

DUTIES OF A LAWYER IN A MULTICULTURAL SOCIETY: A CUSTOMARY LAW PERSPECTIVE?

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1 Introduction

The rule of law is one of the values upon which South Africa is founded.¹ The role of law in the lives of people cannot be underestimated. There is virtually no aspect of human life that is not affected by law. Of interest for this contribution, is that law also affects sensitive areas such as custody of children, marriage and divorce, succession, citizenship, property and access to some of the constitutionally guaranteed rights among others. The Constitution has vested courts² of law with the authority to apply the law without fear, favour or prejudice.³ It is mainly in courts or appropriate fora or tribunals that disputes are resolved.⁴ Any error in the interpretation and application of the law by the courts may, therefore, potentially result in devastating consequences on the lives of those affected. As officers of the court, lawyers play an equally important role in assisting the courts to interpret and apply the law. The centrality of their role goes beyond the mechanical interpretation of rights. To a certain extent lawyers “may manipulate or even create rights in the first place”.⁵

Legal dualism⁶ is a reality in South Africa. African customary law coexists side by side with the Western-inspired dominant common law. Available literature on the two legal systems reveals that there are more dissimilarities

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¹ S 1(c) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

² This contribution makes a distinction between traditional courts presided over by traditional leaders and common-law courts as known in the dominant legal system.

³ S 165(2) of the Constitution.

⁴ S 34.

⁵ EAL Lewis *Legal Ethics: A Guide to Professional Conduct for South African Attorneys* (1982) 278.

⁶ In South Africa, common law co-exists with other religious and indigenous legal systems and the much preferred term to describe this reality is legal pluralism. GJ van Niekerk “Legal Pluralism” in C Rautenbach, JC Bekker, & NMI Goolam (eds) *Introduction to Legal Pluralism* (2010) 1-3. The preferred term for this contribution is legal dualism which describes the co-existence between common law and African customary law. See M Pieterse “Its a ‘Black thing’: Upholding Culture and Customary Law in a Society Founded on Non-Racialism” (2001) 17 *SAJHR* 364-365 n 4 for a similar distinction.

than there are similarities.⁷ One such dissimilarity is the use of lawyers in dispute resolution processes. The use of lawyers is historically alien to customary law. In a constitutional democracy, however, legal representation has become an indispensable requirement of justice in both legal systems, particularly in criminal matters. The recognition of customary law by the Constitution means that more lawyers will deal with customary law-related matters in court. Ordinarily, both the courts and lawyers are fully conversant with the rules and procedures of the common law, but less so with customary law.⁸ Customary law on the other hand is silent on what the duties of a lawyer are or should be. This is so because customary law knows of no class of people called lawyers and has no role for them in its processes and procedures. The concept of lawyers is a creation of the dominant Western-inspired legal system.⁹ In South Africa, lawyers are trained according to the norms and values of the Western-inspired dominant legal system. They execute their duties in accordance with the dictates of the dominant legal system albeit in a multicultural society with more than one legal system.

African customary law pre-dates all other legal systems in South Africa. For a long time, it was the only legal system which was applicable to everyone.¹⁰ Colonialism and later apartheid played a major role in relegating customary law to the periphery.¹¹ Despite being recognised by the Constitution, the position of customary law in the legal system of the Republic is debatable.¹² To date, customary law is still struggling to claim its rightful place in the South African legal discourse. Due to reasons rooted in history, customary law is the weaker of the two systems.¹³ Debates about customary law and its future role are not new.¹⁴ These debates go to the very foundation of the legal system. For instance, there is uncertainty as to what customary law is, when it is applicable and to whom. A further compounding problem is that there is a dichotomy between the codified law of the state and the living customary law

⁷ See G van Niekerk "The Challenge of Legal Pluralism" (2008) 23 *SAPL* 208-220; D Taylor "Where there is a Way there is a Will: How Traditional African Homesteads Reflect the Legal Consequences of Succession" in T Falola & SJ Salm (eds) *Urbanisation and African Cultures* (2005) 417-432; M Chanock "Law, State and Culture: Thinking About 'Customary Law' after Apartheid" (1991) *Acta Juridica* 52-70; TW Bennett "Legal Anthropology and Comparative Law: Disciplinary Compromise?" (2010) 21 *Stell LR* 4-25

⁸ AJ Kerr "Issues Arising from a Challenge to the Constitutionality of the Customary Law of Intestate Succession: *Mthembu v Letsela* [2000] 3 All SA 21 (A); 2000 3 SA 867 (SCA)" (2001) 64 *THRHR* 320

⁹ For an historical overview of the legal profession see: L Wildenboer "The Origins of the Division of the Legal Profession in South Africa: A Brief Overview" (2010) 16 *Fundamina* 199-225

¹⁰ DD Ndima "The African Law of the 21st Century in South Africa" (2003) 36 *CILSA* 325-326

¹¹ See F Mnyongani "Whose Morality? Towards a Legal Profession with an Ethical Content that is African" (2009) 24 *SAPL* 123-126

¹² G van Niekerk "The Status of Indigenous Law in the South African Legal Order: A New Paradigm for the Common Law?" (2001) XXXXII *Codicillus* 5-6; J Church & J Church "The Constitutional Imperative and Harmonisation in a Multicultural Society: A South African Perspective on the Development of Indigenous Law" (2008) 14 *Fundamina* 1-2

¹³ Van Niekerk (2008) *SAPL* 208

¹⁴ AN Allot "What is to be done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950" (1984) 28 *J Afr L* 56-71

that governs traditional communities.¹⁵ In the post-apartheid era, customary law is still struggling to develop and is also not readily ascertainable.¹⁶

In South Africa, lawyers execute their professional duties in a multicultural society still struggling to rid itself of the challenges of racial discrimination, inequality and illiteracy. The relationship between customary law and the dominant legal system has over the years been a mirror image of the racial divisions in the country particularly in relation to black and white people.¹⁷ The dominant legal system de-centred the customary legal system and elevated itself to be the norm against which customary law was to be measured.¹⁸ Up until 1986¹⁹ only dedicated courts presided over by native commissioners and traditional leaders could recognise customary law as law.²⁰ Customary law became the legal system applicable to blacks and was enforceable only when it was not repugnant to the norms of the Western dominant legal system. The Constitution has brought about a transformation in the relationship between the two systems.²¹ Customary law is now recognised alongside common law but subject to the Constitution.²²

This contribution argues that, notwithstanding the uncertainty and the debates, a majority of the population in South Africa adheres to principles of the living customary law and its underlying philosophy of *ubuntu*.²³ When disputes among them arise, they settle those disputes in accordance with the living customary law principles where services of a lawyer are not required. However, when their disputes go beyond the traditional court systems, as they often do, this contribution is of the view that justice requires that such disputes be settled according to the rules and norms of the living customary law. In principle this is still possible, since all courts can now take judicial notice of customary law, including living customary law. However, the move to a non-traditional court setting brings with it a number of changes. The context of the hearing moves from a familiar environment to one which may be less familiar to the parties involved in the disputes. The officiating language changes thus creating a need for an interpreter. Engaging the services of a legal practitioner becomes a necessity, thus introducing a price tag to justice.

¹⁵ There is a distinction made between the “official” customary law and the “living customary law” See Ndima (2003) *CILSA* 325-329; C Himonga & C Bosch “The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?” (2000) 117 *SALJ* 306 319-336

¹⁶ See M Pieterse “Killing it Softly: Customary Law in the New Constitutional Order” (2000) 1 *De Jure* 35-53

¹⁷ See Pieterse (2001) *SAJHR* 364-379

¹⁸ J Church “The Convergence of the Western Legal System and the Indigenous African Legal System in South Africa with reference to Legal Developments in the Last Five Years” (1999) 5 *Fundamina* 8-10; Ndima (2003) *CILSA* 327

¹⁹ The Special Court for Blacks Abolition Act 34 of 1986 abolished special courts for blacks Two years later the Law of Evidence Amendment Act 45 of 1988 permitted courts to take judicial notice of customary law

²⁰ Bennett (2010) *Stell LR* 6-7

²¹ S 211(3) of the Constitution

²² See Van Niekerk (2008) *SAPL* 208 who writes that customary law “enjoys the status of law when it has been authorised by the state”

²³ This contribution is aware of the fact that there are those black people who have embraced Western lifestyle and all its values, but there are also those who have rejected Western civilisation and its trappings See Ndima (2003) *CILSA* 329 This discussion focuses mainly on those in rural areas who are under traditional leadership systems, who generally have no inkling to embrace Western values

Though the court may take judicial notice of customary law, it is still not clear what this entails in practice. Does this refer to how proceedings are conducted, or to the substantive issues addressed or even the remedy sought? To a large degree, the court will be guided by the legal practitioners involved. The assumption being that legal practitioners are conversant with the living customary law rules.

The view that law is an important expression of national culture is well established in South Africa.²⁴ Multiculturalism has always been a reality in South Africa. Under apartheid, multiculturalism was characterised by an unequal treatment of cultures different from the Western-inspired Judaeo-Christian culture.²⁵ In the post-apartheid era, the transformation of the legacy of apartheid is at the core of the constitutional project. South Africa is a multicultural society, and the right to culture is constitutionally protected.²⁶ The first part of this contribution will discuss the transformational agenda of the Constitution of South Africa, especially in as far as it relates to racial discrimination, inequality and unjust structures. It will be argued that the rights discourse has become the defining feature of the constitutional democracy. In the second part, the contribution will discuss access to justice in a multicultural society. Justice is a relative term, and to talk of justice in a multicultural society requires a consideration of the context within which such a demand is made. In the third part the contribution will outline duties of a lawyer as understood within a Western-inspired dominant legal system. This contribution will argue that duties of a lawyer are framed in an individualistic manner to respond to the needs of a Western-inspired dominant legal system and are therefore inadequate to respond to the needs of a multicultural society. In the fourth part, the contribution will present the African conception of the law. The contribution will argue that conceptions of African law should also have a bearing on duties of a lawyer, particularly when lawyers deal with African customary law issues. In the last part, the paper will put forward some possible proposals on how these issues may be taken forward and then conclude.

2 The transformative agenda of the South African Constitution

Racial inequality was at the core of the apartheid ideology. Different policies and legislations were put in place to ensure that the apartheid ideology was realised. The law and the courts were used as instruments to enforce the racial exclusion and oppression of the majority black people.²⁷ While the central theme of apartheid was the elevation of white people and their values to a superior position, the sub-theme was to ensure that each racial category lived separate from each other.²⁸ Parallel institutions were created to cater for the

²⁴ Chanock (1991) *Acta Juridica* 52

²⁵ See P Lenta "The *Tikoloshe* and the Reasonable Man: Transgressing South African Legal Fictions" (2004) 16 *Law and Literature* 353-379

²⁶ S 30 of the Constitution

²⁷ E Cameron "A 'Single Judiciary'? Some Comments" (2000) 117 *SALJ* 141 142

²⁸ S Biko *I Write what I Like* (2004) 29

different race groups. National resources were distributed on the basis of race. A hierarchy of importance was created with white people occupying a privileged position which gave them access to most resources within the Republic. Below whites were Asians who had access to privileges which were not available to coloureds. At the very bottom of the hierarchy were the majority black people. This hierarchy was replicated in state institutions like prisons.²⁹

Race became relevant to where one lived, the inferiority or superiority of the services one would have access to, the entrance one would use at public buildings, the school one would go to, the hospital available to one and the cemetery one would be buried at when one died. So to be classified wrongly could have privileged or de-privileged one. It was therefore common to have someone mounting a legal challenge to appeal against their classification, especially if one were wrongly classified as black.³⁰ The unequal *status quo* that obtained within the Republic, replicated itself within the legal system. The Western-inspired common law became the law of the Republic while customary law, which was applicable to the black majority, was treated as inferior.³¹

The struggle to counter the hegemony of the racial policies and legislation in South Africa was waged using the rights discourse language.³² As a result of this, the international community, regional bodies and human rights organisations condemned apartheid policies using the same rights language.³³ With the demise of apartheid, the rights discourse continued to be one of the strategies to transform the apartheid legacies and to construct a constitutional state. The rights discourse, albeit with its own limitations, became the foundation of the negotiated South African constitutional state.³⁴

The first democratically elected government inherited a racially divided country. To talk of poverty and inequality in the South African context became synonymous with race. In the words of Thabo Mbeki, South Africa was divided into two nations, the one black and the other white:

²⁹ N Mandela *Long Walk to Freedom* (1994) 232 who writes that even the diet given to the prisoners was fixed on the basis of race. While whites received a far more superior breakfast, blacks, indians and coloureds received the same quantities, except that indians and coloureds received a half teaspoon of sugar while blacks received nothing.

³⁰ Mandela *Long Walk* 141

³¹ Ndima (2003) *CILSA* 324-330; Pieterse (2001) *SAJHR* 372. See also Chanock (1991) *Acta Juridica* 53 who writes that:

“As a telling mark of its subordinate status in South African jurisprudence, discussions of, and knowledge of, the customary law have been corralled off from legal knowledge in general. It has been an area in which some, often anthropologists rather than lawyers, have claimed special expertise, and which lawyers in general have been content to cede.”

³² M Mutua “Hope and Despair for a New South Africa: The Limits of Rights Discourse” (1997) 10 *Harv Hum Rts J* 63-114

³³ 64 n 3

³⁴ See Mutua (1997) *Harv Hum Rts J* 68 who argues that the adoption of the rights discourse has “frozen the hierarchies of apartheid by preserving the social and economic status quo”, and also M Pieterse “Finding for the Applicant? Individual Equality Plaintiffs and Group-based Disadvantage” (2008) 24 *SAJHR* 397 who writes that one of the criticisms sometimes levelled against human rights discourse is that “[i]ts individualist orientation precludes it from effectively confronting group-based patterns of social and economic disadvantage”

“One of these nations is white, relatively prosperous, regardless of gender or geographical dispersal. It has access to a developed economic, physical, educational, communication and other infrastructure. This enables it to argue that, except for the persistence of gender discrimination against women, all members of this nation have the possibility of exercising their right to equal opportunity, and development opportunities to which the Constitution of 1993 committed our country. The second and larger nation of South Africa is black and poor, with the worst affected being women in the rural areas, the black rural population in general and the disabled. This nation lives in conditions of grossly underdeveloped economic, physical, educational, communication and other infrastructure. It has virtually no possibility of exercising what in reality amounts to a theoretical right to equal opportunity, that right being equal within this black nation only to the extent that it is equally incapable of realisation.”³⁵

When the 1996 Constitution was enacted it was hailed for, among other things, its inclusion of justiciable socio-economic rights and its transformative agenda.³⁶ A transformative constitution seeks “to facilitate a fundamental transformation in the unjust political, economic and social conditions inherited from our colonial and apartheid past, and to create a new society based on social justice, democracy and human rights”.³⁷ The South African Constitution is founded upon the values of human dignity, non-racialism and non-sexism.³⁸ In keeping with the rights discourse, the Constitution mentions race within the context of the right to equality.³⁹ The drafters of the Constitution have situated the equality clause at the heart of the inequalities of the past. The equality envisaged by the Constitution is both formal and substantive.⁴⁰ Formal equality, as De Waal⁴¹ writes, refers to sameness of treatment, that is, everyone must be treated in the same manner regardless of their circumstance, while substantive equality refers to the fact that the circumstances of each individual must be considered so as to ensure equality of outcome. The equality clause therefore occupies “a central and overarching place”⁴² in the South African legal order. As a value and as a right, Albertyn and Goldblatt⁴³ argue, equality is central to the task of transformation.

A further point to make is that constitutional rights are interdependent and interconnected.⁴⁴ Liebenberg and Goldblatt⁴⁵ propose what they call an interpretive interdependence of rights. By this they envision a form of interpretive dependence whereby courts are encouraged to consider how values which underlie one right may be of assistance in developing the jurisprudence

³⁵ T Mbeki *Statement of the Deputy President Thabo Mbeki* (1998) delivered at the Opening of the Debate in the National Assembly on *Reconciliation and Nation Building* held in the National Assembly, Cape Town, 29-05-1998 <<http://www.dfa.gov.za/docs/speeches/1998/mbek0529.htm>> (accessed 18-04-2010)

³⁶ C Albertyn & B Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) 14 *SAJHR* 248-276; S Liebenberg & B Goldblatt “The Interrelationship between Equality and Socio-economic Rights under South Africa’s Transformative Constitution” (2007) 23 *SAJHR* 335-361; D Moseneke “Transformative Constitutionalism: Its Implications for the Law of Contract” (2009) 20 *Stell LR* 3-13

³⁷ Liebenberg & Goldblatt (2007) *SAJHR* 338

³⁸ S 1(a)-(b) of the Constitution

³⁹ S 9

⁴⁰ J de Waal “Equality and the Constitutional Court” (2002) 14 *SA Merc LJ* 141 142-143

⁴¹ 142-143

⁴² S Jagwanth “Expanding Equality” (2005) *Acta Juridica* 131 131

⁴³ Albertyn & Goldblatt (1998) *SAJHR* 249

⁴⁴ See M Pieterse “Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardships Revisited” (2007) 29 *Hum Rts Q* 796 799-806

⁴⁵ Liebenberg & Goldblatt (2007) *SAJHR* 339

of another right.⁴⁶ They propose that since equality is a foundational value in the Constitution, it must inform the interpretation of all the rights in the Bill of Rights.⁴⁷ With regard to equality and socio-economic rights, they note that “an approach to the interpretation of equality and socio-economic rights that acknowledges the interrelationship between these rights is also more likely to be responsive to the reality that the most severe forms of disadvantage are usually experienced as a result of an intersection between group based forms of discrimination and socio-economic marginalisation.”⁴⁸

It is argued in this contribution that such an approach may be of assistance in dealing with the legacies of colonialism and apartheid.

The constitutional transformative agenda to build a society based on democratic values, social justice and fundamental human rights is far from being realised.⁴⁹ Eighteen years into a constitutional democracy, South Africa continues to be beset by challenges of racial discrimination, poverty and inequality.⁵⁰ The apartheid footprints refuse to go away, as Liebenberg and Goldblatt note:

“Its legacy is very much with us. It is manifest in the racialised geography and unequal provision of services characterising South African townships and cities, the vastly inferior quality of education experienced by black children in informal settlements in urban areas, and in the inadequate, overtaxed public health-care system serving mainly middle income to wealthy communities.”⁵¹

Customary law seems to be the Achilles heel of the constitutional transformative agenda. Race is still at the centre of the division between customary law and the dominant legal system. Customary law is applicable mainly to black people, and this potentially puts customary law on a collision course with the founding value of non-racialism in the Constitution.⁵² Ndima⁵³ however, is of the view that in a constitutional era, customary law is no longer applied based on the race of the litigating parties, but on its applicability. Ideally, the view by Ndima is correct and accords with the constitutional injunction that “courts must apply customary law when it is applicable”.⁵⁴ The reality however, is that in essence customary law will still continue to be applicable to the majority black people. Correctly or incorrectly so, the court

⁴⁶ 339

⁴⁷ 341

⁴⁸ 339

⁴⁹ See the Preamble of the Constitution

⁵⁰ Chaskalson P stated in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 8 that:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”

⁵¹ Liebenberg & Goldblatt (2007) *SAJHR* 23

⁵² Pieterse (2001) *SAJHR* 364-379

⁵³ Ndima (2003) *CILSA* 340

⁵⁴ S 211(3) of the Constitution

has also adopted the same view.⁵⁵ In most civilised societies, people often rely on the courts of law to give direction in their disputes. How the court discharges this task will have a bearing on how the public views the whole justice system. In colonial times and later apartheid era, courts of law did not have legitimacy in the eyes of the black majority. They were viewed as institutions of oppression.⁵⁶ In the constitutional era, there has been an effort to ensure legitimacy of the courts and the law. Some judges are also sensitive to this. This sensitivity is well captured by Cameron who states that:

“What we as judges and magistrates have most in common is this. We are, quite literally, the edge that cuts the law. To the public, we represent the face and the force of the law.”⁵⁷

To reach the institutions tasked with dispensing justice, such as courts, parties to a dispute have to sometimes go through a number of hurdles, particularly in a country like South Africa. It is to such challenges that this contribution now turns.

3 Access to justice in a multicultural society

The challenges of poverty and illiteracy pointed out above potentially impede the enjoyment of the constitutionally-guaranteed rights. If people are not aware of their constitutionally enshrined rights and how they can access and protect those rights, the human rights discourse will be of no meaning to them. Before anything else, people must be aware that they have rights and that those rights are protected.

Mamtolwana, a fictional character of Sindiwe Magona, embodies the challenge that South Africa faces.⁵⁸ It is 27 April 1994 and Mamtolwana has just cast her vote for the first time in her life. Though almost seventy, Mamtolwana was not eligible to earn pension. This is so because in her earlier years when she applied for a pass, she did not protest when a clerk told her that she was twenty years of age. As a result her pass incorrectly states that she is in her fifties while in actual fact she is approaching seventy. Mamtolwana has no source of income and lives from hand to mouth. In her own words: “*Ndiphila ngecebo likaThixo*. I live by the mercy of God”.⁵⁹ As if that was not enough, now she no longer has her teeth. She accidentally swallowed her only set while eating.

⁵⁵ *Fosi v Road Accident Fund* 2008 3 SA 560 (C) para 24 where Dlodlo J stated:

“The Plaintiff in this matter is an African (Black) person. The deceased was a Black person. I fail to see why I must not apply customary law that governed them.”

⁵⁶ See J Hlophe “The Role of the Judges in a Transformed South Africa – Problems, Challenges and Prospects” (1995) 112 *SALJ* 22-24

⁵⁷ Cameron (2000) *SALJ* 142

⁵⁸ S Magona “Walking the Moon” (1995) *New Internationalist* <<http://www.newint.org/features/1995/03/05/moon/>> (accessed 06-04-2010)

⁵⁹ Magona “Walking the Moon” *New Internationalist*

Reflecting on the inertia of Mamtolwana, Magona writes:

“I close my eyes and try to see her fighting for the right to false teeth – and for the right to electricity in her home, the right to water in her house. And the picture refuses to be born in my mind. Why would she fight for things when she does not know she has a right to them? Why would she fight when rights are not in her recollection of things she knows, things she does, things people like her do? How can she do something that is so completely foreign to her?”⁶⁰

Magona then goes on to write:

“And that is what I fear. The steps you have to take to avail yourself of the opportunity the new South Africa promises all its people, simple as they appear to be, may be too much for people who have no memory of ever walking them.”⁶¹

Only when people are aware of their rights would we begin to talk of access to justice. In this regard, advocacy work of human rights organisations becomes important.

African customary law is an integral part of South African law.⁶² In a pluralistic society, access to justice entails the choice of the applicable law to the dispute. Legal dualism is a reality in South Africa. There is very little in common between customary law and the dominant Western-inspired legal system. Philosophically, the two systems are grounded on completely different jural postulates.⁶³ Procedurally and substantively, the systems are worlds apart.⁶⁴ What is fair in one system may therefore not necessarily be fair in another.⁶⁵ Access to justice is more than physical access and includes being heard effectively.⁶⁶ To be heard effectively will require fluency in the legal language and its processes. People in a dispute, as McQuoid-Mason points out, want their case to be considered by people who have knowledge of the matter at hand.⁶⁷ Courts have not always been fully conversant with African customary law issues.⁶⁸ This contribution argues that when people are involved in customary law disputes, their legal representatives should ensure that such representation embodies the ethos, worldview and rules of customary law. Customary law should not be moulded to be like Western-inspired common law as was the case in the past. To mould customary law according to the dictates of the dominant legal order will only continue to distort it further and therefore stunt its development in its own right.⁶⁹ Litigants need to be assured that the forum adjudicating their dispute will

⁶⁰ Magona “Walking the Moon” *New Internationalist*

⁶¹ Magona “Walking the Moon” *New Internationalist*

⁶² *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 51

⁶³ See GJ van Niekerk “A Common Law for Southern Africa: Roman Law or Indigenous African Law” (1998) 31 *CILSA* 160-161

⁶⁴ Ndima (2003) *CILSA* 329 who writes that the “meaning and functions of the institutions of marriage, inheritance, guardianship, or ownership are different from their western counterparts”

⁶⁵ See CRM Dlamini “The Effect of Customs, Religions and Traditions on the Right to a Fair Trial in Africa” (2000) 33 *CILSA* 318

⁶⁶ J Dugard “Courts and the Poor in South Africa: A Critique of Systematic Judicial Failures to Advance Transformative Justice” (2008) 24 *SAJHR* 214 216

⁶⁷ See D McQuoid-Mason “Access to Justice in South Africa” (1999) 17 *Windsor Yearbook of Access to Justice* 230 who writes that “[p]eople involved in a dispute want to have their cases considered by persons who have knowledge, experience and impartiality and they want access to appropriate tribunals”

⁶⁸ See C Himonga & C Bosch “The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?” (2000) 117 *SALJ* 306 309

⁶⁹ See Ndima (2003) *CILSA* 26, and also Bennett (2010) *Stell LR* 8-11

do so in a fair and just manner. As to what is fair and just will of course depend on the cultural context and the people involved. Justice, after all, is “contingent and particular, not universal”.⁷⁰

In the Western-inspired dominant legal system, the practice of law, its institutions and the language used are far removed from the people. Even the most sophisticated member of the society would struggle to understand the language and the processes followed in court. One of the core features of the South African legal system is that it is adversarial in nature, though not exclusively so.⁷¹ In an adversarial system disputes are settled primarily through adjudication.⁷² The adversarial legal system operates on the basis that two parties to a dispute, in most cases represented by their lawyers, will present their case to a judge who acts like an umpire. At the end of the hearing, the judge or presiding officer will give a ruling. The institutional arrangement of the legal system makes the services of a lawyer indispensable.⁷³ In the words of Steytler, “a fair adversary system is thus dependent on the prosecutor and the accused participating fully and effectively in order to produce a just decision”.⁷⁴ Full participation by the accused is only possible if the accused is legally represented. However, in a country like South Africa, not all poor people can afford the services of some of the best legal practitioners available in the Republic. In a country with socio-economic challenges like South Africa, the high costs make justice available only to the rich.⁷⁵

The centrality of legal representation in an adversarial system cannot be underestimated.⁷⁶ Given the draconian nature of apartheid laws, most black people constantly found themselves on the wrong side of the law. With the services of a lawyer being financially beyond their reach, most of them attempted to represent themselves, often to their own detriment.⁷⁷ Didcott J noted:

“Grave hardships are suffered in this land by those who happen to be black, as the great majority do indeed. Many are illiterate or barely literate. Few speak or understand either official language, or cope well enough to hold their own in a tongue that remains foreign to them. What is said in our courtrooms to each of the rest, what he in turn says there, must therefore be interpreted, word by word. But still he is not oriented. *For much of the jurisprudence is alien to the culture and traditions of the society from which he springs.* So are some of our procedures. Entangled in the workings of a legal machinery that bewilders him, he has the most to gain from a lawyer’s help and the most to lose from lack of it.”⁷⁸

⁷⁰ P Lenta “Just Gaming? The Case for Postmodernism in South African Legal Theory” (2001) 17 *SAJHR* 173 173

⁷¹ C Himonga “The Legal Culture of a Society in Transition: The Case of South Africa” in R Blanpain (ed) *International Encyclopaedia of Laws: World Law Conference in Motion* (1997) 75 81

⁷² 81

⁷³ Small claims courts are an exception as there are no lawyers involved. These courts were designed to make the court processes cheaper and quicker

⁷⁴ N Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) 302

⁷⁵ J Sarkin “Restructuring the Legal Profession and Access to Justice: The Duty of the Law Graduates and Lawyers to Provide Legal Services” (1993) 9 *SAJHR* 223

⁷⁶ Dugard (2008) *SAJHR* 216

⁷⁷ CJ Ogletree “From Mandela to Mthwana: Providing Counsel to the Unrepresented Accused in South Africa” (1995) 75 *Boston University Law Review* 1 1-56

⁷⁸ Didcott J in *S v Khanyile* 1988 3 SA (N) 812-813 (emphasis added)

Under the Constitution accused persons have a constitutionally protected right to a legal representative at state expense.⁷⁹ This right includes accused persons appearing before traditional courts.⁸⁰ The Legal Aid Board has been at the forefront of providing the much-needed legal representation to the indigent accused. With *pro bono* work soon to be compulsory for all practitioners, help seems to be at hand for the Legal Aid Board.⁸¹ However, the limitation of the right to legal representatives at state expense to criminal matters only has become of concern to legal scholars. Dugard,⁸² for instance, argues that even though civil trials may not have the possibility of imprisonment like criminal ones, they also deal with power imbalances where the other side may be legally represented. For this reason, she advocates for the provision of legal aid to poor people in civil matters.⁸³ Given the prominence of the role of lawyers in an adversarial system, most of the strategic decisions regarding the direction of the case will fall on the wit, skill and diligence of the lawyer.

4 The role of a lawyer in the dominant legal system

Historically there was no role for lawyers in the African dispute resolution mechanism. African traditional processes are not complicated and are conducted not only in a familiar environment, but also in a language familiar to the parties. Disputes in traditional settings were dealt with at different levels of the societal hierarchy, depending on the nature of the dispute and the parties involved. Most traditional societies in South Africa would generally follow the same organisational structure.⁸⁴ In a family household, the head of the family was responsible for settling disputes and dispensing justice.⁸⁵ Where such disputes involved more than one family, elders and clan leaders took responsibility to ensure that justice was served. The first two levels were characterised by a degree of informality. The process is formalised when the dispute involves people from different clans or neighbourhoods, in which case the sub-headman would convene his court or council.⁸⁶ Proceedings ordinarily took place in the open or “literally under a tree”.⁸⁷ Criminal and

⁷⁹ S 35(3)(g) of the Constitution

⁸⁰ See *Bangindawo v Head of the Nyanda Regional Authority* 1998 2 All SA 85 (Tk)

⁸¹ *The Legal Services Sector Charter and Scorecards* (2007) art 2 2 2(i) <http://www.justice.gov.za/LSC/LSSC_Dec%2007.pdf> (accessed 10-02-2011)

⁸² Dugard (2008) *SAJHR* 216-217

⁸³ 217 n 7 Dugard writes:

“Although most civil matters do not carry the penalty of imprisonment (with the notable exception of contempt of court), many civil matters relate to unequal power relations and directly impact on attempts to advance socio-economic transformation. These include gender relations (divorce, custody, maintenance, estates), access to land (restitution, communal land), access to housing (evictions) and access to other developmental and socio-economic rights.”

⁸⁴ South Africa is both matriarchal and patriarchal, and the hierarchical structures would generally apply to both. The level and degree of participation of women and men in such hierarchical structures may vary.

⁸⁵ P Holomisa “Balancing Law and Tradition: The TCB and its relation to African Systems of Justice Administration” (2011) 35 *SACQ* 17 18

⁸⁶ 18

⁸⁷ 18 See *Constitutional Court* <www.constitutionalcourt.org.za/site/thecourt/thelogo.htm> (accessed 04-04-2010) for the Logo of the Constitutional Court of South Africa which is based on the same notion of justice under a tree

civil disputes follow the same procedure in that they are informal and open to every adult member. Examination and cross-examination of the accused is open to everyone in attendance. As Holomisa points out, even “a traveller would be allowed to impart his wisdom to the gathering”.⁸⁸ Before sentence is passed, the accused would be asked to suggest the sentence which he himself deems fit for the crime committed. Should the dispute need further referral, it would then proceed to the headman and senior traditional leaders until it reaches the king for final determination.⁸⁹

A Traditional Courts Bill is currently before Parliament.⁹⁰ The Bill seeks to affirm the recognition of the traditional justice system and its values, among others. It sets the contours of the traditional courts. According to this Bill, parties to a dispute in traditional disputes may not bring a legal representative.⁹¹ The Bill enjoins it on the court to “apply the system of customary law with which the parties or the issue in dispute have their closest connection”.⁹² Though kings are still responsible for the administration of justice within their jurisdiction, Western-inspired courts have taken over a greater part of that role. This is so because though the order of the traditional court is final, a party to a dispute may still appeal to a magistrate’s court for appeal or review.⁹³ Court processes and procedures in a magistrate’s court are different from those of traditional courts. At the magistrates’ courts, formalities of the dominant legal system apply, hence the need for the services of lawyers. Himonga and Manjoo point out that the appeal provision has been criticised for undermining the right of rural communities to have their disputes settled in a system familiar to them.⁹⁴

South Africa has fashioned duties of a lawyer to be like those of developed countries. Like in the United States of America, most of what is called ethics within the legal profession in South Africa is nothing but rules made by administrative agencies with the sole purpose of regulating the conduct of professionals within the legal profession.⁹⁵ Rules are indispensable, especially for a profession as complex as the legal profession. Rules, however, are not value-neutral; they impart a value system embedded in a particular culture, and in the South African context, a Western culture.⁹⁶ According to a Western-

⁸⁸ Holomisa (2011) *SACQ* 18

⁸⁹ N Ntlama & DD Ndima “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* 6-9

⁹⁰ Traditional Courts Bill B15-2008 For an in-depth analysis of the Bill, see Ntlama & Ndima (2009) *International Journal of African Renaissance Studies* 6-30

⁹¹ S 9(3)(a) of the Bill

⁹² S 9(4)(a)(ii)

⁹³ See S 12

⁹⁴ C Himonga & R Manjoo “The Challenges of Formalisation, Regulation, and Reform of Traditional Courts in South Africa” (2009) 3 *Malawi LJ* 157-177

⁹⁵ See TL Shaffer “The Legal Ethics of Radical Individualism” (1987) 65 *Tex L Rev* 963-963 where he writes that:

“Most of what American lawyers and law teachers call legal ethics is not ethics. Most of what is called legal ethics is similar to rules made by administrative agencies. It is regulatory. Its appeal is not to conscience, but sanction. It seeks mandate rather than insight.”

⁹⁶ See Lewis *Legal Ethics* 1 who states that the code of ethical conduct of lawyers in South Africa places an “emphasis on the observance by legal practitioners of Western culture imposed by the mores of the nation”

inspired legal system, core duties of a lawyer are directed towards the court, the client and the public.⁹⁷ So often when court decisions are analysed, not much is said about the role lawyers play in assisting the court to arrive at a decision.⁹⁸ In exercising these duties, lawyers play an indispensable role with far-reaching consequences. In so far as the court is concerned, their diligence or sloppiness goes beyond the mere act of assisting the court to reach the truth, follow proper procedures and rules. It impacts on the very image of the court. The court is therefore as good as its lawyers are:

“The judge is too often but the mirror that reflects the bar around the court. If the court give back distorted images of justice and righteousness, it is because the lawyers about the court are crooked and warped. If the bar be inspired by high ideals, standing *rectus in curia* (upright in court), exhibiting the nobility of character, intellectual greatness, and real culture, the effect is to make the court itself what Cicero lauded as *perfectus magister* (perfect master).”⁹⁹

Clients play a very important role in the life of the lawyer. Financially, lawyers depend on clients for their livelihood. Incidentally, most of the unprofessional conduct of lawyers revolves around this relationship. It is the lawyer who charts the way, the lawyer has the skill and knowledge and the client follows. Currently, legal professional ethics in South Africa is a reflection of the Western-inspired common law with its emphasis on the sovereign individual. Once the professional relationship is established, the best interest of the client becomes the preoccupation of the lawyer to the exclusion of the rest. As the court stated in *Ross v Caunter*:¹⁰⁰

“In broad terms, a solicitor’s duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb “properly”, that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client. The duty owed by a solicitor to a third party is entirely different. There is no trace of a wide and general duty to do all that properly can be done for him.”¹⁰¹

A total dedication to the interest of the client of the lawyer raises its own ethical dilemmas, even within the Western-inspired legal system itself. For instance, how far should a lawyer go in securing the best interest of the client? Simon¹⁰² illustrates this point by referring to a debate regarding disclosure of information in divorce matters. The core of the question is whether a lawyer representing a husband in a divorce matter should disclose the income that the husband has kept secret from his wife or not. The answer of course depends on the orientation of the lawyer in so far as the rules of the profession are concerned. One school of thought would say yes, without even blinking, and

⁹⁷ See WH Simon “Ethical Discretion in Lawyering” (1988) 101 *Harv L Rev* 1083-1090

⁹⁸ Kerr (2001) *THRHR* 328 notes that:

“Innumerable cases in virtually all systems of law show the value of thorough study by counsel and one finds statements where the court is content to say: ‘Counsel for the...referred the court to...and submitted that...I agree’ or words to that effect”

⁹⁹ Gena Walling McCray, PLLC “A Lawyer’s Duties in the Practice of Law” *Attorney McCray* <<http://www.attorneymccray.com/ALAWYER/SDUTIESINTHEPRACTICEOFLAW.pdf>> (accessed 04-04-2010)

¹⁰⁰ [1980] 1 Ch 297

¹⁰¹ Sir Robert Megarry V-C quoted with approval by Diccott J in *Road Accident Fund v Shabangu* 2005 1 SA 265 (SCA) para 11

¹⁰² Simon (1988) *Harv L Rev* 1089

the other would say no. Simon is of the view that the merits would determine whether to disclose or not. His view is that the lawyer has the discretion to follow the path that would promote justice.¹⁰³

Lawyers have an equally powerful role to play in society. They are the medium through which the law reaches the people and their role in society can direct the course of events for good or evil.¹⁰⁴ When clients approach a lawyer, they do so with no knowledge of the law applicable to their matter, the arguments they need to advance and the remedy to look for. It behoves the lawyer to frame the argument within the applicable law, without losing sight of the possible remedy. What the remedy entails, will be determined with reference to the jural postulates of the legal system chosen, which is why in a multicultural society such as South Africa, it is important for a lawyer to know what the African conceptions of the law entail.

5 African conceptions of the law and their impact on the duties of the lawyer

Ubuntu is a multi-dimensional concept that covers a broad range of issues including, among others, the law, philosophy, ethics and morality. The legal importance of this value has been underscored by judicial decisions and academic writings.¹⁰⁵ Within the South African context, *ubuntu* finds expression in almost all South African languages.¹⁰⁶ Central to the idea of *ubuntu*, is the notion that people are inter-related, that is, a person is a person through other persons. In most African communities there is a connection between the social context and the economic organisation.¹⁰⁷ There is a strong sense of relatedness which goes beyond consanguinal relationships and extends even to animals and the environment.¹⁰⁸ Metaphysically, supernatural forces too have a role to play in the affairs of the living and so do the dead and those not yet born.¹⁰⁹ The need for harmony, in African ethics, surpasses all else.

Viewed in this context, it follows that the practice of law should also strive to maintain this sense of harmony and relatedness. Disputes invariably involve a broken harmony in a community, and resolution mechanisms are geared towards seeking harmony as the goal.¹¹⁰ Songs, proverbs and stories play a

¹⁰³ 1090

¹⁰⁴ Gena Walling McCray, PLLC "A Lawyer's Duties in the Practice of Law" *Attorney McCray*

¹⁰⁵ See F Mnyongani "De-linking *Ubuntu*: Towards a Unique South African Jurisprudence" (2010) 31 *Obiter* 134-145

¹⁰⁶ M Munyaka & M Motlhabi "Ubuntu and its Socio-moral Significance" in MF Murove (ed) *African Ethics: An Anthology of Comparative and Applied Ethics* (2009) 63 who write that:

"Ubuntu is from *Isinguni*, in Sesotho it is *Botho*, in XiTsonga the word is translated as *Vumunhi*; while in Tshivenda it is *Uhuthu*"

¹⁰⁷ Himonga "The Legal Culture of a Society in Transition" in *International Encyclopaedia of Laws* 87

¹⁰⁸ See MF Murove "An African Environmental Ethic Based on the Concept of *Ukama* and *Ubuntu*" in MF Murove (ed) *African Ethics: An Anthology of Comparative and Applied Ethics* (2009) 315 315-331

¹⁰⁹ MB Ramose "An African Perspective on Justice and Race" (2001) *Polylog* <<http://them.polylog.org/3/frm-en.htm#s3>> (accessed 20-04-2010)

¹¹⁰ See Dlamini (2000) *CILSA* 322

pivotal role in conveying ethical virtues.¹¹¹ The African worldview knows no distinction between law and morality.¹¹² In view of the fact that ancestors play a vital role in African life, a morally good life has future implications. The maintenance of harmony may require that one should live a morally good life in order to be a good ancestor as opposed to being a bad one.¹¹³ Ancestors too play a very active role in the daily activities of the community. The atonement of an offence is incomplete without recourse to the world of ancestors.¹¹⁴

Like morality, law is understood within the context of maintaining the harmony within the community. Law, so understood, directs “how individuals and communities should behave towards each other. Its whole object is to maintain equilibrium, and the penalties of African law are directed, not against specific infractions, but to the restoration of this equilibrium.”¹¹⁵ Culturally, each person or categories of people are assigned their various roles in society. Driberg explains this important feature thus:

“Every individual is born into a certain status, relative to all other members of his [*sic*] community. It is not a personal status, as it may be in an individualistic society, and does not imply rank, but reciprocal obligations and benefits which he incurs as a member of the community. All his conduct is conditioned by his status, which is not a permanent one, but changes with his age and experience and may be affected by the decease of relatives and the inheritance of new responsibilities.”¹¹⁶

There are no hard and fast rules with regard to the application of the law.¹¹⁷ As restitution is at the centre of the application of the law, what constitutes justice may vary on a case by case basis. Justice is served when equilibrium has been reached. For instance, there may be circumstances where the actual stolen property would have to be returned, and in another case with the same facts the equivalent of the stolen property may be given.¹¹⁸ Should there be a conflict between the community and the individual, the interest of the community will rank higher than those of the individual. Duties and responsibilities of each and every member are interpreted in relation to the community.¹¹⁹ This puts African worldview on a collision course with the individualistic conception of law as espoused by the rights discourse. The human rights discourse places more emphasis on the right of the individual, while customary law places more emphasis on the community within which each member has duties.¹²⁰ Most of the post-apartheid customary law court decisions evince a struggle between balancing the right of the community to

¹¹¹ A Shutte “*Ubuntu as the African Ethical Vision*” in MF Murove (ed) *African Ethics: An Anthology of Comparative and Applied Ethics* (2009) 85 and also Murove “An African Environmental Ethic” in *African Ethics* 315

¹¹² Ramose “An African Perspective on Justice and Race” *Polylog*.

¹¹³ Murove “An African Environmental Ethic” in *African Ethics* 321

¹¹⁴ JH Driberg “The African Conception of Law” (1934) 16 *J Comp Leg* 230 238

¹¹⁵ 231

¹¹⁶ 232

¹¹⁷ Ramose “An African Perspective on Justice and Race” *Polylog*.

¹¹⁸ Driberg (1934) *J Comp Leg* 234

¹¹⁹ JF Holleman “An Anthropological Approach to Bantu Law: With special reference to Shona Law” in G Woodman & AO Obilade (eds) *African Law and Legal Theory* (1995) 5-18

¹²⁰ See Pieterse (2000) *De Jure* 38

its cultural practices and the right of the individual litigant.¹²¹ Courts have not always succeeded in getting the balance right.

From the foregoing, it follows that what lawyers understand to be their duty from the initial stage of the case will automatically have a bearing on the envisaged outcome. A lawyer trained in accordance with the dictates of Western norms would seek to prioritise instructions from the client. Duties of a lawyer in the dominant legal system are therefore designed to advance the legal system and its jural postulates at the centre of which lies the sovereign individual. Given the silence of African customary law on duties of a lawyer, it follows that in so far as African customary law is concerned, the imposed role of a lawyer is tantamount to a continuation of a “cultural imperialism”¹²² of one system over another. In a constitutional democracy, cultural imperialism is not desirable. To counter it, there needs to be a clear formulation of what is expected of a lawyer representing clients in customary law matters. Such a formulation needs to be rooted in African philosophy, and reflect the African worldview as understood by those who live according to the norms and standards of African law. This then begs the question: who should take the lead in implementing this?

6 Possible proposals

The discussion above has highlighted some of the inherent tensions and sensitivities that exist in a multicultural society like South Africa. On the one hand the Constitution seeks to protect the right to equality while on the other it allows for different treatment of people in order to protect their right to culture. A further point of tension for this discussion is the fact that the rights discourse has become a defining feature of constitutionalism in South Africa. The right to counsel has become synonymous with justice, and yet the proposed Traditional Courts Bill asserts that in traditional courts there will be no legal representation. Drafters of the Bill are sensitive to the need to recognise both the traditional justice system and its values; while at the same time ensuring that the traditional courts are in line with constitutional imperatives and values.¹²³ To this end, the Bill insists on the training of designated traditional leaders who will preside over the traditional courts.¹²⁴ There is a sense that designated traditional leaders will not be left to follow their own devices, but that their work in these courts will be closely monitored by the Department of Justice and Constitutional Development.

With regard to customary law, the contribution has pointed out some challenges which may be condensed into two. Firstly, customary law has not as yet found its place in the South African jurisprudence, and secondly, customary law rules are not readily ascertainable. The latter is further compounded by

¹²¹ See *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC); *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 460 (CC); *Bhe v Magistrate Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the Republic of South Africa* 2005 1 BCLR 1 (CC)

¹²² N Bohler-Muller “When Things Fall Apart: Ethical Jurisprudence and Global Justice” (2005) 20 *SAPL* 23 30

¹²³ See the purpose of the Bill

¹²⁴ S 4(1)-(8) of the Bill

the existence of the distinction between codified law of the state and the living customary law. As far back as the year 2000, Himonga and Bosch highlighted the difficulty of finding easy solutions to the problems associated with the application of customary law and encouraged continued debates and research over this issue.¹²⁵ It is argued in this contrinution that these debates and research need to be focused and channelled towards finding a solution. The Department of Justice and Constitutional Development may take the lead in guiding these debates and ensuring that all interested stakeholders are made part of the process.¹²⁶

In as far as legal practitioners are concerned; there is a need for training for both aspirant legal practitioners and those already in practice. In the academia, African customary law should be made to be part of the mainstream syllabus and through it, students should be sensitised to the diverse needs of a multicultural society within which they will operate. For those practitioners already in practice, it behoves the Law Society of South Africa to organise seminars and workshops at which legal practitioners will be constantly updated on the developments related to African customary law.

Finally, in 2007 the Law Society of South Africa and other stakeholders adopted a Legal Services Sector Charter and Scorecards¹²⁷ document after an extensive period of consultation. In the foreword, the document was hailed as a “milestone for the profession”.¹²⁸ It is suggested that a similar initiative or approach can be adopted for the development and advancement of African customary law. As pointed out above, duties of a legal practitioner are three-fold. These duties are to the court, the client and the public. For a lawyer who is keen on playing a role in assisting the court to develop customary law proper, while also ensuring that justice is served to the client in accordance with the norms of the living African customary law, the initiatives above will give them confidence to be assertive and robust in their work. They will know which customary law rules to apply, and who to invite as expert witnesses in certain matters that have an impact on the general harmony within the traditional communities. As a result, courts would therefore be in a position to give judgments that are in tandem with the core traditional values of the people, and thereby play a role in developing the living customary law of the people and not the distorted official customary law. Only when such a state of affairs is attained, would we be able to speak of inclusive duties of a lawyer in a multicultural society.

¹²⁵ Himonga & Bosch (2000) *SALJ* 306

¹²⁶ A list of stakeholders would include among others: custodians of African tradition such as traditional leaders, headmen, headwomen, kings, queens, senior traditional leaders, the Human Rights Commission, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Law Society of South African and the various representative bodies within it, academic institutions, magistrates and judges

¹²⁷ See the *Legal Services Sector Charter and Scorecards*

¹²⁸ 2

7 Conclusion

In a multicultural society like South Africa, there will always be a competition of cultures, values and norms. In colonial times and later apartheid, Western norms became the normative point of reference against which other cultures were measured. This happened at the time when race was used as a basis for discriminating against people of other cultures. African customary law, which was applicable to many black people, was relegated to the margins and became applicable only when it was not repugnant to Western norms. The Constitution which is rooted in the rights discourse recognises customary law along with the common law. The Constitution is now the normative framework against which all law should be measured. The right to legal representation has now become synonymous with access to justice. Despite the fact that customary law has no role for lawyers in its processes and procedures, it is now a constitutional imperative for accused persons appearing in courts higher than the traditional courts to have legal representation. It has been argued that lawyers understand their duties with reference to the dominant system. Duties of a lawyer are based on rules, but rules espouse a certain Western notion of reality based on the sovereign individual. This contribution has argued that if customary law is to develop in its own right, it has to begin to conceptualise what the duties of lawyers dealing with customary law matters should be. In the absence of such duties, lawyers in South Africa will continue to practice law in a void in as far as customary law is concerned. To fill the void, lawyers will automatically revert to the system they know best, which is more developed, readily ascertainable and is currently dominating the discourse. In a multicultural society with a transformative agenda, such an approach is not desirable.

SUMMARY

This article is about duties of a lawyer in a multicultural society like South Africa. South Africa is a multicultural society characterised by among others a constant competition of cultures, values, and norms. At the heart of the competition lies the use of the law as a tool for social change. Under the colonial government and later apartheid, the Western-influenced legal system de-centred the African customary law to become the dominant normative point of reference. African customary law, which was applicable to the majority black population and still is today, became applicable in as far as it was not repugnant to the Western-inspired norms. The dominant legal system, its norms, values and procedures became the standard against which customary law was to be measured. Available literature on the two legal systems reveals that there are more dissimilarities than there are similarities. One such dissimilarity is the use of lawyers in dispute resolution processes. Customary law knows no class of people called lawyers and has no role for them in its processes and procedures. In a constitutional democracy, however, legal representation has become an indispensable feature of justice in both legal systems. South African lawyers are trained according to the norms and values of the Western-inspired dominant legal system. They execute their duties in accordance with the dictates of the dominant legal system. This article has argued that duties of a lawyer in South Africa are designed to serve the dominant legal system and are therefore not adequate to respond to the challenges of a multicultural society. The premise of the argument is this: If legal dualism is a reality in South Africa and there are vast dissimilarities between the two systems, then the duties imposed by the two legal systems should also be different.