “an independent source of norms within the legal system”.¹²⁶ Of importance to Van der Westhuizen J was the fact that African law is a body of law by which millions of South Africans regulate their lives.

From the above analysis of the nature of customary law under the Constitution, Van der Westhuizen J extracted the following factors that must inform any determination of the content of African law:

- 1 There must be a consideration of the traditions of the community concerned.¹²⁷ This is because customary law has developed over a number of centuries. An enquiry into customary law involves past practices of the community. This involves focusing on the system’s own setting, rather than viewing it in terms of the common law paradigm.¹²⁸ In this regard one has to be wary of the distorting tendencies of older authorities, which often viewed customary law through conceptions foreign to it.¹²⁹
- 2 Traditional authorities have a right in terms of section 211(2) of the Constitution, to develop their law.¹³⁰ According to the judge, the right of the

¹²³ *Shilubana* 1 par 85.

¹²⁴ *Idem* par 116.

¹²⁵ *Idem* par 43 quoting *Bhe-Shibi supra* par 41.

¹²⁶ *Shilubana 2 supra* par 43 quoting *Richtersveld Community supra* par 51.

¹²⁷ See *Shilubana 2 supra* par 44.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Idem* 45.

communities under this sub-section includes the right of traditional authorities to amend and repeal their customs. This is because of the evolving nature of customary law, which was frustrated and stagnated under the discriminatory policies of the past. In the present era, the communities must be encouraged to develop their laws.¹³¹ This can be done by determining both the history and the usage of the community, because the “living” customary law is not always easy to establish, and sometimes impossible to determine.¹³² In the event of a dispute as to the “living” law, the parties must prove it by means of evidence, which the courts must examine in its context, and must acknowledge any developments that may have occurred.

- 3 There is a need for flexible development, and the mandate to facilitate this must take cognisance of the fact that customary law regulates the lives of people. Such considerations must be balanced against the values of legal certainty, respect for vested rights, and the protection of constitutional rights. Van der Westhuizen J recalled that in attempting to perform this balancing act, the Constitutional Court had refrained from developing the customary law of succession in the *Bhe-Shibi* case for fear that such development would result in piecemeal, slow, and inadequate protection for women and children. At the same time, the new dispensation opens the possibility for the parties to make their own arrangements on the devolution of estates.¹³³
- 4 A further factor was the distinction between the development of African law by the courts, which had to take account of their obligations under section 39(2) of the Constitution, and the development by the customary community. Unlike the community, the courts must ensure the rule’s compliance with the Bill of Rights, once they have decided that it needs to be developed.¹³⁴ If, however, the development has occurred within the community, the court must strive to recognise and give effect to that development, taking into

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

account the imperative to comply with both section 39(2) and to defer to the right of the customary community to develop their laws.¹³⁵

Having laid down the rules for determining customary law, the court proceeded to apply them to the dispute at hand. It started with Sidwell's two-pronged claim that as the eldest son of the previous hosi, he was entitled to succeed as of right, and that the confirmation of his status by the traditional authority was simply a formality.

Secondly, Sidwell claimed that Ms Shilubana's attempted installation was grossly irregular and of no force or effect in that the traditional authority had no power to appoint someone other than the heir. According to Sidwell the actions of the traditional authorities could not have the effect of changing the law to the extent that it would allow them to do what they traditionally could not do.¹³⁶

Van der Westhuizen J referred to the classical test of the existence of custom as expounded in the case of *Van Breda and Others v Jacobs and Others*,¹³⁷ which held that for a practice to be recognised as law, it had to be certain, uniformly observed for a long period of time, and reasonable. He then recalled that the Constitutional Court judgment in the *Alexkor* case had cast doubt on the appropriateness of the Van Breda test for establishing customary law.¹³⁸ Van der Westhuizen J argued that this issue needed to be finally decided and held:

Van Breda dealt with proving custom as a source of law. It envisaged custom as an immemorial practice that could be regarded as filling in normative gaps in the common law. In that sense, custom no longer serves as an original source of law capable of independent development, but survives merely as a useful accessory. Its continued validity is rooted in and depends on its unbroken antiquity. By contrast, customary law is an independent and original source of law. Like the common law it is adaptive by its very nature. By definition, then, while change annihilates custom as a source of law, change is intrinsic to and can be invigorating to customary law.¹³⁹

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ 1920 AD 330.

¹³⁸ See *Shilubana 2 supra* par 53.

¹³⁹ *Idem* 54.

The court held that the Van Breda test cannot be used to accomplish the development of the “living” law that section 211(2) of the Constitution requires. It argued that this section demands that customary law must be permitted to develop, and the enquiry as to whether that has happened must be rooted in the contemporary practice of the community.¹⁴⁰

In the course of this enquiry, information regarding past practice is important, and where this is not in dispute, it is often conclusive of the content of customary law. However, where contemporary practice has been proved, it means that customary law has evolved. In that situation past practice can no longer prevail.

Van der Westhuizen J concluded:

Where a norm appears from a tradition, and there is no indication that a contemporary development had occurred or is occurring, past practice will be sufficient to establish a rule. But where the contemporary practice of the community suggests that change has occurred, past practice alone is not enough and does not on its own establish a right with certainty, as the three- factor test set out above makes clear. Past practice will also not be decisive where the Constitution requires the development of the customary law in line with constitutional values.¹⁴¹

The requirement of past consistent application of the rule is the test that any new development of the “living” law must necessarily fail because development implies departure from past practice.¹⁴² Adherence to that requirement would result in the court applying rules which the communities no longer observe, thus stifling the recognition of new social practices in response to the changing face of the society under the Constitution.¹⁴³

The court therefore held that the Van Breda test cannot be applied where the issue is the development of “living” African law. Having emphasised the importance of recognising contemporary practices in the context of a developing African law, Van der Westhuizen J went on to issue the following warning against the notion that African law needs always to be proved in order to be determined:

¹⁴⁰ *Idem* 55.

¹⁴¹ *Idem* 56.

¹⁴² *Idem* 55.

¹⁴³ *Ibid.*

It is not to say that customary law must in the ordinary course be proven before a court before it can be relied upon. The time when customary law had to be proved as foreign law in its own land is behind us.¹⁴⁴

On the basis of this analysis, the court held that as important as the past practice of the Valoyi community was, it was not decisive in determining Sidwell's entitlement to the right that he claimed. The court found that in agreeing with Sidwell that the traditional leadership in the Valoyi community was a matter of birth, as opposed to election, the High Court¹⁴⁵ and the Supreme Court of Appeal¹⁴⁶ found that the traditional authorities had acted unlawfully in attempting to install Ms Shilubana contrary to African law. Van der Westhuizen J referred to the following dictum to illustrate the basis on which the High Court rested its decision:

I accept that the royal family plays an important role. I have not heard evidence as to its position generally. As far as the successor to the Hosi is concerned it is the repository (and I say this without disrespect), it really plays a formal role in that it does not elect a Hosi, it recognises and confirms a Hosi. Where there is not a Hosi or the candidate is not suitable, it may play a more direct role (but that was not the case here).¹⁴⁷

Van der Westhuizen J doubted whether the pre-amendment African law of the Valoyi community could have permitted the installation of Ms Shilubana, and noted that the Royal Family, which included the late Hosi Richard Nwamitwa, were motivated by the fact that the Constitution considers female and male children equals.¹⁴⁸

In the light of the status of African law under the Constitution the judge decided rather to consider the actions of the Valoyi authorities, and concluded that they amounted to restoring the office of traditional leadership to a woman who would have been appointed in that position in 1968, were it not for the fact that she was female. The court then held:

¹⁴⁴ *Idem* 56.

¹⁴⁵ *Nwamitwa v Phyllia and Others supra*.

¹⁴⁶ *Shilubana 1 supra*.

¹⁴⁷ See *Shilubana 2* par 64 where Van der Westhuizen J quoted from the High Court case of *Nwamitwa v Phyllia and Others supra* at 545.

¹⁴⁸ *Shilubana 2* par 67.

As far as lineage is relevant, the chieftainship was restored to the line of Hosi Fofzo from which it was taken away on the basis that he only had a female and not a male heir ... Accordingly, this court has no basis on which to overturn the High Court's finding that, in terms of the existing customary law, the role of the Royal Family is more than formal only where there is no candidate for the chieftainship or where the candidate is not suitable, which is not alleged to be the case in the present matter. However, even if the High Court was correct on this point, it must be true that the traditional authorities had the power to act as they did, for the reasons that follow.¹⁴⁹

On this basis, Van der Westhuizen J proceeded to justify his finding as follows:

The traditional authorities' power is the high water mark of any power within the traditional community on matters of succession;¹⁵⁰

if the authorities have only the narrow discretion the High Court found them to have had, it follows that nobody in the community has more power here than those authorities;¹⁵¹

this would mean that no body in the customary community would have the power to make constitutionally-driven changes in traditional leadership.¹⁵²

The judge demonstrated how the narrow view favoured by the High Court would frustrate the traditional authorities' efforts to effect constitutionally mandated changes because it meant that, where a suitable male heir exists, such authorities cannot appoint a woman as hosi even if she is the eldest child of the previous chief, Such traditional authorities would have to approach the courts in order to be able to appoint a woman as hosi.¹⁵³ Section 211(2) of the Constitution, however, gives traditional communities the power to function subject to African law. This includes amendment and repeal of laws. In terms of this provision, the judge opined, the Constitution empowers the community to bring its laws in line with the Constitution, and strives to avoid a result that would be both contrary to its section 211(2) and "disrespectful of the close bonds between a customary community, its leaders and its laws".¹⁵⁴

¹⁴⁹ *Idem* pars 70-71.

¹⁵⁰ *Idem* par 72.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Idem* par 73.

Van der Westhuizen J spelt out his view of the court's developmental role in terms of section 39(2) of the Constitution as including empowering the community itself to achieve the objectives of the Bill of Rights for its African law, through incremental amendments.¹⁵⁵ According to the judge, even if it was true that the traditional authorities had no power to improve their laws, their power would have to be expanded to enable them "to act on constitutional considerations in fulfilling their role in matters of traditional leadership".¹⁵⁶ He regarded the appointment of a female hosi as development of African law.¹⁵⁷

Unlike in the Bhe-Shibi case where vulnerable persons needed to be protected by the installation of interim measures pending the enactment of legislation in order to avoid legal uncertainty, the judge found that such concerns do not arise where the installation of a particular leader arises from written resolutions which do not have a country-wide effect.¹⁵⁸ The court held that in making such a decision, the judge must guard against possible violations of vested rights where there is a reigning hosi. As there was no such hosi in the Shilubana matter Sidwell's (respondent's) expectation, which was based on the 1968 change of lineage and past practice cannot override the decision of the traditional authorities to align their law with the Constitution.¹⁵⁹ Such a decision necessarily changes the rule that a hosi must always be fathered by the previous hosi since past practice cannot render the actions of a traditional authority illegitimate.¹⁶⁰ Whilst rejecting respondent's theory that moving the traditional leadership one generation back to the line of Hosi Fofeza Nwamitwa would obliterate the entire Nwamitwa traditional leadership, the court conceded that the woman's installation leaves some questions relating to how the Valoyi succession will operate in the future unanswered.¹⁶¹

The court, however, relied on the nature of customary law as a "living" system that will be interpreted, applied, amended or developed by the community and the courts in

¹⁵⁵ *Idem* par 74.

¹⁵⁶ *Idem* par 75.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Idem* par 77.

¹⁵⁹ *Idem* par 78.

¹⁶⁰ *Idem* par 79.

¹⁶¹ *Idem* pars 80-81.

future, with due observance of existing “customs, traditions, previous circumstances and practical needs, and of course, the demands of the Constitution as the supreme law”.¹⁶² The court concluded the question of future succession to the Valoyi traditional leadership thus:

First, whereas the Valoyi people moved away from any previously existing rule that a woman could never be a Hosi, other aspects of the customs and traditions governing chieftainship are not necessarily affected. For example, to the extent that the principle that a Hosi is born and not elected indeed exists, it is not necessarily changed by this ruling. Ms Shilubana was born as the child of a Hosi. She was not elected from a number of candidates who campaigned for the position. Her birth was crucial to the decision of the Royal Family.¹⁶³

Second, such additional developments of the law as Ms Shilubana’s installation may necessitate are in the first instance a matter “for the relevant traditional authorities, acting in accordance with custom, practical needs and the Constitution. These future decisions are not before this Court, and nothing further need be said about them”.¹⁶⁴

In the result, the court affirmed the right of a traditional community to develop its law, and held that it is not outweighed by factors of legal certainty and the protection of vested rights. In the court’s view, the Royal Family has the authority to affirm constitutional values in its community, and there is no reason for refusing to recognise their actions in this regard.¹⁶⁵

It criticised the High Court and the SCA for not recognising the power of the traditional authorities to change their law, as

too narrow, tied to the statement that a Hosi is never appointed, but born, and unable to countenance that the lineage would change from that of Hosi Richard to that of Hosi Fofeza. They gave insufficient consideration to the historical and constitutional context of the decision, more particularly the right of traditional authorities to develop their customary law.¹⁶⁶

Consequently, the Constitutional Court arrived at the decision that Sidwell’s expectation

¹⁶² *Idem* par 81.

¹⁶³ *Idem* par 82.

¹⁶⁴ *Idem* par 83.

¹⁶⁵ *Idem* par 84.

¹⁶⁶ *Idem* par 85.

did not amount to a right to succeed his father as hosi. That being the case, the traditional authorities acted validly in changing their law to accommodate the appointment of women. As the traditional authorities can decide that Ms Shilubana will be succeeded by a “sociological” child (born of the male Nwamitwa bloodline) the decision by the traditional authorities does not suggest that Ms Shilubana will be succeeded by her own child or by a female. The decision of the Traditional Authority was therefore an attempt to combine the preservation of royal bloodline with measures to oppose gender discrimination.¹⁶⁷

For two reasons *Shilubana 2* can be proffered as the most decisive judgment on the status of African law and its institutions under the Constitution. This case not only confirms the demise of the primogeniture rule that was announced by the Constitutional Court in the case of *Bhe-Shibi*; it also extends the declaration of its unconstitutionality to the public law sphere by tackling the delicate matter of succession of women to traditional leadership which was left unresolved in the latter case.¹⁶⁸

In *Shilubana 2*¹⁶⁹ the pervasive question of the applicability of the “living” law emerged once again. Van der Westhuizen J states clearly that the first step to be considered is the past practice of the community, which, if it is not disputed, the court must enforce, subject to its compliance with the Constitution. If a new practice has been proved, however, the court must, after considering its consistency with the Constitution, accept that the law has developed and give effect to it.

Van der Westhuizen J’s judgment goes further than the *Bhe-Shibi* judgment, and makes it compulsory for the court to investigate the possible existence of both past practice and if it no longer exists, the current practice of the community. In this way, the Constitutional Court moved away from the common law prism embraced by the *Bhe-Shibi* majority. The court also abandoned the focus on the development of the discredited “official” version proposed by the minority judgment in the *Bhe-Shibi* case.

¹⁶⁷ *Idem* par 90.

¹⁶⁸ In *Bhe-Shibi* *par supra* par 94 Langa DCJ writes: “Nor, I emphasise, does this judgment consider at all the constitutionality of the rule of male primogeniture in other contexts within customary law, such as the rule which govern status and traditional leaders”.

¹⁶⁹ See *Shilubana 2*.

According to Van der Westhuizen J, only community practice, past or present, is relevant. The lens of the common law used by the majority, and the “official” apartheid version, developed by the minority, were not even considered by Van der Westhuizen J. It is unfortunate that he proceeded to embark on a somewhat bizarre recognition of the legislative capacity of the Valoyi Royal Council and its traditional council to amend customary law without the participation of the customary community. This is contrary to the African tradition which designates the customary community, operating within traditional institutions, as the law-maker.¹⁷⁰

With respect, the Constitutional Court misconstrued the powers of the traditional council under the Constitution to mean that such council can function outside of its traditional setting. As a result the court failed to see the nefariousness of the reasons behind the exclusion of the community assembly when the traditional council embarked on the legislative process.

The following are the obvious reasons why the traditional authorities avoided the involvement of the assembly of the community:

- 1 The traditional council wanted to push their agenda of appointing a woman as a senior traditional leader without the leadership having to answer uncomfortable questions from the traditional community;
- 2 The traditional council knew that there was no crisis of succession in their chieftdom as the previous incumbent, Hosi Richard Nwamitwa, had left an eligible successor, Sidwell Nwamitwa. The community would therefore have wanted to know what the compelling reason was for overlooking him.
- 3 The judgment of Swart J in the High Court,¹⁷¹ which was confirmed by the SCA,¹⁷² clearly stated how the lineage was legally and customarily transferred from Hosi Fofozza’s lineage to Hosi Richard’s; thus establishing a new lineage in 1968.

¹⁷⁰ See Lehnert *op cit* 241.

¹⁷¹ See *Nwamitwa v Philia and Others* 2005 (3) SA 536 (T).

¹⁷² See *Shilubana* 1.

This transfer of lineage was justified by the impending crisis occasioned by the death of Hosi Fofeza, without an eligible successor. A community assembly would have insisted on the balancing of the tension between the constitutional imperative to achieve gender equality and the cultural imperative to preserve community's identity through the male line.

Failure to summon the community assembly amounted to a subversion of the principle of participatory democracy, which the Constitutional Court had previously emphasised.¹⁷³ It also translated into the disenfranchisement of the customary community as "law-makers" who discovered that their traditional law-making role had been usurped by the administrative traditional council. The judgment also entailed a violation of the principle of legality which insists on respect for the vested interests of Sidwell who was, under custom entitled to succeed his father. It further went against the principle of legitimate expectation which requires compelling reasons for overlooking the natural successor whom the community expected to succeed.¹⁷⁴

In short the unanimous decision by Constitutional Court represents yet another lost an opportunity to set guidelines for the implementation of the gender equality imperative in African law matters. A thorough airing of this matter was desirable in view of the sensitivity of gender equality in the largely patriarchal environment of the institution of traditional leadership. The judgment also paved the way for a future succession crisis by creating a perception that the court has no regard for the development of a strong institution of traditional leadership in South Africa. In endorsing a traditional council's female-empowerment decision without putting a viable succession plan in place, *Shilubana 2* abolished the African law tradition that ensured the provision of a natural successor to every traditional leadership position.

The woman who was appointed as traditional leader was married to another family, and had already given birth to children who were not members of the eligible royal family –

¹⁷³ See *Matatiele Municipality v President of the Republic of South Africa* 2007 (1) BCLR 47.

¹⁷⁴ On legitimate expectation see generally *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A); *President of RSA and Others v SARFU and Others* 2000 (1) SA 1(CC); and *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C).

and are therefore commoners – who could not succeed her in that position. Significantly, the judge appreciated the crisis he had caused to the customary law of intestate succession. He found that the answers to the questions regarding the future succession to the appointed woman traditional leader must be left for the day when they arise, but that they were not then before the court. This admission of the awareness of the judicial abolition of customary law systems exposes the court's inability to successfully implement the constitutional injunction to institutionalise African law.

The Constitutional Court has even conceded that the solution it has brought is dysfunctional to, and has paralysed, the institution of traditional leadership by expecting the traditional authorities again to meet and decide on Shilubana's successor when that day comes.¹⁷⁵ The court abdicated its constitutional injunction to balance gender equality with African culture, by deciding to abandon a system of governance that provided the institution of traditional leadership with a smooth succession scheme throughout the country.

The impugned indigenous succession scheme had the merit of preserving the constitutionally protected identity of the newly enfranchised black majority, by ensuring the self-generating stability and certainty of the royal household which kept the position of hosi in the male line. The court created unprecedented levels of uncertainty because:

- 1 Before the judgment, it was always certain who the next traditional leader would be, but in the wake of the judgment this is no longer the case.
- 2 The court itself acknowledges this fact by conceding that the traditional authorities will have to meet and find solutions each time a succession issue arises.
- 3 Succession through the male line provides the link between the ruling agnatic family and the traditional community.
- 4 By severing this link, the judgment has threatened the survival of customary law and its institutions.

¹⁷⁵ See *Shilubana 2* par 83.

- 5 By endorsing the decision of the elite traditional council to change the existing customary law in the absence of the traditional community (that is the customary law-maker) the court violated the principle of participatory democracy.

Judicial approval for decisions of elitist groups such as this one is a divisive act of authoritarianism which risks being resisted by the constituency. The Constitutional Court endorsed a law amendment made by a traditional council, without tabling it before the community for deliberation as required by African law. This error is a reflection of a narrow construction of the powers of law amendment that section 211(2) of the Constitution confers on the traditional councils.

In fact this section does not abolish the traditional African law-making processes but recognises the powers of traditional councils to introduce changes to the law through the normal traditional legislative process before the assembly of customary law makers. The Constitution neither created this provision as a new power for the traditional council to exercise, nor repealed the customary one allowing the community to participate. It merely recognised the role of the traditional council.

However, the court appears to have felt that it was dealing with a new provision that created a power that African law did not have. As a sequel to its literal interpretation that traditional councils could make law without traditional communities, the court endorsed the elitist procedure followed by the council. In so doing, the court lost sight of the fact that the Constitution gave the council the licence to make law in accordance with African law procedures only.¹⁷⁶ Such procedures require the traditional authorities to table the item in the agenda and put it before the assembly of the people during legislative proceedings.

The matter must be introduced, deliberated upon and adopted as law or as an amendment to the law. In *Shilubana 2* the court balked at the thought that denying the

¹⁷⁶ In *Shilubana 2* par 39 the Congress of Traditional Leaders of South Africa (Contralesa) is reported to have queried the validity of the amendment of the Valoyi custom by only a limited discussion by a privileged few participants without calling a people's assembly as required by customary law.

council the power to legislate would leave that community powerless to develop their law.¹⁷⁷ With respect, the court's fears were unfounded, as the community could still legislate through their popular assembly where the council's objectives would be tabled, canvassed, and accepted, before being implemented.

This is the process that would have eliminated resentment and promoted democracy, popular participation, and, above all, affirmed African culture. In any event, the court's interpretation that section 211(2) of the Constitution gives the traditional authority power to amend applicable legislation is highly contestable. With due respect, a proper interpretation of the Constitution is that the section gives such authorities the power to function according to legislation, but not to amend it.¹⁷⁸ The latter is a parliamentary function which is not accessible to traditional authorities.¹⁷⁹

Indeed, the Constitution could never have allowed traditional authorities to amend parliamentary legislation. This is unthinkable in the South African situation, where hundreds of traditional authorities would thereby be empowered to make thousands of disparate legislative amendments independently of parliamentary control. The traditional authority does not have a structure at its level, by which to amend legislation in a manner that would warrant the approval of the Constitutional Court. In fact the Constitution mandated the traditional authority to function subject to amendments to or repeals of such "legislation or custom". It is therefore submitted that functioning subject to the amendment to or repeal of the law is not the same as being able to amend or repeal such law. Interestingly, the court held:

Section 211(2) specifically provides for the right of traditional communities to function subject to their own system of customary law, including [functioning subject to] amendment or repeal of laws.¹⁸⁰

Yet the court misconstrued the Constitution by creating the impression that it

¹⁷⁷ *Idem* par 72.

¹⁷⁸ Section 211(2) reads: "A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs."

¹⁷⁹ See section 43 of the Constitution.

¹⁸⁰ See *Shilubana 2* par 42.

empowered traditional authorities to amend and repeal “legislation or custom”. Consequently, it approved an amendment of the law by a traditional authority without the necessary support of the traditional community. In so doing, the court created the impression that the traditional community itself had acted. Secondly, even if the traditional authority had such capacity at its level to amend the law, it would not have been exercised by an administrative body such as the traditional council.

With regard to section 39(2) of the Constitution, the traditional council cannot develop the law. This is an interpretive provision to be used by “every court, tribunal or forum”.¹⁸¹ Most probably, the Constitution here envisaged a “traditional court”, which would qualify as a judicial tribunal or forum, and thus have interpretive powers and functions; but certainly not such an administrative institution such as the traditional council. The latter is an administrative body which cannot exercise the section 39(2) legal developmental powers, which are essentially of a judicial nature.

The envisaged section 39(2) legal development cannot be performed at a meeting of councillors performing administrative functions. It can only happen during judicial proceedings. With respect, therefore, the court erred in concluding that “court, tribunal, or forum” includes an administrative body such as the traditional council. Being an interpretive provision section 39(2) refers only to tribunals and forums that operate in an interpretive context, which is beyond the ambit of the traditional council or, for that matter, any other administrative body.¹⁸²

6.5 The principle that an individual always functioned within the milieu of the collective

The High Court judgment in *Mabena v Letsoalo*¹⁸³ is a manifestation of the proper

¹⁸¹ See Mailula D “Abdication of judicial responsibility, cultural self-determination and the development of customary law: Lessons from *Shilubana*” (2008) 23 *SAPR/PL* 215.

¹⁸² Administrative councils such as traditional councils, municipal councils, provincial councils, or national council (cabinet) do not have judicial functions, and therefore cannot interpret or develop the law. They are therefore not included in the judicial/interpretive institutions listed as “court, tribunal, or forum” in section 39(2) of the Constitution. In this context the Constitution has in mind institutions such as the superior court, magistrate’s court, or traditional court which have legal developmental/interpretive functions.

¹⁸³ See *Mabena v Letsoalo supra*.

affirmation of African law where the judge deviated from the ready-made “official” version and traversed the difficult path of finding the contemporary version of African law. The court abandoned the outdated “official” rule which demanded that the prospective husband always be represented by his father in *lobolo* negotiations. The court endorsed the “living” rule that had emerged in social practice, allowing the husband’s personal involvement in these negotiations for his own wife where the father could not fulfil that function.

In the same case the High Court went further and rejected the old “official” African law principle that African women were perpetual minors by endorsing the right of the bride’s mother to represent her marital family in the *lobolo* negotiations of her daughter, whose father was absent and had abandoned the family. Whilst the High Court was motivated by the constitutional principle of equality in affirming the rights of these individuals to fully participate in the affairs of their families it found itself harmonising the communal tradition of participation in *lobolo* negotiations with the democratic principle of equality. The end result was that the High Court, perhaps inadvertently, recognised the principle of African law that individuals always represented their family collectives.

In the process the husband’s African law standing as a representative of his side of the bargain in *lobolo* negotiations was affirmed as well as the mother-in-law’s status as a full member and representative of her marital family. This was a departure from past practice, where “official” customary law demanded that a fully-grown man should seek the consent of his father and a mother of a family depended on her absent husband in these matters.

Ultimately the result of the case addressed the question of agency in African law where the group consists of inter-connected individuals, whilst each individual operates in the context of a group. The Constitution covers this phenomenon as it recognises the nation as a united collective that acknowledges the diversity of individuals and groups. Hence the opening statement in the preamble is “We, the people...united in our diversity”. In this way the Constitution mandates the nation to undertake its fundamental tasks as a collective in, for example, recognising the injustices of the past, honouring

those who suffered, respecting those who have worked, healing the divisions of the past, laying the foundations of democracy, improving the quality of life and building a united South Africa. This is a powerful basis on which to claim the recognition of the values of common belonging, inclusiveness and group solidarity that feature so prominently in African culture. It is therefore not difficult to re-imagine how the individualistic nature of the rights in the Bill of Rights derived from the common law can be re-interpreted to accommodate the communal spirit of African jurisprudence.

6.6 The principle that the crux of the customary marriage is the *lobolobogadi* covenant

In the case of *Mabuza v Mbatha*¹⁸⁴ it was common cause that a customary marriage was successfully negotiated by the families of the spouses, and that the *lobolobogadi* goods were properly delivered as required by custom. However, the validity of the customary marriage was assailed on the basis of non-observance of an archaic practice known as *ukumekeza*, which entailed smearing the bride's face with red ochre by women and girls of her marital family as a sign of integrating her into that family.

The attack aimed at vitiating the validity of the customary marriage on the basis that the bride was never integrated into the marital family through the so-called *ukumekeza* practice. The High Court noted that the *ukumekeza* practice was not one of the listed requirements for the validity of a customary marriage, and rejected the argument that its non-observance negatively affected the validity of the marriage. The court observed that marriage goods had been delivered in a proper customary celebration following the conclusion of *lobolobogadi* negotiations.

In this way the court deviated from the "official" customary law of the old order which enforced the *ukumekeza* practice as part of the Swazi tradition and adopted the progressive route of upholding the validity of the marriage based on its requirements. In the end the non-observance of a non-central ritual was not allowed to vitiate the validity of a properly celebrated marriage.

¹⁸⁴ See *Mabuza v Mbatha* 2003 (7) BCLR 43 (C).

Most recently, Tshigi J had an opportunity to preside over *Maluleke and Others v The Minister of Home Affairs and Another*¹⁸⁵ in the Witwatersrand Local Division, where the validity of a customary marriage was impuned on the basis that the traditional *imvume* ritual, the Zulu variation of *ukumekeza*, for integrating of the bride into the groom's family had not been observed before the death of the husband. Tshiqi J examined the requirements for a valid customary marriage as laid down in section 3 of the Recognition of Customary Marriages Act.

On the basis of these requirements the judge concluded that customary marriage has evolved over the years, and that this evolution has been accepted by the South African courts. She then rejected the pre-transformation "official" version of customary law which held that the non-observance of the *imvume* ritual was fatal to the validity of a customary marriage. The judge accordingly approved the bride's averment that the *imvume* practice was not an essential requirement for the validity of her customary marriage.

This conclusion was reached after the court rejected Professor JC Bekker's expert opinion that until there was a form of integration of the bride into the bridegroom's family by means of the *imvume* ceremony, there could be no valid customary marriage. The expert's opinion conflicted with Bekker's own concession that "as a result of urbanisation and social and economic factors, tradition and custom have evolved to the extent that some families dispense with the formal and elaborate festivities that used to be held in the past to signify the integration of a bride into the groom's family".

Tshiqi J concluded by reviewing the provisions of the Recognition Act regarding the requirements of a customary marriage as follows:

As the Act specifically requires, for the validity of a customary marriage that it "be negotiated" and that it be "entered into" or "celebrated", the negotiations, which, in many instances involve and culminate in *lobola* payment therefore seem to be the fundamental stage in the conclusion of customary marriages. The negotiations and payment of *lobola* are crucial in signifying an intention to marry and consequently

¹⁸⁵ See *Maluleke and Others v The Minister of Home Affairs and Another* Case no 02/24921 [2008] ZAG PHC 129 (9 April 2008) (unreported).

indicate that the parties plan to advance beyond mere cohabitation. Once it is clear that the negotiations have taken place, the next inquiry, applying the Act is whether there are any factors that show that the marriage was “entered into” or “celebrated”.¹⁸⁶

This is not to say that the performance of customary rituals such as *ukumekeza* (Swati),¹⁸⁷ *imvume* (Zulu),¹⁸⁸ or *utsiki* (Xhosa),¹⁸⁹ have no significance. Whilst non-performance of such rituals does not affect the status of a validly contracted customary marriage in terms of both custom and the Act,¹⁹⁰ they should not be taken as mere anthropological curiosities. In many instances the performance of such practices is conclusive evidence of the existence of a customary marriage.¹⁹¹ This is because these rituals often signify the celebration of the marriage and therefore distinguish other relationships between men and women, short of the status of marriage, which lack of such rituals.

The legislative exclusion of the integration rituals from the requirements for a valid customary marriage has enabled the courts to achieve equal treatment for civil and customary marriages. This development has transformed the status of African women who were previously treated as perpetual minors who depended on being handed over by men in order to become married women. In the case of *Maluleke v Minister of Home Affairs* Tshiqi J has developed customary marriage by interpreting the requirement that the marriage must be “entered into”. The judge held that this requirement refers to the fact that at one point during the proceedings the spouses reach consensus that they are now married.

The spouses’ meeting of the minds concludes the marriage and displaces the handing over of the woman to the husband’s family from the list of requirements. Once this stage has been reached the handing over of the bride or lack of it can no longer determine the existence of the customary marriage. This ritual then merely serves to supplement the festivities of the wedding, but does not define the marriage. This

¹⁸⁶ *Idem* 12.

¹⁸⁷ See *Mabuza v Mbatha supra*.

¹⁸⁸ See *Maluleke v Minister of Home Affairs and Another supra*.

¹⁸⁹ See *Fanti v Boto* 2008 (5) SA 405 (C).

¹⁹⁰ See *Mabuza v Mbatha supra* and *Maluleke v Minister of Home Affairs supra*.

¹⁹¹ See *Motsoatsoa v Roro and Others* (2011) 2 All SA 324.

development has resulted in treating African law with the same judicial decorum with which the courts ordinarily apply the common law. This accords with the imperative language of the Constitution that compels the courts to apply African law when it is applicable.

The section 211(3) constitutional injunction demands judicial respect for the customary law-maker to the same extent accorded by the courts to parliamentary, provincial, and municipal legislatures that are listed in section 43 of the Constitutions.¹⁹² The improved judicial attitude can be ascribed to the fact that under the current dispensation, the courts must apply African law when it is applicable, subject to the Constitution and specifically applicable legislation.¹⁹³ Indeed this injunction requires the post-apartheid courts to transform themselves from old order institutions that merely had to take judicial notice of African law at the level of foreign law in South Africa¹⁹⁴ and demands that African law be treated as an authoritative component of the South African legal system.¹⁹⁵

6.7 Chapter conclusion

An assessment of the contributions of South Africa's post-apartheid courts to the decolonisation of African law in the first two decades of democracy must be viewed from the judicial imperative to synergise the indigenous value system with constitutional norms. To this end the courts have endeavoured to reform African law from the background of a grossly distorted system designed to evoke alarming levels of alienation from its own constituency.

However, the judiciary was not fully prepared to embark on so colossal a task which

¹⁹² Section 43 of the Constitution – Legislative Authority of the Republic – reads:
In the Republic, legislative authority –
of the national sphere of government is vested in Parliament, as set out in section 44;
of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

¹⁹³ Bennett TW "Re-introducing customary law to the South African legal system " (2009) LVII/1 *The American Journal of Comparative Law* 1 at 7-8 believes that the words "subject to... any legislation that specifically deals with customary law" in section 2 11(3) mean that only legislation that is specifically directed to do so can limit customary law.

¹⁹⁴ See Section 1(1) Act 45 of 1988.

¹⁹⁵ See generally Nwabueze RN "The dynamics and genius of Nigeria's indigenous legal order" (2002) 1 *Indigenous Law Journal* 153.

demanded that they “reverse this trend and to facilitate the preservation and evolution of African law as a legal system that conforms with [the Constitution’s] provisions”.¹⁹⁶ Consequently any analysis of the progress made by the judiciary in transforming African law necessarily leads to a strange mixture of success and diffidence depending on the attitude of individual judges towards the idea of embracing the project of indigenisation in a constitutional democracy.

Many South African courts have shown an appreciation for the need to transform their approaches from a culture of resistance to the African value system when theirs was to advance colonial and apartheid interests by reducing African law to a mere sub-system of the common law. In recent times such courts have strived to mainstream African jurisprudence and advanced the advent of judicial renaissance in handling African law. In the *Richtersveld Community* judgment for instance the court exorcised the lingering coloniality which the legal practice of the past reflected.¹⁹⁷ This renewal was all the more significant in that it followed soon after the alarming Mthembu judgments which sought to transpose the colonial and apartheid mindsets to the democratic dispensation by perpetuating the un-customary patriarchal “official” version of African law.

Judicial transformation is a very tricky project in South Africa as it entails that the courts should un-learn the tried and tested repugnancy jurisdiction of the past and re-learn to appreciate the resilience, adaptability and flexibility of the principles of “living” indigenous law. The latter features of African law served as the bulwark that shielded the adherents of African law from complete cultural annihilation during the long centuries of a concerted de-Africanisation crusade. Such resilient features became handy tools for debunking the authenticity of the old state-imposed, distorted “official” version of African law, as they enabled progressive judges to weave current social practice into the new human rights culture.¹⁹⁸

¹⁹⁶ Bennett TW “Re-introducing customary law” *op cit* 35.

¹⁹⁷ In his unpublished inaugural lecture entitled “Coloniality of power in development studies and the impact of global imperial designs on Africa” delivered at the University of South Africa on 16 October 2012, Ndlovu-Gatsheni says: “Coloniality of power works as a crucial structuring process within global imperial designs, sustaining the superiority of the Global North and ensuring the perpetual subalternity of the Global South using colonial matrices of power”.

¹⁹⁸ See the *Mabuza* and *Mabena* cases *supra*.

In varying degrees the South African courts managed to disentangle African law adjudication from the baggage of the old order which had seriously marginalised this system over the long centuries of colonial and apartheid cultural imperialism ushered in by the repugnancy interpretive regime in the past.¹⁹⁹ The courts have managed to re-centre a number of indigenous principles as part of their mandate to apply African law in adjudicating indigenous rights.²⁰⁰ Such principles include the communal nature of agency in African law and the collective notion of property ownership;²⁰¹ the assertion of African custom as the source of traditional authority²⁰² and the mainstreaming of the lobolo/bogadi covenant as the nucleus of customary marriage.²⁰³ Indeed judicial efforts to synergise indigenous African law principles with human rights reflect institutional willingness to affirm the system's constitutional recognition.

In the above cases of *Mabena v Letsoalo*, *Mabuza v Mbatha* and *Maluleke v Minister of Home Affairs* the various High Courts followed this trend by endorsing the "living" version's indigenous values which tend to blend with constitutional norms in social practice. The High Courts' application of the "living" law is particularly interesting as this version emerged more or less intact as the judges reached transformative conclusions without even invoking the Constitution to justify their actions.²⁰⁴ In these cases the judges appear to see their primary task as the recognition of the practices by which the communities transact their businesses.

The compatibility of the "living" law with the Constitution has contributed to shaping the task of the High Courts in moulding the existing social practices from their crude state into juridical language as they develop customary law. In this sense the High Courts have exhibited a realisation that their ordinary role is not to create new African law, but to merely "juridify" the formulation of the social practices in the process of identifying and recognising them as binding legal rules.²⁰⁵

¹⁹⁹ See *Bhe-Shibi supra* par 89.

²⁰⁰ See *Richtersveld Community supra* par 51.

²⁰¹ See *Bhe-Shibi supra* par 167.

²⁰² *Idem* 96.

²⁰³ See the cases of *Mabuza*, *Mabena* and *Maluleke supra*.

²⁰⁴ See Lenhert *op cit* 254.

²⁰⁵ See Nwabueso *op cit* 198. Kerr AJ "Inheritance in customary law under the Interim Constitution and under the Present Constitution" (1998) 115 SALJ 262 agrees that the community is the lawmaker and that the principle *ius dicere non facere* [the courts declare but not make the law] applies in customary law.

CHAPTER 7

FINDINGS, EMERGING CHALLENGES AND RECOMMENDATIONS

7.1 Introduction

To conclude the study chapter 7 draws from a number of findings arising from the analyses of the preceding chapters, proceeding from the revelations that various scholars hold different orientations about the meaning, nature and characteristics of African law. This debate illuminates the impact of the various historical, political and ideological stages undergone by African law starting from the condition in which it was practised by its indigenous adherents before it was hijacked during the colonial and apartheid periods. This background explains why the application of African law as envisioned in the democratic Constitution continues to be problematic in the hands of a legal profession nurtured in a culture that viewed the system as inferior to common law.

As a concluding chapter this part of the thesis endeavours to summarise the findings of the study and to map out the recommendations in the light of the observations that emerged in the process of resolving the problem that was identified. This necessitates identification of the challenges inherent in the study involving the imperative to reverse the ills inflicted on African law over a long period of time by a vicious system whose impact can only be undone by an equally effective remedy.

This chapter is essentially a call for the adoption of the theory of re-indigenisation, discussed more fully below, as the panacea for fixing the continued marginalisation of African law and its alienation from its constituency within the South African legal system.¹ This theory entails envisioning African law's renewal on the basis of its pristine

¹ In *Pilane's Pilane and Another v Pilane and Others* 2013 (4) BCLR 431 (CC) (hereafter *Pilane 2*) par 34. Sikweyiya J writing for the court's majority held: "It is well established that customary law is a vital component of our constitutional system, recognised and protected by the Constitution, while ultimately subject to its terms. The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs."

pre-colonial condition, immanent in its indigenous metaphysics, and embedded in a worldview that was circumscribed by a distinct and uniquely African frame of reference emblazoned with the spirit of the Bill of Rights.

As will appear below the call for re-indigenisation is a de-colonisation measure that seeks to respond to the persistent crisis of illegitimacy that bedevils South Africa's legal order in which the values of the African majority continue to enjoy an underdog status. This reduces the African value system to a cultural minority, despite the Constitution's recognition of indigenous law as a credible component of the legal system. African law's inferior status reinforces the obduracy of the dominant Euro-Western legal culture which continues to determine the course of decisions made by South Africa's judicial and legislative institutions, leaving African law invisible in the face of an overwhelmingly dominant Roman-Dutch legal superstructure.

7.2 Summary of important findings of the study

The existence of a synergy between the indigenous normative value system and the Constitution's Bill of Rights has been proved. Consequently the former system needs to be re-centred to put to rest any doubt about the compatibility of African culture and human rights.² Indeed Ebo sees indigenous African law as comparable with other social systems of the world. In this regard Ebo writes:

In their pristine state of society, [African] peoples were not lawless men living in a state of permanent anarchy. They observed elaborate rules of law, which were seldom apparent to a casual observer because they were not codified but formed part and parcel of the fabric of local tradition where they existed. These codes evolved in response to the usual needs and pressures which impelled people in other societies toward the rule of law.³

² In *Gumede v President of the Republic of South African and Others* 2009 (3) BCLR 243 (CC) at par 22 the court states: "... customary law, like statutory law or common law, is brought into harmony with the supreme law".

³ Ebo C "Indigenous law and justice: Some major concepts and practices (1979) 76 *African Law and Legal Theory* 139 at 139. See also Ayinla, another Nigerian scholar, "African philosophy: A critique" (2002) 6 *Journal of International and Comparative Law* 147 at 168 saying: "The conclusion is that traditional African Societies certainly did have systems of social control which closely resembled modern legal systems. In fact, when those African legal systems are studied in detail it is easy to agree with T Elias that the differentiation between African laws and the laws of other people is only superficial."

The conclusion that African law is consistent with human rights is reached after an appraisal of selected high profile post-apartheid judicial decisions which mainstream the debate on the application of African law in a constitutional democracy. The inevitable observations are that there are instances where the courts seem to have succeeded in their efforts to develop African law in line with its value system⁴ as well as instances where the courts seem to have relapsed into the old apartheid legal culture and failed to contribute towards the achievement of the constitutional vision of African law.

The constitutional vision for the establishment of an African law rooted in the indigenous African culture and in harmony with human rights implies an inherent acceptance of a synergy between indigenous values and the norms of the Constitution. To achieve this vision, high levels of judicial activism which will progressively blend these two legal cultures to realise a true socio-legal renaissance in post-apartheid South African law are required. This vision was illustrated by Ngcobo J in *Daniels v Campbell and Others*⁵ in the following terms:

Our Constitution contemplates that there shall be a coherent system of law built on the Bill of Rights, in which the common law and indigenous law should be developed and legislation interpreted so as to be consistent with the Bill of Rights and with our obligations under international law.⁶

This dictum confirms that the components of South Africa's post-apartheid legal system comprise both the common law and African law as modified by legislation and the Bill of Rights. These components converged to form South African law after developing from divergent sources of origin and continue to reflect the metaphysical underpinnings immanent in their respective civilisations. This thesis focuses on the capacity of African law to draw from the pristine pre-colonial indigenous values which have survived the cultural onslaught of the colonial and apartheid periods. The contemporary usefulness of such values, properly adapted and adjusted, lies in their ability to temper the adverse effects of the current emphasis on pure individualism by humanising the legal system with elements of inclusiveness and solidarity.

⁴ *Alexkor v Richtersveld Community* 2003(12) BCLR 1301 (CC).

⁵ 2004 (7) BCLR 735 (CC).

⁶ *Idem* par 56.

The philosophy of *ubuntu* – on which the indigenous African society was anchored – includes such Afrikological features as the culture of inclusiveness, communal living, shared belonging, collective responsibility, and group solidarity together with an ethos of compassion, reciprocity and reconciliation. These values have human, humane, and humanitarian elements whose resilience in surviving the colonial/ apartheid onslaught on African culture portend well for their capacity to conflate the human rights provisions of the Bill of Rights and lend credence to the conclusion that the Constitution’s vision for the system’s renaissance can be achieved. *Ubuntu* and its features have been applied in a number of cases discussed in this thesis and have shown their ability to contribute to the emerging African jurisprudence.

Constituting a link between the past, the present and the future, the philosophy of *ubuntu* contributes to the renaissance of African law as envisioned by the Constitution in that it reflects the indigenous worldview in which the individual’s role is inseparably intertwined with that of other individuals with whom he/she shares a greater communal field of force it regulates.

This is so because the African life-world is a total civilisation whose strength for the South African transformation lies in its uniqueness, originality and distinctiveness from, not similarity to, the Western worldview.⁷ In this sense *ubuntu* embodies all the forces that advance the human condition and is the root from which good governance and correct decisions germinated historically.

The qualities of *ubuntu* give impetus to the hope that the envisioned African law can indeed be realised as they offer a common denominator between the surviving African value system and the new constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms.⁸ Through *ubuntu*, indigenous values and international human rights become the core components of both African jurisprudence and the Constitution.⁹

⁷ See Hollemann JF *Issues in African law* (1974) 15.

⁸ See section 1 of the Constitution.

⁹ See Mahao NL “O se re ho morwa “morwa towel’ – African jurisprudence exhumed” (2010) XLIII/3 *CILSA* 317 at 318-319.

The synergy that exists between these two value systems lies in their mainstreaming of the maximisation of the human condition in that what *ubuntu* means in African culture is what human rights mean in international law. This can be gleaned from the role played by *ubuntu* in recent decisions discussed below and the values encompassed in its philosophy which place the interests of humanity at the centre of all social activities and function in a way that historically circumscribed and cushioned the impact of authoritative decisions issued by African leaders.

In this way, the indigenous version of human rights through which African law leveraged pre-colonial political power in South Africa by emphasising the connectedness of individuals to other humans for collective prosperity, is blended with modern and international human rights to produce a fitting renaissance for African jurisprudence. That being the case the indigenous values contained in *ubuntu* complement the constitutional values as both mainstream human consciousness as the centre of their social interactions.

As a result of this synergy, the envisioned African jurisprudence aspires to forge unity between the indigenous African value system and the spirit, purport and objects of the Bill of Rights to reflect the influence of the pristine African legal system on the framework of the Constitution.¹⁰

In this context, *ubuntu* and the Bill of Rights constitute the ideal combination for the envisioned African law as the communal character of *ubuntu* and the individual orientation of the Bill of Rights combine to mitigate the excesses of each for the benefit of South African law. As the core of African law, *ubuntu* is synonymous with the African concept of human rights. This means that African law, as an *ubuntu*-based system, can only be properly viewed as pro-human rights, rather than the opposite.

¹⁰ See Holleman *op cit* 15. See also Koyana DS “Customary law and the role of customary courts today” (1997) November *Consultus* 126 at 126 where he quotes from an unpublished paper read by a certain Mrs NS Peart at a conference at Mthatha in 1977: “It is clear from the legislation and the practice of the courts that customary law is not judged in terms of an African system of values but exclusively in terms of a European system. The danger is, however, that if customary law is to be struck down because it is in conflict with European notions of morality and ethics, there may be little left of customary law.”

This implies that the values of *ubuntu* that were proclaimed in the interim Constitution have influenced the Constitution; and that therefore the imperative contained in section 211(3) to apply African law consistently with human rights is in fact an injunction to include African jurisprudence as a determinant of the South African concept of constitutionality; and is the instrument behind the injunction to undo the enormous cultural genocide that disfigured African law in the past. The latter problem was exacerbated by the tendency to define and apply African law according to the Euro-Western benchmark which also directs its description and analysis.¹¹

As the source of humaneness, *ubuntu* can, therefore, not properly be condemned for lacking in human rights. Pieterse accordingly says “a uniquely African perspective of law and society does indeed exist”¹² and can offer unique solutions to uniquely African human rights problems. Only through the arrogance of ignorance of the proportions exhibited by Keevy¹³ can African law, which has *ubuntu* as its nucleus, be said to conflict with the South African Constitution.

Any view therefore that a conflict exists between African law and human rights is either influenced by an external conception of human rights that excludes the indigenous notion of rights in its definition or by reliance on a distorted version of African law which is not current in social practice and does not resonate with the system’s normative values. That being so, the tendency of state institutions to prefer Western legal institutions over their indigenous counterparts makes no sense as each system addresses its own concerns adequately, without deference to the other.

Ubuntu is a human rights doctrine because it disciplines African law towards anchoring its trajectory on maximising the survival of, and respect for, humanity. It does this by fostering solidarity among households, families and communities to observe responsible customary traditions that nurture mutual belonging among individuals. The Constitution

¹¹ See generally Care JC “The status of customary law in Fiji Islands after the constitutional amendment act 1997” (2000) 4/1 *Journal of South Pacific Law* 1.

¹² See Pieterse M “Traditional African jurisprudence” in Roederer C and Moellendorf D (eds) *Jurisprudence* (2004) 438 at 438.

¹³ See Keevey I “*Ubuntu* versus the core values of South African Constitution” (2009) 43/2 *Journal of Juridical Science* 19 at 19.

has brought the history of non-recognition of African law to an end by decreeing African law a recognised component of South African law, equal to the common law.

By so doing the Constitution has ushered in a new tradition for the judicial treatment of African law and common law as equal; and for the reversal of the adverse effects of centuries of cultural non-recognition. The time has, therefore, come for African law to affirm the possibility of the envisioned African jurisprudence. This is reinforced by the Constitution's own framework which is designed to pave the way for a transformed South African legal system in which African law will play a vital role. This framework is made up by sections 211(3), 31 and 39(2) of the Constitution which respectively enjoin the courts to apply African law, and to develop it in accordance with its values subject to the Bill of Rights and constitutionally valid legislation.

African jurisprudence has made an indelible impact in humanising the common law by commanding the latter's transformation under the Constitution. The cases of *Makwanyane*,¹⁴ *Azapo*,¹⁵ *Dikoko*,¹⁶ *Fosi*,¹⁷ and *Port Elizabeth Municipality*¹⁸ evidence how African jurisprudence can harmonise both components of South African law under the Constitution's supreme praxis.¹⁹ By allowing African values to influence South African law, the Constitution has engendered an enlightened coexistence between the country's legal traditions. This stands in sharp contrast to the disharmonious, hostile cultural take-over imposed by the repugnancy clause in the past. Part of the realisation of the envisioned liberation of the adherents of African culture, is that they are no longer subjected to the dehumanising and condescending need to apply for exemption from the operation of their own culture. In the past, imperial authorities demanded such an application as a precondition for the granting of the status of a "civilised native".²⁰

The Constitution's vision for a transformed South African jurisprudence is based in the primacy it accords the Bill of Rights, buttressed by the foundational values of social

¹⁴ See *S v Makwanyane* 1995 (6) BCLR 665 (CC).

¹⁵ See *Azapo v President of RSA* 1996 (4) SA 672 (CC).

¹⁶ See *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

¹⁷ See *Fosi v Road Accident Fund* 2008 (3) 560 (C).

¹⁸ See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

¹⁹ See the judgment of Ngcobo J in *Daniels v Campbell supra* par 56.

²⁰ See section 13 of the Bantu Administration Act (later the Black Administration Act) 38 of 1927.

justice, human dignity, equality, freedom and fundamental human rights the spirit of which must suffuse all the components of our law. In the *Port Elizabeth Municipality* case, as well as in the *Makwanyane*, *Dikoko* and *Fosi* cases the courts commended African jurisprudence in the form of *ubuntu* for enabling them to operationalise the values of the Constitution in the face of an obdurate resistance of rigid common law principles.

This new value system frees African law from the hegemonic gaze of the common law, so that it can best reflect its own cultural heritage in a liberated human rights environment. Consequently, legislation and judgments aimed at democratising African law must target a simultaneous re-indigenisation of this system as a foundation for its renaissance and its constitutionalisation to accord with international imperatives. As the new judgments testify, the Constitution and the Bill of Rights reverberate with values integral to both Western and traditional African jurisprudence, [where] others correspond more with one than with the other, and both Western and African legal rules and concepts will sometimes fall short of the standards set by the Bill of Rights.²¹

In *Dikoko* the African values of *ubuntu*, and the Dutch principle, *amende honore*, were both found by the Constitutional Court to be complementary of the values of the Constitution whereas in the cases of *Carmichele*²² and *Bhe-Shibi*,²³ both common law and African law were equally found to be wanting when measured against the values of the Constitution. In other words, whilst the possibilities for the emergence of the envisioned post-1994 law of South Africa abound because of the legal and the institutional framework created by the simultaneous demise of apartheid and the birth of democracy, with *ubuntu* which “represents the crux of African jurisprudence” and contains “authentically African jurisprudential values” at its heart,²⁴ as a positive additional element, there are still challenges facing the attainment of this ideal.

²¹ See Pieterse “Traditional” *op cit* 439.

²² See *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC).

²³ See *Bhe v The Magistrate Khayelitsha*; *Shibi v Sithole*; *Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC) (hereafter *Bhe-Shibi*).

²⁴ *Idem* 442. See also Ramose “The philosophy of *ubuntu* and *ubuntu* as a philosophy” in Coetzee PH and Roux APJ (eds) *Philosophy from Africa* (2002) 230 at 230.

South Africa's constitutional institutions have also contributed towards the conclusion that the envisioned African jurisprudence can be achieved. In its effort to contribute to the implementation of the current constitutional injunctions, the post-apartheid legislature seeks to create an enabling environment²⁵ by removing obnoxious and offensive legislation²⁶ and enacting progressive laws.²⁷ Indeed, parliament has enacted transformative statutes with preambles which affirm the new status of customary law. By enacting humanising legislation which seeks to place African law on par with common law in South Africa's constitutional democracy, parliament has contributed to the conclusion reached in this thesis – that the envisioned version is possible.

Likewise the courts have striven to mainstream African values in developing South African jurisprudence²⁸ and have re-affirmed the recognition of African law within the framework of the Constitution.²⁹ This involves judicial endorsement of African law's equality with the common law and rededicating the courts to the observance of the imperative to view African law within its own context, as opposed to through a borrowed Euro-Western prism.³⁰

A further notable development has been increasing judicial sensitivity to popular participation and culture, through preferring the "living" law over "official" law,³¹ as demonstrated by the courts' commitment to apply current African law values in consonance with the Constitution. The place for African jurisprudence is assured as the highest courts are beginning to view the African life-world from the indigenous frame of reference.³²

²⁵ See the Promotion of Equality Prevention of Unfair Discrimination Act (hereafter Equality Act) 4 of 2000.

²⁶ See section 23 the Black Administration Act 38 of 1927 and section 1(b) of the Intestate Succession Act 81 of 1987, both of which perpetuated colonialism, apartheid and patriarchy.

²⁷ See the Equality Act the Recognition of Customary Marriages Act (hereafter Recognition Act) 120 of 1998; the Traditional Leadership and Governance Framework Act 41 of 2003 (hereafter Traditional Leadership Act), the Traditional Courts Bill and Communal Land Rights Act 11 of 2004.

²⁸ See *S v Makwanyane supra*; *Fosi v Road Accident Fund supra*; *Port Elizabeth Municipality v Various Occupiers supra*.

²⁹ See *Bhe-Shibi supra*.

³⁰ See *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) (hereafter *Richtersveld Community*).

³¹ See *Mabena v Letsoalo* 1998 (2) SA 1068 (T); *Mabuza v Mbatha* 2003 (7) BCLR 43 (C).

³² See *Richtersveld Community supra* par 51.

In the *Richtersveld Community* case, both the SCA and the Constitutional Court recognised the binding practices of the indigenous people collectively by construing their rights and interests in their lands in their distinct, unique, and original indigenous form.³³ When both these courts approved indigenous rights over common-law based statutory instruments designed to thwart them it became clear that the Africanisation project could succeed in South Africa.³⁴

In the *Bhe-Shibi*³⁵ and the *Shilubana*³⁶ cases, the Constitutional Court drew its inspiration from the *Alexkor* case which laid the foundation for the distinctiveness of the position of customary law under the Constitution. The *Shilubana* judgment goes further and reprimands both the High Court and the SCA for their failure to affirm the power of traditional authorities to transform their law as required by the Constitution.

The Constitution enjoins the courts to apply African law when it is applicable to the matter before them.³⁷ There is therefore no longer a mere discretion to apply African law; nor can they choose to take judicial notice of it only when it suits them.³⁸

Moreover the courts have gone further and cautioned against benchmarking African law against the alien Euro-Western normative values of the common law.³⁹ The indigenous value system has since become the paradigm of discourse and the frame of reference for construing the African worldview for shaping the judicial implementation of the Constitution's vision for African law.⁴⁰ The success of the Africanisation project is assured by the compatibility of the surviving indigenous norms with the spirit of the Constitution.

This much has emerged from the recent High Court judgments in the cases of *Mabena*

³³ *Ibid.*

³⁴ See references to the *Richtersveld Community* case in the Constitutional Court judgments in *Bhe-Shibi supra* and the *Gumede supra*.

³⁵ 2005 (1) BCLR 580 (CC).

³⁶ See *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC) (hereafter *Shilubana 2*).

³⁷ See section 211(3) of the Constitution.

³⁸ See section 1(1) of Act 45 of 1988.

³⁹ See *Richtersveld Community supra* par 51.

⁴⁰ See *Shilubana 2 supra*.

v Letsoalo,⁴¹ *Mabuza v Mbatha*⁴² and *Maluleke and Others v Minister of Home Affairs and Another*⁴³ where the application of the “living” African law in the context of its values has illustrated the congruence that exists between the emerging binding social habits and human rights as entrenched in the Bill of Rights.

7.3 Critical emerging challenges

Despite the above achievements critical challenges to the attainment of the envisioned African jurisprudence have emerged and are still emerging. For instance, some South African courts have failed to reflect the version of African law envisioned by the Constitution in their judgments. This is not to contradict the conclusion that the courts in broad terms have indeed contributed towards the attainment of the mandated national goal; a contribution which leads to the firm conclusion that the goals of the Constitution regarding African law are attainable.

This does not, however, negate the reality on the ground: the vision of African law postulated in the Constitution is not yet a reality – the above positive milestones notwithstanding. As a result of the stranglehold of the apartheid legal culture on the institutions of the state, the latter’s best efforts have not yet produced the envisaged transformation of the system.

Whilst the fragility of the provisions of the South African Constitution on the affirmation of African culture is also not helping, these provisions are nevertheless firm enough to enable the state institutions to achieve their goals through purposive interpretation. The latter institutions could therefore have used the present constitutional provisions to achieve their goals.

In doing so the post-apartheid courts had to contend with the legacy of the colonial/apartheid jurisprudence as reflected in cases such as *Sigcau v Sigcau*,⁴⁴

⁴¹ 1998 (2) SA 1068 (T).

⁴² 2003 (7) BCLR 43 (C).

⁴³ (2008) JOL 21827 (W).

⁴⁴ 1944 AD 67.

Tshabalala and Others v Estate Tunzi,⁴⁵ *Tshiliza v Ntshongweni*,⁴⁶ and *Ex parte Minister of Native Affairs: In re Yako v Beyl*⁴⁷ all of which reinforce the nefarious repugnancy policy that regarded Afri-culture as a sub-system of Euro-culture. Yet post-apartheid courts had to attain the envisioned version of customary law despite the distortions caused to the African value system in the past.

This background explains why South Africa's constitutional institutions continue to manifest a lingering common law bias towards the colonial/apartheid legal culture. They seem to confuse the imperative of human rights with a license to impose common law on African law matters. Consequently many legal and political interpreters remain unwilling to acknowledge that unlearning the previous legal culture is a necessary prelude to re-envisioning the new status of African law in the South African legal system.

The legacy of apartheid legalism continues to influence the Westernisation of the interpretation of African law. This factor discourages the latter system's re-indigenisation project envisaged by the Constitution and has without doubt affected the quality of the resultant version of African law. This lends credence to the perception that the Constitution is Western-oriented. And this in turn leads to the absurd conclusion that the Bill of Rights is the contemporary agent of cultural imperialism comparable in its effect to the infamous repugnancy clause of yesteryear.⁴⁸

This negative comparison between the unconscionable apartheid legalism and the unresponsive jurisprudence of the present is fuelled by certain recent judgments and statutes which continue to subject African law to common law standards. This level of complacency continues to allow the courts to trivialise the denigrating impact of apartheid distortions on the African value system.

The constitutional vision also suffers a heavy blow when conspiracy theories begin to

⁴⁵ 1950 N AC 46 (C).

⁴⁶ 1908 N H C 10.

⁴⁷ 1948 (1) SA 388.

⁴⁸ See Juma L "From 'Repugnancy to Bill of Rights': African customary law and human rights in Lesotho and South Africa" (2007) 21/1 *Speculum Juris* 88 at 88.

emerge implicating such auspicious institutions as the Constitutional Court and parliament in the betrayal of their own constitutional mandate by undermining indigenous norms.⁴⁹ This is a sequel to the infamous parliamentary endorsement of judicial substitution of common law for African law in statutes such as the Reform of Customary law of Succession Act⁵⁰ on the pretext that the mooted reforms were necessitated by the demands of transformation.⁵¹

The expectation was that the Reform of Customary law of Succession Act⁵² would correct the Constitutional Court's preference for common law over African law when it imported the Intestate Succession Act. The latter Act was designed for the administration of common law estates, before its judicial importation to resolve an African law succession dispute.⁵³ To the chagrin of Africanist scholars,⁵⁴ this eagerly anticipated statute confirmed the judgment, thus rendering the substitution of common law for African law permanent.

The subtext implied by the institutional substitution of Western values for those of Africa is that African law is an obstacle to the achievement of human rights in the new South Africa. As if further to frustrate the attainment of the vision of the Constitution, the Act appeared as a cocktail of common law and African law, lending further credence to the mooted conspiracy theory to subvert the authority of the indigenous value system.⁵⁵

With regard to the superiority of the Constitution in sections 211(3), 31 and 39(2) and its confirmation in some of the most important Constitutional Court decisions,⁵⁶ the fact

⁴⁹ The "conspiracy" insight was obtained from Professor DS Koyana, a colleague from the University of Fort Hare during a discussion of this phenomenon at the Conference on African law held at the University of Botswana in October 2008.

⁵⁰ Act 11 of 2009.

⁵¹ See *Bhe-Shibi supra*.

⁵² See Act 11 of 2009.

⁵³ Mbatha L "Reforming the customary law of succession" (2002) 18 *SAJHR* 259 at 259.

⁵⁴ See Juma "From 'Repugnancy to Bill of Rights'" *op cit* 88, Mailula D Abdication of judicial responsibility cultural self-determination and the development of customary law: Lessons from *Shilubana*" (2008) 23 *SAPR/PL* 215 at 215 and Ntlama N and Ndimma DD "The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems" (2009) 4 *International Journal of African Renaissance Studies* 6 at 6.

⁵⁵ See *Bhe-Shibi supra* and the Reform of the Customary of Succession Act.

⁵⁶ See Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) par 199; *Richtersveld Community supra* par 51; and *Bhe-Shibi supra* pars 41 and 46.

that any tension between the Bill of Rights and African law must always be resolved constitutionally to the detriment of African law, reflects negatively on judicial commitment to achieve the vision of the Constitution.⁵⁷

Something akin to this development was echoed in the *Gumede* case,⁵⁸ where the Constitutional Court endorsed the Recognition Act that purports to recognise African marriage as an important indigenous cultural institution, while in fact adopting the essential features of Western marriage as regards age, consent, community of property and registration of the marriage as building blocks for the African marriage. This provoked Bekker and Van Niekerk to issue the following critical comment:

The tenor of our further comments is that the Act and the judgment in *Gumede v President*⁵⁹ have finally laid official customary marriages to rest and created a new statutory marriage ... The parties may enter into an ante-nuptial construct to regulate the matrimonial property system of their marriage (section 7(2)). Given this provision, why should they not simply conclude a common law marriage (?)⁶⁰ ... moreover, the Westernisation of official customary marriages has progressed so far that it has become practically impossible to reverse the process. The only vestiges of customary law that now remain are *lobolo* (although it is not a requirement for the new statutory customary marriage) and that marriages are required to be negotiated and entered into or celebrated in accordance with customary law.⁶¹

The opportunity to deliver the envisioned new African law was lost when the most prominent statutes, such as the Recognition Act and the Reform of the Customary Law of Succession Act failed to formulate indigenous concepts preferring simply to borrow un-customary concepts from common law institutions. While seeking legitimation from Western legal doctrine has come to characterise post-apartheid legislative reforms of African law in general, marriage and succession laws have been particularly targeted. More significantly, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000⁶² has also been affected by this Euro-Western bias, thereby frustrating its stated purpose of attempting to eradicate all vestiges of inequality and unfair discrimination in South African law.

⁵⁷ See Section 8(1) of the Constitution unequivocally subjects all law, including African law, to the Bill of Rights. Yet in the judgments in *Bhe-Shibi* and *Shilubana* cases *supra*, Western-inclined human rights prevailed over indigenous cultural rights. See also the South African Law Commission Discussion Paper 93 Customary law of succession (June 2000) par 2.1.8.

⁵⁸ See *Gumede v President supra*.

⁵⁹ *Ibid.*

⁶⁰ (2009) 24 *SAPR/PL* 206.

⁶¹ *Ibid.*

⁶² Hereafter Equality Act.

A concomitant lack of Afro-cultural responsiveness is reflected in the performance of South Africa's judiciary. The *Bhe-Shibi* judgment has viewed African law with Euro-Western lenses by applying a common law remedy for a customary law dispute. This is an embarrassing admission by a post-apartheid court that the African law has no adequate remedies; despite the Constitutional Court's emphasis in the *Richtersveld Community* case that the courts should not look at African law with common law eyes.

The *Shilubana* judgment has done no better. Having approved the appointment of a woman to a traditional leadership position without providing for its transmissibility to future successors, this judgment concedes that it has created a problem that will have to be addressed when future appointments are considered. It thus accepts the irresponsibility of its actions. By sacrificing the tradition of smooth succession in the institution of traditional leadership, the court promoted the principle of equality for its own sake, and ignored that the primary function of the state is to avoid actions that could lead to social breakdown.

The court then took refuge behind the flexibility and adaptability of African law hoping that these features would rescue the situation of succession on the demise of the incumbent traditional leader. Having destroyed the custom that regulated succession the court resorted to damage control and held that the traditional authorities would have to meet, deliberate and appoint a future traditional leader. The paralysis in the wake of the *Bhe-Shibi* and *Shilubana* judgments has resulted in untold alienation among the customary communities of South Africa who now find themselves without a law of intestate succession.

To institutionalise this cultural dispossession, the *Bhe-Shibi* judgment substituted the Intestate Succession Act – originating in Roman-Dutch customary law – for the African law of South Africa. This is a far cry from the African law envisioned for the post-apartheid society. The *Mthembu* and *Bhe-Shibi* cases have also failed to affirm African law by not informing the male respondents that in order to be appointed as a successor they would need to show commitment to their customary obligations to protect the communal interests of the family shareholders, namely, women, children and vulnerable family members, as required by their culture.

The alienation of African culture emerged clearly when the courts proceeded directly to constitutional challenge, without testing the cogency of the claims in African law terms. In so doing, the courts have shown that they have lost the vision of the Constitution for African law. In these cases the Constitution should not have been invoked at all⁶³ since, as communal shareholders, the property interests of the women and children involved were adequately secured in African law.

The judiciary could have avoided most of these problems by heeding its own earlier decisions. In the *Amod* case⁶⁴ Mahomed CJ held that where law is adequate to resolve the matter, the Constitution must generally not be invoked. Similarly in *S v Mhlungu* Kentridge AJ held:

I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed.⁶⁵

These judgments encourage the courts to give effect to the system of law involved in the proceedings and to apply the remedies it provides without involving the Constitution. In terms of the *Richtersveld Community* judgment such a step also advances the vision of the Constitution which requires the courts to seek remedies to protect indigenous interests from within African law norms. Adhering to this advice would also save the courts from bowing to Euro-Western principles.⁶⁶

As Bronstein argues, members of a particular culture have a right to contest their rights within the culture concerned, without having to abandon their tradition in order to get redress.⁶⁷ Indeed the Constitution encourages the application of African law when it is adequate to compel the male respondents to act in terms of their own based culture.⁶⁸ In this sense, claiming private ownership of communally owned family property is in fact a subversion of the very custom they relied on and of the Constitution. This is

⁶³ See Bronstein V "Reconceptualizing the customary law debate in South Africa" (1988) 14 *SAJHR* 388.

⁶⁴ See *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) par 30.

⁶⁵ 1995 (3) SA 867 (CC) par 59.

⁶⁶ See Bronstein *op cit* 394.

⁶⁷ *Idem* 397.

⁶⁸ See section 211(3) of the Constitution.

particularly so as the respondents claimed their customary entitlements while vowing not to observe their customary responsibilities to support the women and children in their families.

Furthermore, an institutional commitment to African values amounts to killing the proverbial two birds with one stone. On the one hand African law is affirmed by the assertion that the heir's customary responsibilities included the protection of the women and children concerned, by ensuring their access to their customary entitlements. On the other hand, the Constitution's vision would be affirmed by the emergence of a rule that a party must prove his/her commitment to customary law's normative values, as a precondition to succeeding in preference to another who fails so to commit. In this way South Africa's constitutional institutions would be empowered to recognise African law's contemporary binding practices under "living" law, and desist from bowing to the colonial /apartheid hegemony through the anachronistic embrace of its "official" legal culture.

The primary reason why the heirs lose cases should be their lack of cultural responsiveness, rather than the violation of the Constitution. One such reason would be where they rely on the distorted "official" primogeniture rule which they normally use as a patriarchal weapon with which to denigrate African values and obstruct the implementation of human rights. In their capacities as applicants, women assert their claims as customary shareholders, and demand their own property interests under African law. It does not advance the objectives of the Constitution if women win their claims for wrong reasons namely, as victims of human rights abuse.

The Constitution does not envisage that it will be unnecessarily dragged into matters where African law is adequately equipped to handle the issues. The cause of re-indigenisation requires women's claims to be founded on the loftier basis of intra-cultural rights to which they are entitled as original customary law shareholders. Judicial condemnation of the tendency to rely on uncustomary "official" African law for indigenous claims, whilst maintaining a distance from all customary responsibilities, would reduce the problem of distortion.⁶⁹

⁶⁹ See Biko S "Some African cultural concepts" in Coetzee PH and Roux APJ (eds) *Philosophy from Africa – a text with readings* (1998) 26 at 26-30.

Such responsibilities include commitment to a shared belonging with fellow family members rather than competing with them. This entails showing the court how the judgment in one's favour would enhance the family's collective survival opportunities, rather than widening divisions between its members. It also involves demonstrating collective solidarity with your dependants, instead of bastardising their legitimate interests by threatening them with eviction.

The male respondents in *Mthembu* and *Bhe-Shibi* were in a better position to convince the court of the link between respect for African culture and the advancement of the interests women and children. This would include demonstrating how the heir intended facilitating equitable access to the deceased's assets by family beneficiaries. This approach would have engaged the sympathy of the court by revealing the centrality of the ethic of compassion towards the vulnerable family members in African culture.

By following this approach the heirs would have discharged the question relating to the appropriateness and the "Africanness" of their conduct. The enquiry into the cultural appropriateness of the parties' conduct would determine whether parties relying on African law should proceed to the question of the constitutionality of their conduct. Unfortunately, South African courts have not always shown this level of responsiveness to indigenous values. For instance, the senior male in *Mthembu* was successful – ostensibly on the basis of African law – despite the fact that he told the judges that he would not fulfil any of the obligations imposed on him by the African tradition⁷⁰ and

⁷⁰ The present author is mindful of Koyana's unconditional praises for "the recent judgment of Roux J in *Mthembu v Letsela and Another* 1997 (2) SA 936 (T) will go down in history as one of first judicial pronouncements which vindicate customary law as the appropriate legal system to be applied by the millions of black South Africans whose lives are governed by it. More importantly, it has corrected the error of many who thought that the equality clause and the clause against discrimination in the new South African Constitution should result in the rules of customary law that at first glance discriminate against women on the ground of gender being abolished as contrary to the Constitution He reiterated that customary law has been accepted by the framers of the Constitution them selves as a separate legal and cultural system which may be freely chosen by persons desiring to do so by virtue of ss 31 and 33(3) ... He saw merit in the rule of customary law relating to succession because as a corollary of the system of primogeniture there is the duty to provide sustenance, maintenance and shelter, and agreeing with Professor TW Bennett that this is one of the most hallowed principles of customary law, he refused to grant the relief sought" (Koyana DS "Customary law and the role of the customary courts today" (1997) November *Consultus* 126 at 126-7). See also Nwabueze RN "The dynamics and genius of Nigeria's indigenous legal order (2002) 1 *Indigenous Law Journal* 153 at 197 who refers to the same judgment as "a most commendable show of sociological jurisprudence [in which] Le Roux J ... embarked upon a disquisition on the social context of the allegedly offending customary law rule. The learned judge disavowed mechanical constitutional scholarship, dictating

although his claim and success were based on his family position, and not his personal capacity. The courts were, furthermore, well aware that his claim was not aimed at benefitting the family of which he claimed to be its customary head.

The heir's un-customary conduct in the *Mthembu* cases, where he claimed personal ownership of family property instead of custodianship of the property for the benefit of the collective, should have cost him his suite if the High Court and the SCA had followed the counsel of the Constitutional Court in the *Alexkor* judgment. The latter judgment urges the courts to take the distinctiveness and originality of African law seriously. Likewise, in the *Bhe-Shibi* case the two males lost their cases, but not because their claims for personal ownership of family property were found to be "un-African", as should have been the case. Both the children's grandfather in *Bhe*, and the woman's paternal cousin in *Shibi*, violated the letter and spirit of *ubuntu* by claiming – clearly in conflict with custom – exclusive personal ownership of family assets to the exclusion of the very women and children (customary law shareholders) on whose protection and support their claims to heirship rested.

The same applies to *Shilubana 2* where the Constitutional Court endorsed the decision of the Valoyi Traditional Council which was never approved by the assembly of the Valoyi traditional community – the customary law-making constituency. Such approval is required by both African custom and the principle of participatory democracy.⁷¹ Thus, *Shilubana 2* poses a threat to both the legitimacy of the Constitution and the community's shared sense of belonging, communal solidarity and collective survival in that it endorses an elitist procedure which sidelines the community. The Constitutional Court failed to rebuke the traditional authority for their un-customary conduct, in the same manner that it never reprimanded the heirs who subverted custom in the *Bhe-Shibi* case.

a mundane juxtaposition and appraisal of customary law rule of primogeniture against constitutional Bill of Rights" The present author agrees whole-heartedly with the sentiments expressed by these two writers. The only concern is that Le Roux J, like the other judges who do not even show the same appreciation of customary jurisprudence as his, also does not then hold the respondent to his customary commitment, and penalise him for claiming family property whilst denouncing family responsibility as required by custom.

⁷¹ On the emphasis placed by the Constitutional Court on the importance of public involvement see *Matatiele Municipality v The President of the RSA and Others* 2007 (6) SA 477 (CC); *Merafong Demarcation Forum and Others v President of the RSA and Others* 2008 (5) SA 171 (CC) and *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

Moreover, in *Shilubana 2* a judicial declaration to nullify the decision of the traditional authority to amend their law based on its under-inclusiveness in taking the decision would expose its un-customary nature. Such a declaration would benefit for the cause of African renaissance and would foster more customary and democratic methods of law-making, thus re-enfranchising the customary communities to take charge of the law reform process. The prize would be a deeper respect for the judiciary and acceptance of its decisions by the adherents of African law, who would then more readily pursue their disputes through customary means. In this way, the revival of African law as the system that was ghettoed⁷² by the scourge of colonial/apartheid no-recognition, as well as the feelings of re-enfranchisement by its adherents would usher in the envisioned renewal of African law. In view of the history of African law in colonial/apartheid South Africa, this thesis concludes that the recognition of traditional institutions in chapter 12 of the Constitution cannot be realised through the persistent imposition of the Euro-Western value system.

An injunction radically to invoke the previously suppressed indigenous metaphysical perspectives represents a mandate to the constitutional institutions to free the indigenous structures from the imperial inhibitions that prevented them from generating their own ontological and epistemological prowess in reviving African values and norms. In order to accomplish this, the illusion that African law can be transformed to the level of an independent and credible system of law, on par with the common law, without the necessary shift of paradigm from Western metaphysics to the African life-world must be dispelled. This would debunk the myth that African law can be adequately reconstructed whilst it continues to be viewed through hegemonic lenses modelled on Euro-Western metaphysics. The hegemonic colonialism of the latter approach underlies the resilience of alien paradigms of interpretation that denigrate the African frame of reference.

Consequently South Africa's constitutional institutions have not accomplished their mission as they have failed to fashion a novel and revolutionary theory to guide them

⁷² See Okupa E "African customary law: The new compass" in Hinz MO and Patemann HK (eds) *The shade of new leaves: Governance in traditional authority – a southern African perspective* (2006) 375.

towards an indigenous epistemology that forms the substratum for its legislative and judicial procedures and processes. These institutions appear to lack the courage to “rise to the challenge of applying customary law in the spirit of its recognition”.⁷³ This is reflected in their adherence to the historical paradigm of apartheid legalism based on colonial “methodological orientation”,⁷⁴ instead of developing culturally responsive and creative post-imperial liberation approaches.

As matters stand, South Africa’s constitutional institutions continue to be modelled on Euro-centric common law structures and are manned by elitist professionals such as attorneys, advocates, magistrates and judges whose Western bias is ontologically and epistemologically linked to the destruction of the pristine indigenous values through the repugnancy clause of the past. The realisation of the envisioned African law can only be accomplished through a resuscitation of indigenous approaches, values, institutions, processes and procedures, which cannot be rekindled through steadfast adherence to the Western judicial tradition.

The unresponsive attitude of South Africa’s constitutional institutions reflects the naive assumption that the envisioned version of African law can be achieved by developing within a Eurocentric environment, in which the very notions of the judiciary and judicial proceedings are construed solely within the positivist Western knowledge system to the exclusion of the restorative African concept of justice. From the current judicial practice it unfortunately appears that one is encouraged to construe the constitutional recognition of African law as not demanding the use of the indigenous tradition in the adjudication of African values.

Related to the matter of metaphysical and ontological orientation of the judiciary is the assumption that the court must always adjudicate within the Euro-Western tradition. No one has raised the question why South African courts never use the indigenous tradition of hearing and resolving disputes. In none of South Africa’s post- apartheid cases was the matter of customary law procedure raised, not even to find it inappropriate or non-

⁷³ See Bekker JC and Van Niekerk GJ “*Gumede v President of the Republic of South Africa: Harmonisation, or the creation of new marriage laws in South Africa?*” (2009) 24 *SAPR/PL* 206 at 220.

⁷⁴ See Himonga C and Bosch C *op cit* 333.

existent.⁷⁵ The courts simply assume that the Roman-Dutch procedure is appropriate in African law issues. The unfortunate sub-text implied by this judicial conduct is that the constitutional recognition of African law does not include the recognition of the African judicial process and its institutions.

Consequently, the courts, including the Constitutional Court, continue to import the common law as the solution for resolving African law problems, despite the plethora of academic criticism of the last decade. In 2013 the Constitutional Court endorsed the approach of the North-West High Court⁷⁶ which approved the application of the Roman-Dutch law of interdict as a remedy to an African law dispute.⁷⁷ The matter came as an application for leave to appeal to the Constitutional Court after the North-West High Court, which had granted the interdicts, dismissed the application.

In its opening paragraph in *Pilane 2*⁷⁸ the Constitutional Court's majority identified the issue for determination as the appropriateness of three interdicts restraining applicants, acting in a manner contrary to applicable statutory and customary law, from holding themselves out as a traditional authority.⁷⁹ One would have thought that the court was querying the appropriateness of Roman-Dutch interdicts as a remedy for discouraging a contravention of African law. Regrettably, the court did not even require to be addressed on whether there was an appropriate African law remedy for that situation. The old legal culture of assuming that South African courts follow the Roman-Dutch tradition automatically prevailed without even being noted. Most tragically, this was not even raised in the dissenting opinion – despite the fact that Mogoeng CJ and Nkabinde J had issued the following strong admonition:

Courts, Parliament and the Executive would do well to treat African customary law, traditions and institutions not as an inconvenience to be tolerated but as a heritage to be nurtured and preserved for posterity, particularly in view of the many years of distortion and abuse under the Apartheid regime ... But courts ought not to be dismissive of these institutions when they insist on the observance of traditional governance protocols and conventions on the basis of whatever limitations they might impose on constitutional rights.⁸⁰

⁷⁵ See also *Pilane 2*.

⁷⁶ See *Pilane and Another v Pilane and Another* [2011] ZAN WHC 80 (unreported) (hereafter *Pilane 1*).

⁷⁷ See *Pilane 2*.

⁷⁸ *Ibid.*

⁷⁹ *Idem* par 1.

⁸⁰ *Idem* pars 77-78.

The *Pilane* matter was an African law dispute as it turned on whether a traditional gathering known as the *kgothakgothe*, at which the traditional authority publicly debates and decides on matters affecting the community, which may include evaluating and criticising the performance of their leaders, could have been convened by the applicants who were not holders of any statutory traditional authority positions.⁸¹ By its very nature, the dispute was placed squarely within the African law domain as the main issue turned on the entitlement of the applicants to convene a *kgothakgothe* according to African law. The Constitutional Court, however, went on to perpetuate this very problem by not allowing African law sufficient space within which to evolve, despite its apparent appreciation of the constitutional, statutory, and customary law scheme within which African law operates in the South African legal system. The court held:

It is well established that customary law is a vital component of our constitutional system, recognised and protected by the Constitution, while ultimately subject to its terms. The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs. Our history, however, is replete with instances in which customary law was not given the necessary space to evolve, but was instead fossilised and “stone-walled” through codification, which distorted its mutable nature and subverted its operation. The Constitution is designed to reverse this trend and to facilitate the preservation and evolution of customary law as a legal system that conforms with its provisions.⁸²

*Mayelane v Ngwenyama*⁸³ also provides scant prospects for the condition of African law in the hands of the Constitutional Court. The case investigates the role of the first wife’s consent, or lack of it, in relation to the validity of her husband’s subsequent polygynous customary marriages.⁸⁴ There was no question that the marriage had been “negotiated and entered into or celebrated under customary law”, as required by the Recognition Act.⁸⁵ The procedures followed revealed that the subsequent marriage was as valid as the first one in terms of African law.

The Constitutional Court introduced an additional requirement for the validity of the

⁸¹ *Idem* par 46.

⁸² *Idem* par 35.

⁸³ 2013 (8) BCLR 918 (CC) (hereafter *Mayelane 2*).

⁸⁴ *Idem* par 1.

⁸⁵ See section 3 of Act 120 of 1998.

customary marriage, namely, that if the subsequent marriage is to be valid the first wife must have consented. There was no support for this finding either in the Act or in African law. The court thus “legislated” retrospectively and unfairly to the prejudice of the second wife who believed that she was married until her husband died. The communal nature of African law in term of which the subsequent marriage was negotiated by two clans in an open process of which the first wife was aware was completely ignored. There was therefore enough opportunity for the first wife to take steps to protect herself. She did not do that because she knew the custom. The court simply narrowed the enquiry to the consent of the first wife as if a customary marriage were a private matter concerning her and her husband only. Yet the highest court in South Africa acted as a foreign institution that was not aware of this notorious fact. The Constitutional Court held:

There is no evidence that Ms Mayelane was ever informed of the impending further marriage of Mr Moyana to Ms Ngwenyama. It is therefore clear that the latter marriage is invalid for want of compliance with the requirements of Xitsonga customary law as they existed at the time of the purported marriage.⁸⁶

This dictum inadvertently reveals a novel judicial conception of section 211(3) of the Constitution which provides that African law must be applied subject to specifically applicable legislation. Yet the court says legislation must be applied subject to applicable customary law. The result was that a marriage that is valid in terms of the Recognition Act was invalidated by non-compliance with Xitsonga custom. One hopes this is not just an expedient way of trumping a polygamous marriage but a serious constitutional principle.

It is surprising how the Constitutional Court brushed aside good counsel from the SCA judgment in the same matter, where the court held that the failure of the husband to obtain the consent of the first wife did not affect the validity of the marriage under the Act.⁸⁷ According to the SCA such a defect only affected the matrimonial property regime of the marriage as the Act requires the husband to apply for the winding-up of the

⁸⁶ See *Mayelane 2 supra* par 87.

⁸⁷ See *Ngwenyama v Mayelane and Another* (2012) (10) BCLR 1071 (SCA) (hereafter *Mayelane 1*) par 24.

estate in order to protect the first wife's property interests. With respect the SCA judgment is consistent with both section 7(6) of the Act and African customary law.

This preservation of the Western life-world as the nucleus of South Africa's judicial tradition to thwart indigenous communal transactions with individual notions of family relations is contrary to the vision of the preamble to the Constitution, namely, "healing the divisions of the past...; laying the foundations for an open and democratic society...; improving the quality of life for all citizens and freeing the potential of each person". "[A] united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations" can only be built if all cultures are seriously considered in the composition and interpretation of the South African legal system.

Institutional lethargy towards indigenous materials is conspicuous from a glance at South African legal literature. There is no suggestion of incorporating the inclusive participation of the people and the relaxed procedures of pre-colonial litigation described by Mqhayi⁸⁸ and other African scholars that would have enhanced judicial legitimacy and credibility whilst strengthening the mainstreaming of the indigenous value system in all the cases that seek to raise African law to an acceptable level of credibility. The importance of an Afro-centric approach to law making and legal development is endorsed by Ebo who says:

Law is not a specific enactment of a given ruler or sovereign, with special machinery for its enforcement. Rather, it is a set of prescriptions involved in the belief and practice of the community. Its supportive contexts are so intrinsically powerful and self-sufficient that it is accepted and its principles are not questioned.⁸⁹

This is so because the Constitution does not subject African law's recognition to the Western sense of justice, and does not designate the Western judicial tradition as a medium for conducting judicial proceedings in South Africa. The injunction to "apply customary law when that law is applicable", does not imply that this should be done "subject to the common law tradition".

⁸⁸ See Mqhayi *Ityala lamawele* (1914).

⁸⁹ See Ebo *op cit* 144.

7.4 The necessary recommendations towards a call for a theory of re-indigenisation

As a remedy for fixing the continued marginalisation of African law in the South African legal system and its alienation from its constituency, this chapter recommends the re-indigenisation of the former system through a process of re-imagining and re-interpreting African law in line with its own values as inspired by the Constitution's Bill of Rights. The epicentre of the theory of re-indigenisation is de-coloniality which entails excising all the colonial distortions from African law to pave the way for restoring its pristine pre-colonial condition, immanent in its indigenous metaphysics, and embedded in a worldview circumscribed by a distinct and uniquely African frame of reference, and emblazoned with the spirit of the Bill of Rights.

The theory of re-indigenisation was conceived as a response to the persistence of the effects of the sense of dispossession and disenfranchisement experienced by the adherents of African law and the resultant legitimacy crisis that bedevils the whole of South Africa's legal order whose credibility is threatened by its continued marginalisation of the values of the African majority. The theory of re-indigenisation seeks to reverse the underdog status that has relegated the African value system to the status of a cultural minority despite the Constitution's recognition of African law as a credible component of South African law. This state of affairs is manifested by the obduracy of the dominant Euro-Western legal culture as a determinant of the decisions made by South Africa's judicial and legislative institutions, where African law remains invisible in the face of an overwhelmingly dominant Roman-Dutch legal superstructure.

The process of re-indigenisation involves tracing the cultural injustice of the non-recognition of African law to the advent of colonialism in 1652,⁹⁰ when Roman-Dutch law was superimposed as a substitute for the indigenous legal system and assumed the status of the primary source of South African law. Such an act of imposition exposes the dominant status of Roman-Dutch law as a spurious act of colonial conquest aimed at subordinating African law through the infamous statutory repugnancy clause. Through this clause Euro-Western moral standards were infused to interpret African law as a mere sub-system that subscribed to the values of Roman-Dutch law.

⁹⁰ See Biko *op cit* 26.

Since the disenfranchisement of the indigenous people was an act of cultural imperialism aimed at isolating them from their cultural value system its effects can be reversed through a process of re-indigenisation to restore African law to its rightful position as a distinct and original legal system.⁹¹ As it embarks on its crusade of African renewal the theory of re-indigenisation derives its inspiration from the ideal pre-colonial indigenous metaphysics which must be used by legal interpreters to disentangle African law from the distorted colonial and apartheid legalism and to free the resultant purified “living” version that is amenable to the spirit of the Constitution and its framework.

This thesis is rooted in the ideal pre-colonial indigenous metaphysics and proceeds from the aftermath of colonial non-recognition of African law and its value system. It then embarks on a comprehensive analysis of the profile given to African law by the new constitutional framework. The epicentre of the thesis is the effectiveness of the various legislative and judicial interventions aimed at translating the formal constitutional recognition of African law into a substantive imperative for re-enfranchising its adherents as citizens rather than mere subjects.

This process involves a robust review of the adequacy or otherwise of these measures in reviving the relationship of inherency between the indigenous people, their land and their culture after it was severed by the policy of disenfranchisement, and culminates in a number of conclusions which call for remedial action.

One of the main reasons for the resilience of cultural domination is that South Africa’s legislative and the judicial efforts towards the attainment of the renaissance of African law do not derive from a theory of re-indigenisation which locates indigenous metaphysics at the centre of Africanness. Such a theoretical basis for conceptualising African law through the African value system would assist in re-centring the uncorrupted pre-colonial norms as the fulcrum for anchoring the “living” customary law to the imperatives of the Constitution.

⁹¹ See Roederer C “Traditional Chinese jurisprudence and its relevance to South African legal thought” in Roederer C and Moellendorf D (eds) *Jurisprudence* (2004) 499 where he refers to legal systems other than Western as “other” systems to illustrate the menial role they are accorded in the South African legal system.

In this way the theory of re-indigenisation identifies the African value system as underpinned by indigenous metaphysics as the basis on which to conceptualise the ways and means of re-imagining and re-interpreting African jurisprudence under the Constitution. This foundation will sensitise decision makers to focus on the African frame of reference in order to identify the challenges which hamper the achievement of the African law envisaged by the Constitution. The importance of having such a theory lies in the fact that even the colonial/apartheid administrations needed the guidance of the repugnancy clause as an instrument by which to infuse African law with Roman-Dutch values. Re-Africanisation can therefore not be expected to occur naturally and spontaneously – it needs a re-orientation mechanism by which to provide guidance for a change of paradigm through the theory of re-indigenisation.

The theory of re-indigenisation also generates a level of judicial sensitivity to the courts' responsibilities following upon the recognition of African law and the right to culture. This awareness would be beneficial to constitutional implementation in general as it will sensitise interpreters of the law to the reality that both the section 9 equality rights and the section 31 cultural freedoms are protected by the same Bill of Rights and should be treated as mutually complementary provisions. To overturn the dominant colonial/apartheid culture, the theory of re-indigenisation would persuade the South African courts to domesticate their section 39 interpretive provisions, by promoting the values that underlie an open and democratic society based on human dignity, equality and freedom through the lens of collective solidarity, shared belonging, reciprocity and inclusiveness, to temper the legal system's bias towards crass individualism.

By generating a symbiotic interaction between indigenous values and the Constitution, the courts would fulfil their transformative role and forge the envisioned African law that is free of all traces of cultural distortion. Any distorted version of African law would through judicial condemnation and isolation be discredited and expunged as a violation of constitutional rights. Consequently the recognition of African culture would be associated with its "living" version, which is practised by its adherents and more human rights compliant than its "official" counterpart. The envisaged development of a rule or principle of African law under section 39(2) of the Constitution must affirm the right to African culture in terms of sections 30 and 31 of the Bill of Rights.

The strength of the theory of re-indigenisation lies in its promotion of African culture, in the context of the Bill of Rights, and its potential to seal the synergy between the two. The claim that the Bill of Rights protects culture is a technique of the theory of re-indigenisation to legitimise the Bill of Rights at the level achieved by the Euro- Western individual rights. To that extent the theory of re-indigenisation harmonises the right to culture (sections 30 and 31) with the right to equality (section 9) so that the new non-sexist primogeniture rule can be seen as an instrument for promoting equality in society. In this way the primogeniture rule would be legitimised and the Bill of Rights would be saved from the sceptics who often debunk it as the manifestation of a post-apartheid repugnancy clause.⁹²

The theory of re-indigenisation emphasises the human rights nature of African law rules, thus bringing them within the protection of the Bill of Rights by revealing an inherent synergy between all human rights cultures protected by the Constitution. More importantly, the theory marginalises the absurdities generated by perceptions of Afro-Western cultural tensions among constitutional interpreters by asserting *ubuntu's* position as the indigenous version of constitutionalism and debunking the false perception generated by the myth that African law is inherently inconsistent with human rights.⁹³ In this sense, re-indigenisation entails exposing the extent to which cultural imperialism stripped African law of its indigenous normative values, and offers ways by which to exorcise the colonial impact through reverse judicial re- interpretation in order to implement African values through its constitutional recognition under section 211(3).

The thrust of the theory of re-indigenisation is therefore to mitigate the damage caused by the systemic de-indigenisation crusade of the repugnancy clause, by progressively re-indigenising customary law as a whole, so that its rules, principles, concepts and doctrines can be restored to their natural habitat. In this vein, the theory conscientises the courts to desist from importing the common law under the guise that such a step is necessitated by the developmental imperatives of African law in a human rights environment. To achieve these objectives the thesis proposes the following main recommendations the implementation of which would promote the envisioned African jurisprudence.

⁹² See Juma "From 'repugnancy to Bill of Rights'" *op cit* 90.

⁹³ Keveey *op cit* 19.

7.4(i) *The recommendation to develop the theory of re-indigenisation as a vehicle for mainstreaming the African metaphysical orientation in African law*

Legal interpreters must adopt the theory of re-indigenisation as a vehicle for mainstreaming the African metaphysical orientation as the paradigm for conceptualising indigenous legal rules, principles, concepts and doctrines. To achieve this the human rights-compliant aspects of African culture should be re-centred to promote the system's positive outlook.

This recommendation is supported by a number of sub-recommendations aimed at substantiating them and are driven by the conviction that a theoretical re-indigenisation of African law would serve as a catalyst for producing the version of African jurisprudence that situates the indigenous value system as a unique component of the South African and international human rights systems. An implementation of this recommendations would help cleanse African law of all vestiges of de-Africanisation which entombed African values through the Roman-Dutching crusades of the past.

The theory of re-indigenising African law generates an epistemic revolution which aims to empower South Africa's constitutional institutions to:

- reverse the hegemonic coloniality that subverted the operation of African law by fossilising and stone-walling it through the distortive repugnancy clause;⁹⁴
- restore African law's most hallowed features of adaptability and mutability;⁹⁵
- re-centre the African frame of reference as the mainstream for construing the African law envisioned by the Constitution;
- promote the quest for African law solutions from within this system thereby advancing the advent of the African renaissance in which there is synergy between the Bill of Rights and indigenous values;
- un-learn alien ontological and epistemological orientation so as to create space for re-learning its indigenous counterpart in order to reclaim African jurisprudence as a distinct, unique and original knowledge system with its

⁹⁴ See *Gumede supra*.

⁹⁵ See *Pilane 2* par 35.

own independent normative values and paradigm of discourse anchored to the indigenous African frame of reference

- achieve the envisioned African jurisprudence through prioritising the “living” law based on African values and norms that are evolving together with the changing needs of the community and are consistent with the Constitution;⁹⁶
- re-interpret the distorted version of African customs by reconceptualising their philosophical underpinnings in line with current social practices rooted in indigenous norms;
- re-imagine African law in the light of the constitutional injunction to exhume and re-introduce it after decades of neglect and to redefine it as the site for germinating its cultural renaissance;⁹⁷
- re-indigenise the African paradigm of discourse so as to usher in a totally different metaphysical re-orientation that reflects the African life-world as the basis for construing constitutional commitments.

The theory of re-indigenisation draws its inspiration from the indigenous value system as affirmed in the Constitutional Court’s judgment in the case of *Richtersveld Community*, where the court directs constitutional interpreters to keep the differences between the common law and African law distinct while treating the two components of South African law equally,⁹⁸ mindful of the fact that they are representative of divergent normative value systems. The courts should always bear in mind that common law is oriented towards individual autonomy (the individual); whilst African law hinges on human solidarity (all of humanity).

To ensure that issues arising from a particular component of the legal system are, as far as possible, resolved from within that system the Constitutional Court has held in the *Mhlungu*⁹⁹ case, and the SCA has confirmed this in the *Amod*¹⁰⁰ case, that the Constitution should not be invoked to resolve issues for which the ordinary law of the

⁹⁶ See *Richtersveld Community supra* para 51.

⁹⁷ See generally Mamdani “There can be no African Renaissance without an African-focused intelligentsia” in Makgoba MW (ed) *African Renaissance* (1999) 125.

⁹⁸ See para 51.

⁹⁹ 1995 (3) SA 867 (CC) para 59.

¹⁰⁰ 1999 (4) SA 1319 (SCA).

land has answers.¹⁰¹ Parties seeking to be appointed as heirs must proclaim their customary commitments to support and act in the interests of the other customary shareholders, particularly, women and children. In this way the indigenous knowledge system will be treated as the framework from which to derive credible solutions.

The theory of re-indigenisation inculcates a synergy between indigenous values and constitutional norms so as to galvanise state institutions to revitalise a distortion-free African law. It relies on the design of the constitutional framework as reflected in sections 211, 31 and 39(2), as the instrument for reclaiming the lost cultural integrity of African law. This entails construing the developmental responsibilities of the court enshrined in section 39(2) of the Constitution to mean that the equality rights in section 9 and the cultural rights in sections 30 and 31 of the Constitution may be harmonised as complementary provisions of the same document, as opposed to the chaotic relationship portrayed by the sceptics who choose to see African culture and human rights as conflicting concepts.

The implementation of the theory of indigenisation will promote the symbiosis between the customary law application clause (section 211(3)), the equality clause (section 9), and the culture clauses (section 30, 31) in the Constitution. Ultimately it would reconcile this framework through the developmental clause (section 39(2)). This portrayal of the Constitution would reinstate it as a coherent document that protects both equality rights in section 9 and cultural rights in sections 30 and 31, as opposed to the chaotic document with conflicting provisions as portrayed by the sceptics. In the final instance the acceptance that the Bill of Rights protects both African law and culture and conventional human rights helps to deconstruct the false perception that a constitutionally recognised system is in essential conflict with that Constitution's Bill of Rights.

The recognition of African law as provided for in section 211 of the Constitution must mean restoration of the entire indigenous system as a customary system to be applied and developed by courts that are reconstituted to include indigenous characteristics, such as popular participation and less formalities. The Constitution requires the courts

¹⁰¹ See Bronstein *op cit* 402-404.

to adjust to the African legal tradition, rather than sacrifice the latter to the hegemonic authority of the Western tradition. The resulting harmony envisages the application of African law in the context of indigenous culture that has been reconciled with the Constitution and encourages the communities adhering to African law to cooperate with legal professionals in conceptualising the post-imperial notion of constitutionalism.¹⁰²

7.4(ii) The recommendation for the establishment of an integrated Afro-Western bench.

This involves re-imagining judicial institutions as African fora where legal professionals assume the functions of African leaders, sitting together with community members and considering the issues through indigenous metaphysical lenses. In such a setting all issues would be evaluated against the African value system which must serve as the basis for understanding the notion of human rights as revealed in the philosophy of *ubuntu*. The cultural deficit of the conventional South African bench and legal profession should be supplemented by involving selected members of the community from which the matter arose as assessors in African law proceedings.

Such an integrated judiciary would benefit from the diversity of perspectives which would promote the indigenisation of human rights, and the disentombing¹⁰³ of African law from decades of neglect. Integrated values of interpretation would then help narrow the gap that exists in the divergent conceptualisations of equality and cultural rights. Such a normalised bench would also be able to enforce African law with the level of enthusiasm envisioned by the Constitution. Once exhumed, the indigenous value

¹⁰² See Hopkins KG “Democracy, government policy, and law in South Africa: A reply to Marie Huchzermeyer” in (2003) 14/1 *Urban Forum* 108 at 109 defines constitutionalism thus: “Constitutionalism is the idea that a government should strive to derive its powers from a written constitution and that the powers that a government may exercise should be limited to those that are set out in the Constitution. South Africa is a constitutional state. This much is clear from the Constitution itself, which dictates that all branches of government are bound by its provisions. Government policy that is inconsistent with the Constitution is incapable of legal enforcement. This is clear from section 2, which states that: ‘The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled’.” See also Currie I and De Waal J *The new constitutional and administrative law: Vol 1 Constitutional law* (2001) 10 saying: “Modern constitutionalism is thus a prescriptive doctrine in that it indicates how state power should be exercised and does not simply describe how governments exercise their authority in practice. It is also normative, that is it sets out the values that should be upheld in the governing process.”

¹⁰³ The use of the term “disentomb” in this context has been borrowed from the inaugural lecture delivered by a former colleague, Nqosa Mahao, while he was Professor and Dean of the College of Law, Unisa.

system would help the court to re-conceptualise such basic notions as “court”, “judicial proceedings” and “litigants” in their African setting.¹⁰⁴

Nhlapo believes that the integration of customary communities as actors in law reform can restore indigenous values to the centre of the administration of justice and enhance the application of restorative justice, as “customary law is an amorphous repertoire of norms of varying specificity and values, ranging from rules of etiquette and polite behaviour to those accepted values whose breach is taken very seriously”.¹⁰⁵

In this way the dominant Western culture of individualism would be blended together with the communal ethos of African culture so that the tendency to adjudicate and punish immanent in the common law is tempered by African law’s inclination towards restoration and compensation.¹⁰⁶ In the formulation of judgments, both these cultures must be equally protected, as rights of humans, because the individual needs society as much as society needs individuals. Such a symbiosis can be a catalyst in the revival of the dormant African jural postulates that have the potential to accelerate the articulation of African jurisprudence in accordance with the bedrock norms of its paradigmatic underpinnings.

In a constitutional democracy, institutionalising community participation as part of social involvement of the re-enfranchised customary communities in the judicial function would both advance the re-indigenisation project and promote the goal of legitimation. When applied by an integrated bench, African law would be viewed through its own prism. More importantly, the human rights nature of African cultural rights would enjoy equal constitutional protection with individual rights, as required by the Constitution.¹⁰⁷ This level of re-imagination would empower the integrated judiciary progressively to disentangle the African ontological metaphysics from the stranglehold of the hegemonic Western epistemology and to reveal African law’s identity as a distinct normative value system.

¹⁰⁴ For a contrary opinion see English R “*Ubuntu: The quest for an indigenous jurisprudence*” (1996) 12 *SAJHR* 641.

¹⁰⁵ *Idem* 7.

¹⁰⁶ See Sachs J’s judgment in *Dikoko v Mokhatla supra*.

¹⁰⁷ See Bennett “Re-introducing” *op cit* 10-11.

7.4(iii) *The recommendation to enforce the right to African culture as a human right*

The strategy for constitutional institutions is to enforce the right to culture as a human right by characterising all forms of cultural imperialism as violations of human rights. In this sense re-indigenisation requires a culturally responsive judicial manipulation of African values, to restore genuine African law by translating the “living” version of African law into juridical form. Focusing on the version that is prevalent in social discourse depicts the judicial function as taking the state’s obligation to protect the right to culture seriously and affirms the formal status of “living” law as substantive recognition. In terms of the theory of re-indigenisation the inquiry into African law’s constitutionality should be considered only after it has been infused with authentic indigenous values. This will prevent the courts from finding themselves constitutionalising un-customary state culture such as the distorted “official” version.

It is only when there is no applicable “living” law that the old “official” rule that has been declared unconstitutional, should be rescued from its “official” distorted form and re-indigenised before transforming it to reflect human rights as suggested by Ngcobo J in the *Bhe-Shibi* case.¹⁰⁸ The courts must at the same time condemn the distortion of African law under the repugnancy clause as a human rights violation.

By re-indigenising African law to rid it of the colonial/apartheid distortions, South Africa’s state institutions would be able to expose the nefariousness of the repugnancy dispensation and to characterise its resultant distortions as a cultural genocide and therefore a violation of human rights. Such a finding would marshal support for the Africanisation of all aspects of customary law that were affected by the distortive repugnancy interpretation and the positivist state culture it imposed in its unconscionable annihilation of the dialogic indigenous social culture that historically sustained the African communal living environment.

The implementation of this recommendation would ensure judicial commitment to the un-doing of the distortions of the past through a progressive invalidation of each distorted rule, principle, concept or doctrine of African law as a violation of the right to

¹⁰⁸ See Pieterse M “Killing it softly: Customary law in the new constitutional order” (2000) *De Jure* 35.

culture. Upon application – or *mero motu* – the court would investigate any rule, principle, concept, or doctrine that appears to have been distorted and, upon proof, expunge it from the system and replace it with a current rule reflecting social practice. In due course all “official” distortions would be discredited and replaced with current indigenous norms, which are more amenable to constitutional alignment in accordance with the goal of the theory of re-indigenisation.

In terms of this recommendation, such a large-scale excision of colonial/apartheid distortions would advance the judicial effort to deal effectively with the malady of de-indigenisation inflicted through the Euro-Western enforcement of the repugnancy clause. The courts would view such distortions as part of the policy of cultural imperialism, and feel empowered to declare them unconstitutional. The value of adopting the theory of re-indigenisation lies in its readiness to translate the judicial assertion that customary law is equal to the common law into a substantive commitment to affirm the African value system. In that way the constitutional mandate to apply the latter system can be construed as a real imperative rather than a mere instrument of formal recognition.

7.5 Concluding remarks on the entire study.

This is the end of a study that seeks to devise a way to re-imagine and re-interpret African jurisprudence in South Africa where African law continues to be dominated and conceived against the legal convictions of the Western value system. It also seeks to find solutions for ending African law’s inferiority through maximising the impact of its recognition provisions that are found in the current constitutional framework. The point of departure is that there are sufficient constitutional and legislative provisions on which the courts can rely in restoring African law’s status within the South African legal system as envisioned by the Constitution.

The controversy that is raging among the scholars on the nature of African law demonstrates that the system’s position remains unclear despite its recognition in the new democratic dispensation. It then becomes the responsibility of responsive judges and other legal interpreters to imagine a post-imperial value system for African law,

taking into account the history of colonial and apartheid distortions that were perpetrated through decades of the application of the repressive interpretive technique of the repugnancy clause, and to juxtapose them against the Bill of Rights.

The nature and characteristics of African law as envisioned by the Constitution requires them to be viewed through the lens of their uncorrupted indigenous features which explain the centrality of the philosophy of *ubuntu*, which in turn employs principles such as group solidarity, communal living and shared belonging to reflect a uniquely African orientation. When viewed against this background, the distortions wrought on the African value system since the advent of colonialism become apparent for stunting the development of African values and demonising some of the loftiest norms underpinning the indigenous life-world.

On this basis an appraisal of the extent of the damage engendered by the colonial onslaught to African law and its normative value system was made so as to assess the sufficiency of the constitutional framework and its legislative scheme *vis-à-vis* the task to resurrect and rehabilitate the system as a credible component of South African law on par with the common law of Western origin. The constitutional framework thus established facilitates this task by categorically coupling the recognition of African law with an injunction enjoining the courts to apply it whenever it is applicable so that judicial officers can no longer treat its application as a matter of discretion in the manner they used to do it in the past.

The thesis proceeds to explore how the legislature set out to implement the mandate to affirm African law through the promulgation of a number of statutes aimed at harmonizing indigenous values with constitutional norms. This involves revising the law relating to customary marriages, traditional leadership and succession where indigenous rules and principles were integrated with common law concepts to re-create these institutions in the image of the envisioned democratic South Africa. In the process the study also reveals how the courts have managed to re-centre a number of indigenous principles as part of their mandate to apply African law in adjudicating

indigenous rights.¹⁰⁹ Such principles include African law's communal and collective ethos that represent the cornerstone of the indigenous life-world reflected by its institutions.

The study also shows that in as much as the courts have registered appreciable successes in refashioning African law as envisioned by the Constitution there remains a lot of intractable challenges that continue to bedevil its transformation in South Africa. In the majority of cases African law remains invisible, as legal practitioners do not usually plead its applicability until they have to do so in cases arising from indigenous African disputes. Nor do the judges ever demand to be addressed by the lawyers on such applicability. Hence the theory of re-indigenisation is being proposed as the panacea for this perennial challenge to help exorcise the lingering ills inflicted on African law by the repugnancy dispensation of the past.

¹⁰⁹ See *Richtersveld Community* *supra* par 51.

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