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A REVIEW OF THE LEGAL MEASURES TO PROTECT INDIGENOUS CULTURE IN SOUTH AFRICA

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A mini-thesis submitted in partial fulfilment of the requirements for the LLM Degree in International Trade, Business and Investment Law in the Faculty of Law, University of the Western Cape

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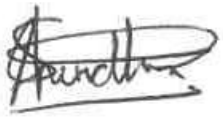
DECLARATION

I declare that 'A review of the Legal Measures to Protect Indigenous Culture in South Africa ' is my own work and that this work has not been submitted before for any degree or currently being considered for a degree at any other institution and all sources I have used or quoted have been duly acknowledged as complete references.



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KEYWORDS

Indigenous Law

Indigenous People

Culture

Identity

Marriage

Land Restitution

Goods

Community

Protection

International Trade

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CHAPTER ONE

INTRODUCTION

1.1 Background

Globalisation has enabled the different countries of the world to be connected to each other irrespective of geographical constraints or time zones. Such connectivity has resulted in more than just an economic exchange, but also a cultural exchange in most instances.[1] Due to the advancement of globalisation a new manner of life has commenced, one which has both positive changes and challenges. Globalisation has led and continues to increase the economic growth of countries and in so doing, the poverty levels of various countries has reduced.[2] Despite the reduction of poverty levels, it is proposed that globalisation poses a challenge in the culmination of cultural homogeneity.[3]

In our rapidly developing world, there is a flow of ideas, capital, commodities, knowledge, information and beliefs. It is advanced that globalisation has contributed to the homogenisation of cultures which has further led to the decrease of values and morals of people throughout the world.[4] It is against this background that the question arises as to whether the legal measures currently utilised to protect indigenous law with a focus on marriages and land ownership in South Africa are adequate.

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Communities of people have been introduced to a way of life, which includes the acceptance of multiple cultures with new goods and skills. The acceptance of multiple cultures by individuals has meant that people view themselves as being a part of a global community or a global world, otherwise known as a global citizen.[5]

A global citizen is a person who identifies with being part of an evolving world community, whose actions contribute to building this community's values and practices.[6] This invariably leads to the assimilation of a new culture, a culture which is chosen and not inherited.

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[1] Tomlinson J 'Cultural Globalization Reconsidered' available at *https://www.bbvaopenmind.com/en/articles/cultural-globalization-reconsidered/* (accessed 20 March 2020)

[2] Van den Bossche P & Zdouc W *The Law and Policy of the World Trade Organization* 4 ed (2017) ch 2

[3] Rahman KMA 'Globalization and Cultural Transformation: The Case of Bangladesh' available at *http://www.ccsenet.org/journal/index.php/ach/article/view/36043/20285* (accessed 21 March 2020)

[4] Rahman KMA 'Globalization and Cultural Transformation: The Case of Bangladesh' available at *http://www.ccsenet.org/journal/index.php/ach/article/view/36043/20285* (accessed 21 March 2020)

[5] Bornman E 'Struggles of Identity in the age of globalisation: Searching for anchors that hold' available at *http://www.unisa.ac.za/contents/faculties/humanities/comm/docs/Struggles%20of%20identity%20in%20the%20age%20of%20globalisation.rtf* (accessed 20 March 2020)

[6] Israel R 'What does it mean to be a global citizen?' available at *http://www.opendemocracy.net/ourkingdom/ron-israel/what-does-it-mean-to-be-global-citizen* (accessed 29 March 2020)

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The identification with new or additional values and practices establishes the new culture that is in accordance with identifying as a global citizen and it is proposed that this impacts the understanding and practice of indigenous law.

1.2 Problem Statement

The question as to whether there are adequate legal measures in place to protect indigenous culture with a focus on marriage and land ownership in South Africa is important. Indigenous law comprises of indigenous culture and through the protection of indigenous law, indigenous culture is protected. This protection is important because indigenous law has a positive effect in protecting the environment[7] and on the cultural practices which are passed on to subsequent generations.

The protection of indigenous law invariably leads to the protection of indigenous culture. Thus, an understanding of the terms must be expanded upon. These concepts have briefly been alluded to in the in the background statement and are discussed more fully in Chapter Two of this mini-thesis. The definitions also include the concepts of identity, globalisation, indigenous people and indigenous law. The definitions of these concepts assist in providing a clear understanding of what indigenous law comprises of and avoids the confusion surrounding these concepts.

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In the continued progression of globalisation and information, an existing culture remains stagnant or is 'exchanged' for a new culture which appears to be the culture of the Western World, thus giving rise to perceived cultural homogenisation and cultural imperialism.[8] The challenge posed is whether there are adequate laws to protect the indigenous law of indigenous South Africans, in light of the continuous process of globalisation.[9]

The area of indigenous law is broad and this research study will be delimited in scope to focus on indigenous law in the areas of marriage and land ownership.

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[7] Swiderska K 'Protecting indigenous cultures is crucial for saving the world's biodiversity' available at *https://www.iied.org/protecting-indigenous-cultures-crucial-for-saving-worlds-biodiversity* (accessed 18 April 2021)

[8] Xue C 'A Review of Tomlinson's Views on Cultural Globalization' available at *http://www.ccsenet.org/journal/index.php/ass/article/viewFile/1446/1392* (accessed 21 March 2020)

[9] Tomlinson J 'Globalization and Cultural Identity' available at *http://www.polity.co.uk/global/pdf/GTReader2eTomlinson.pdf* (accessed 20 March 2020)

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1.3 Research Question

The overarching research question that this mini-thesis seeks to address is the extent to which existing legal measures are protecting indigenous law in South Africa within the areas of marriage and land ownership. In answering the question, the following sub-issues are raised:

1.4.1 The concepts and interrelation of the terms culture, identity, globalisation, indigenous law and indigenous people;

1.4.2 The need to protect indigenous law while allowing its development;

1.4.3 The legal measures that protect indigenous law in South Africa in the areas of marriage and land ownership.

1.4.4 A discussion of legal measures in South Africa which protect indigenous law to that of Australia and Hong Kong; and

1.4.5 Should the South African measures to protect indigenous law be modified and what would such modification entail?

1.4 Significance of Research

This research is important due to the diverse cultures present in South Africa, which include indigenous and non-indigenous cultures. South Africa comprises of the Indian, English, Chinese, Afrikaner, Zulu, Xhosa and Coloured cultures which are not indigenous cultures to South Africa however it does indicate the intermingling of indigenous and non-indigenous cultures. The myriad of cultures in South Africa is further enlarged by the increase of refugees, asylum seekers and other immigrants, from various other countries who have varying cultures.

Due to the numerous indigenous cultures and non-indigenous cultures, each of the three countries, South Africa,[10] Australia[11] and Hong Kong[12] have enacted legal measures to protect their respective indigenous laws and in so doing this study aims to examine the impact of these legal measures in the determination of whether indigenous law and therefore indigenous culture in South Africa is afforded adequate legal protection.

[10] Mukundi C Centre for Human Rights, University of Pretoria *South Africa: Constitutional, Legislative and Administrative* Provisions Concerning Indigenous Peoples (2009)

[11] Pepper R 'Not Plants or Animals: The Protection of Indigenous Cultural Heritage in Australia' available at *http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwiS6M-9wYzPAhUlLMAKHdMgAY4QFggiMAE&url=http%3A%2F%2Fwww.lec.justice.nsw.gov.au%2FDocuments%2Fnot_plants_or_animals.pdf&usg=AFQjCNFDWykZAYYbNDJwjtL2KH2zFn7M8w* (accessed 8 September 2020)

[12] Martin M 'Hong Kong: Ten Years After the Handover' available at *https://www.google.co.za/?gws_rd=ssl#q=legal+protection+of+indigenous++culture+hong+kong&start=10* (accessed 8 September 2020)

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1.5 Research Methodology

The research undertaken will comprise of an analytical assessment of relevant journal articles, policies, laws and internet sources on this topic pertaining to South Africa, Australia and Hong Kong. This will consist of an analysis of the practices in each country and not merely a study of all the laws within each country. The first reason that Australia and Hong Kong were selected as comparative countries was because these countries share a similar history of colonisation by Britain.[13] This has led to complex histories, within each country, which incorporate indigenous law with other law from different parts of the world. The second reason for comparing South Africa to Australia and Hong Kong rests on the multicultural communities within each of these countries. Each country did not always have the multicultural communities that currently exist as they were home to specific indigenous people. South Africa was home to the San and Khoi-Khoi and the now majority Black population,[14] Australia was home to the Aboriginals,[15] whereas the Chinese were the indigenous people of Hong Kong.[16] South Africa, Australia and Hong Kong are now home to people from various different countries and cultures. It is for these reasons the abovementioned countries have been chosen.

1.6 Chapter Outline

Chapter One: Introduction

This is an introductory chapter which will present the topic, background, problem, research question and the proposed content to the reader as a guide to the mini-thesis. This chapter will also indicate the reasons for choosing Australia and Hong Kong, as comparative countries.

Chapter Two: The Concepts of Culture, Identity, Globalisation, Indigenous Law and Indigenous People

The chapter follows on the introduction by defining the terms of indigenous law, identity culture and globalisation as these terms have difficult definitions and theories attached to them.

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[13] Mountain A *The First Peoples of the Cape* (2003) 31

[14] International Labour Organisation and African Commission on Human and Peoples' Rights 'the constitutional and legislative protection of the rights of indigenous peoples: South Africa' available at *http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj6qYrEgIbTAhUMAcAKHR3cBEgQFggYMAA&url=http%3A%2F%2Fwww.chr.up.ac.za%2Fchr_old%2Findigenous%2Fcountry_reports%2FCountry_reports_SouthAfrica.pdf&usg=AFQjCNEoGX_oWlfvw0F1VW_SkqAd4j0mgw* (accessed 10 September 2021)

[15] Australian Law Reform Commission 'Changing Policies Towards Aboriginal People' available at *http://www.alrc.gov.au/publications/3.%20Aboriginal%20Societies%3A%20The%20Experience%20of%20Contact/changing-policies-towards-aboriginal* (accessed 09 September 2020)

[16] Gopan T, Shuting Z and Zhaio L 'Modern Traditional Village Life in Hong Kong: The case of Lung Yeuk Tau Village' (2012) 6 *Hong Kong Anthropologist* 2 24

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In addition to the definitions Chapter Two discusses the Khoi Khoi and San people and their identification as the indigenous people of South Africa.

Following the definitions and discussion on the indigenous people of South Africa, this chapter focuses on the case law which developed the terms as discussed in the chapter whereas the next chapter advances the legal measures which protect indigenous law in South Africa.

Chapter Three: The Legal Measures That Protect Indigenous Law in South Africa with a Focus on Marriage and Land Ownership

This chapter discusses the legal measures in South Africa which protect indigenous law. The Constitution of the Republic of South Africa will be discussed, as well as, the Recognition of the Customary Marriages Act 120 of 1998 and the Restitution of the Land Rights Act 22 of 1996.

Chapter Four: Discussion of Legal Measures that Protect Indigenous Law in South Africa to those in Australia and Hong Kong with a Focus on Marriage and Land Ownership

In this chapter the laws that are used to protect indigenous law pertaining to marriage and land ownership in Australia and Hong Kong will be discussed. This will include the laws as well as the discussions and the views as expressed by academics at universities in Hong Kong and Australia.

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This chapter thereafter aims to discuss the legal measures utilised in Australia and Hong Kong and compare that, with the practices in South Africa.

Chapter Five: Conclusion

The final chapter will provide a review of the legal measures that are utilised in each country to protect its indigenous law with a focus on law marriage and land ownership and whether the South African legal measures are adequate.

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CHAPTER TWO

THE CONCEPTS OF CULTURE, IDENTITY, GLOBALISATION, INDIGENOUS PEOPLE AND INDIGENOUS LAW

2.1 Introduction

The protection of indigenous law in South Africa is a developing topic. Despite the increased awareness of the need for legal protection of indigenous law in South Africa, the term indigenous and its related concepts of culture, identity, globalisation, indigenous people and indigenous law are not clearly understood. The aim of this chapter is to elaborate on these concepts individually and in relation to each other, with an emphasis on the development of indigenous law within the scope of the Constitution of the Republic of South Africa, 1996.[17] These particular terms were selected as together they form a part of indigenous law. Indigenous law comprises of these terms and in turn, these combined concepts rely on each other to develop indigenous law.

In isolation, the definitions do not address the need for the protection of indigenous law, however, it is when globalisation is included to the discussion that the protection of indigenous law comes to the fore. In light of the impact and interrelationship of globalisation with the terms, of culture, identity, globalisation, indigenous people and indigenous law, it is important to ensure an understanding of globalisation. A brief overview of globalisation and its role in the development of indigenous law will be incorporated into this chapter as well.

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The first concept discussed in this chapter is culture which is followed by a discussion of the concepts of identity, globalisation, indigenous people and indigenous law. Last, the recognition of indigenous law as a developing law will be further discussed with reference to case law and the South African Constitution.[18]

The conclusion of this chapter aims to use the understanding of these concepts and the constitutional development of indigenous law, as discussed, in the continued discussion of the protection afforded to indigenous law in South Africa.

Once a discussion of the basic understanding of these concepts is advanced it is then important to understand the implementation of the legal measures through applicable legislation and case law. This chapter further focuses on the case law which developed the terms as discussed in

[17] The legal measures that protect indigenous culture are more fully discussed in Chapter Three of this mini-thesis, whereas the legal precedent which developed the concepts referred to in this chapter are advanced in this chapter.
[18] Constitution of the Republic of South Africa, 1996

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the paragraphs above whereas the next chapter advances the legal measures which protect indigenous culture in South Africa.

2.2 Culture

Culture, which is thought to be a combination of people who share the same beliefs and practices[19] is not fast-paced, it is in some instances dependant on a religious text or a traditional custom which has been practised for centuries. Damen defines culture as the

> '… learned and shared human patterns or models for living; day-to-day living patterns. These patterns and models pervade all aspects of human social interaction. Culture is mankind's primary adaptive mechanism.'[20]

A definition provided by Useem and Useem indicates that culture at its simplest, is the learned and shared behaviour of a community.[21] The definition refers to learned and shared behaviour, which raises the question of what does this learned and shared behaviour entail. This learned and shared behaviour as advanced by Banks and McGee is not the tools, artefacts or any other tangible cultural objects but how the members of the group interpret, use and perceive them.[22]

Accordingly, in relation to this mini-thesis, the meaning of culture is considered to be a combination of the definitions advanced by Useem and Useem[23], as well as by Banks and McGee[24]. Culture is therefore understood as the learned and shared behaviour of a community, which relates not only to the tools, artefacts and other tangible cultural objects but also to the manner a community interprets and perceives these objects.

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Culture and the practice of one's culture is protected in the Constitution.[25] Section 9 of the Constitution, also known as the Equality Clause, lists culture as a ground upon which a person may not be unfairly discriminated against.[26] Section 30 of the Constitution further states that a person has the right to participate in the cultural life of one's choices and s 31 of the

[19] Embong AR 'The question of culture, identity and globalisation: an unending debate' (2011) 29 1 *Kajian Malaysia* 11 22
[20] See generally Damen L, *Culture Learning: The Fifth Dimension on the Language Classroom,* 4ed (1987)
[21] Donoghue J, Useem J and Useem R 'Men in the Middle of the Third Culture: The Roles of American and Non-Western People in Cross-Cultural Administration' (1963) 22 (3) Human Organization 169
[22] Banks JA and McGee CA, *Multicultural Education: Issues and Perspectives* 8ed (2013) ch 2
[23] Donoghue J, Useem J and Useem R 'Men in the Middle of the Third Culture: The Roles of American and Non-Western People in Cross-Cultural Administration' (1963) 22 (3) Human Organization 169
[24] Banks JA and McGee CA, *Multicultural Education: Issues and Perspectives* 8ed (2013) ch 2
[25] Constitution of the Republic of South Africa, 1996
[26] s 9(3) Constitution of the Republic of South Africa 1996

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Constitution protects culture by establishing and protecting the rights of cultural communities to enjoy their culture and practise their religion and use their language.[27]

Chapter 9 of the Constitution further establishes a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (hereinafter referred to as the CRL).[28]

The CRL has specific functions.[29] In terms of s 185 the following are listed functions of the CRL:

'(1) The primary objects of the CRL are –
  (a) To promote respect for the rights of cultural, religious and linguistic communities;
  (b) To promote and develop peace, friendship, humanity, tolerance, and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
  (c) To recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council(s) for a community and communities within South Africa.
(2) The CRL is empowered to achieve its primary objectives through monitoring, investigation, research, education, lobbying and reporting issues as regulated by national legislation.
(3) The CRL may also report on any matter that falls within its jurisdiction to the South African Human Rights Commission for investigation.
(4) Additional powers and functions may also be added to the CRL by national legislation.'[30]

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It is advanced that the concept of culture is given extensive protection by the Constitution as the protection of culture is a listed ground in s 9 of the Bill of Rights.[31] The Constitution further established a specific Commission, the CRL, to ensure that different cultures are protected. Despite this, the extent of the acceptance of culture is measured against the other rights of the Bill of Rights and cannot be in conflict with the Constitution.[32] Culture is an important concept that will again be linked to indigenous law later in this chapter, however, a brief description of the concept of identity is discussed next.

[27] Constitution of the Republic of South Africa, 1996
[28] s 185 and s 186 Constitution of the Republic of South Africa,1996
[29] s 185 Constitution of the Republic of South Africa, 1996
[30] Constitution of the Republic of South Africa, 1996
[31] s 9 Constitution of the Republic of South Africa, 1996
[32] Constitution of the Republic of South Africa, 1996

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2.3 Identity

Identity is shaped by one's culture. Debate, however, exists debate as to whether one may choose one's culture or identity. For purposes of this mini-thesis it is limited to the understanding that one's culture provides a basis to one's identity. It is for this reason that identity has been chosen as a concept to discuss in the understanding of indigenous law. The world changes and as it does, so too will the identities of people and communities. In the light of a new democratic South Africa, Bornman examines the struggles of identity.[33]

Bornman cites many definitions of the term 'identity', however for purposes of this mini-thesis 'identity' is the definition of a person on an individual level, his or her uniqueness, which differentiates him or her from another person.[34] Bornman also refers to cultural identity and cites Barth in defining cultural identity as a dynamic process, in which, the culture of a group may change due to an array of factors. The distinction between identity and cultural identity is that cultural identity is not a particular identity that is changing, but the existence of boundaries between the different groups, giving rise to a new cultural identity, that may change.[35]

The concept of a cultural identity must be analysed from a perspective of how the two concepts of culture and identity become one independent concept. The answer as advanced by Bornman is that with the advent of globalisation the concepts of identity and culture have become inter-related because an individual's identity has become a complex mix of local and global elements.[36] Though cultural identity is not directly protected in the Constitution, it has been afforded protection through judicial precedent.

The protection of cultural identity arose in the case of *MEC for Education: Kwazulu Natal and Others v Navaneethum Pillay and Others* (hereafter referred to as the Pillay case).[37] In the Pillay case Langa CJ in his judgement stated the following:

> 'According to Gyekye, "an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons'.

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[33] Bornman E 'Struggles of Identity in the age of globalisation: Searching for anchors that hold' available at *http://www.unisa.ac.za/contents/faculties/humanities/comm/docs/Struggles%20of%20identity%20in%20the%20age%20of%20globalisation.rtf* (accessed 20 March 2020)

[34] Bornman E 'Struggles of Identity in the age of globalisation: Searching for anchors that hold' available at *http://www.unisa.ac.za/contents/faculties/humanities/comm/docs/Struggles%20of%20identity%20in%20the%20age%20of%20globalisation.rtf* (accessed 20 March 2020)

[35] Barth F *Ethnic groups and boundaries: The social organization of cultural difference* 1ed (1969) ch 1

[36] Bornman E 'Struggles of Identity in the age of globalisation: Searching for anchors that hold' available at *http://z,www.unisa.ac.za/contents/faculties/humanities/comm/docs/Struggles%20of%20identity%20in%20the%20age%20of%20globalisation.rtf* (accessed 20 March 2020)

[37] *MEC for Education: Kwazulu Natal and Others v Navaneethum Pillay and Others* 2008(1) SA 474 (CC)

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This thinking emphasises the importance of community to individual identity and hence to human dignity. Cultural identity is one of the most important components of a person's identity precisely because it flows from belonging to community and not from a personal choice or achievement.[38]

It is clear that the concept of cultural identity is not only recognised and accepted but also protected in South African law. Cultural identity is therefore a group identity that may include a global citizen which will be afforded due protection by the Constitution should the need arise.

Bornman agrees with and supports the concept of a global citizen.[39] A global citizen is a person who identifies with being a part of an emerging world community and the actions of such a person contribute to the formation of this global community's values and practices.[40] This does invariably lead to the establishment and assimilation of a new culture, which is chosen and not inherited.

The assimilation of a new culture through globalisation through the global citizen, provides a basis for the need of protection of indigenous law because as values and practices change, the indigenous communities practising their indigenous law, which includes their culture, requires protection to ensure their continuity. This is not the only example or reason as to why indigenous law should be protected, however it is the reason that requires further attention due to the differing application and acceptance of indigenous law as advanced by the research undertaken. In respect hereof, an overview of the impact of globalisation on indigenous law and a few of its associated cultural practices will be discussed below.

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2.4 Globalisation

Globalisation is defined by the Cambridge dictionary as the increase of trade around the world, especially by large companies producing and trading goods in many different countries or a situation in which available goods and services or social and cultural influences gradually become similar in all parts of the world.[41] It is therefore fluid in nature and continually

[38] *MEC for Education: Kwazulu Natal and Others v Navaneethum Pillay and Others* 2008 (1) SA 474 (CC) 53
[39] Bornman E 'Struggles of Identity in the age of globalisation: Searching for anchors that hold' available at *http://www.unisa.ac.za/contents/faculties/humanities/comm/docs/Struggles%20of%20identity%20in%20the%20age%20of%20globalisation.rtf* (accessed 20 March 2020)
[40] Israel R 'What does it mean to be a global citizen?' available at *http://www.opendemocracy.net/ourkingdom/ron-israel/what-does-it-mean-to-be-global-citizen* (accessed 29 March 2020)
[41] Cambridge Dictionary available at *http://dictionary.cambridge.org/dictionary/english/globalization* (accessed 10 September 2020)

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changing. It is not an independent concept, in that, it relies on the connectivity of many factors to realise the change it brings.[42] These factors include culture, indigenous and identity.

Irrespective of time constraints or geographical constraints, globalisation has enabled the connectivity of various countries in the world to each other as it is a process of accelerated connectivity.[43] This connectivity has allowed communication, such as the internet, international calling and forms of travel to reduce the time and geographical boundaries, allowing for easier and cheaper methods of communication and travel.[44]

Globalisation may result in more than just an economic exchange, as it may enable a cultural exchange which may be argued to lead to cultural homogeneity. Cultural homogeneity is viewed as more than just a cultural exchange, it is viewed as a mixture of cultures, wherein one culture is dominant, while the other falls away or adheres to the standards of the dominant culture, resulting in what can also be termed cultural imperialism.[45] Globalisation is not limited to communication and geographical locations in modern times but can be traced back to the search for new lands with spices and mineral wealth.[46]

In past searches for faster trade routes by sea, South Africa was identified as an ideal place to stop and refuel. It was through the trading of spices that parts of South Africa were colonised by the Dutch and then the British.[47]

In establishing the impact of globalisation on indigenous law, it must first be understood that indigenous law existed before the first colonisation of South Africa. Indigenous law is a legal system that has existed in perpetuity and its relevance is based on the daily traditions and practices of a particular group of people as discussed below.[48]

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[42]Tomlinson J 'Globalization and Culture' available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.465.9581&rep=rep1&type=pdf (accessed 20 March 2020)
[43] Tomlinson J 'Globalization and Cultural Identity' available at http://www.polity.co.uk/global/pdf/GTReader2eTomlinson.pdf (accessed on 20 March 2020)
[44] Tomlinson J 'Cultural Globalisation Reconsidered' available at https://www.bbvaopenmind.com/en/articles/cultural-globalization-reconsidered/ (accessed 20 March 2020)
[45] Rahman KMA 'Globalization and Cultural Transformation: The Case of Bangladesh' available at http://www.ccsenet.org/journal/index.php/ach/article/view/36043/20285 (accessed 21 March 2020)
[46] Toussaint E 'Globalization from Christopher Columbus and Vasco da Gama until today' available at https://www.cadtm.org/Globalization-from-Christopher-Columbus-and-Vasco-da-Gama-until-today (accessed 19 May 2021)
[47] Meyer C M 'From Spices to Oil: Sea Power and the Sea Routes around the Cape' (1988) 18 *Scientia Militaria: South African Journal of Military Studies* 1
[48] Bennett TW *Human Rights and African Customary Law under the South African Constitution* (1995)

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2.5 Indigenous People

The term indigenous in the Cambridge English Dictionary is defined as 'naturally existing in a place or country rather than arriving from another place'.[49] This may further be summarised as an origination within a geographical location. This aligns with the term 'indigenous' in the context of the South African legal perspective.[50] This perspective refers to the term 'indigenous' as the languages and legal customs of the majority African population. The Khoisan, though were not afforded the legal status as indigenous people of South Africa, in comparison with the majority African population in terms of the now repealed Population Registration Act.[51]

The term Khoisan refers to the Khoi Khoi and San who have lived in South Africa for over 2000 years as advanced by Van Wyk.[52] The Khoi Khoi were regard as pastoralists whereas the San people were categorised as hunter-gathers.[53] 'Khoisan' refers to the two groupings together which was first used by Leonard Schultz in 1928 and which will be further used hereon.

Upon arrival in 1652 by Jan van Riebeeck, the Khoisan were the first people to meet the Dutch settlers which was followed by the Khoi Khoi-Dutch wars.[54] The wars and further contact with European settlers led to outbreaks of diseases within the Khoisan population, to which the Khoisan had no natural immunity.[55] Unfortunately this led to a large decrease in their population.

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The decrease of the Khoisan population inadvertently impacted the now repealed Population Registration Act of 30 1950 (Population Registration Act) which was enacted and implemented in 1950. This Act required that every person must be registered at birth as belonging to a

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[49] Cambridge Dictionary available at *http://dictionary.cambridge.org/dictionary/english/indigenous* (accessed 1 May 2020)

[50] International Labour Organisation and African Commission on Human and Peoples' Rights 'the constitutional and legislative protection of the rights of indigenous peoples: South Africa' available at *http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj6gYrEgIbTAhUMAcAKHR3cBEgQFggYMAA&url=http%3A%2F%2Fwww.chr.up.ac.za%2Fchr_old%2Findigenous%2Fcountry_reports%2FCountry_reports_SouthAfrica.pdf&usg=AFQjCNEoGX_oWlfvw0F1VW_SkqAd4j0mgw* (accessed 10 September 2021)

[51] 30 of 1950

[52] Van Wyk B 'Indigenous Rights, Indigenous Epistemologies, and Language: (Re)construction of Modern Khoisan Identities' (2016) 4 *Knowledge Cultures* 33

[53] Jansen L and Le Fleur A 'The Khoisan in contemporary South Africa' available at *https://www.kas.de/documents/252038/253252/7_dokument_dok_pdf_35255_2.pdf/13558f4e-c812-7525-51f1-bed7b106f223?version=1.0&t=1539655331503* (accessed 15 May 2021)

[54] Van Wyk B 'Indigenous Rights, Indigenous Epistemologies, and Language: (Re)construction of Modern Khoisan Identities' (2016) 4 *Knowledge Cultures* 33

[55] Van Wyk B 'Indigenous Rights, Indigenous Epistemologies, and Language: (Re)construction of Modern Khoisan Identities' (2016) 4 *Knowledge Cultures* 33

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particular racial group. The Population Registration Act listed the four racial groups as Black, Coloured, White and Other. The minority Khoisan group, who did not fit the Black racial profiling and in some instances spoke Afrikaans were racially categorised as Coloured.[56] The coloured group further comprised of the Cape Coloured, Cape Malay, Griqua and Nama and Other Coloured. Irrespective of the self-identification by the Khoisan population as indigenous people to South, the Khoisan were racially categorised as Coloured.

The race classification of 'Black' in the repealed Population Registration Act was first referred to as 'Native' and then 'Bantu' before the word Black was finally settled upon.[57] The Black race in the repealed Population Registration Act was defined as any person who is generally accepted as a member of any aboriginal race or tribe of Africa.[58] Importantly, the Khoisan were never classified as Black, despite the definition referring to an aboriginal race or tribe of Africa and as such were not legally recognised as an indigenous group of people to South Africa.

Despite the repeal of the Population Registration Act race groups still affiliate themselves with the racial classification as set out in the repealed Act.[59] The Khoisan, however, have stated that they do not want to be referred to as Coloured. They identify as the indigenous people of South Africa and should be recognised as the Cape Khoi, the San or the grouping into which their tribes are divided.[60] The Khoisan believe that the non-identification as Coloured would give them the recognition they deserve.

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It is apparent from the preceding paragraphs that the Khoisan in the pre-democratic era did not receive the same consideration as the majority of the Black communities, in that the Khoisan were not legally recognised as indigenous people of South Africa. This presently also appears to continue. The Khoisan argue that due to their non- recognition as distinct aboriginal people of South Africa, their land rights are not respected. [61]

Despite the Constitution not formally recognising the Khoisan as an indigenous people of South Africa, the Constitution does not exclude the Khoisan from establishing that it is an indigenous

[56] Van Wyk B 'Indigenous Rights, Indigenous Epistemologies, and Language: (Re)construction of Modern Khoisan Identities' (2016) 4 *Knowledge Cultures* 33
[57] 30 of 1950
[58] 30 of 1950
[59] 30 of 1950
[60] Mellet P 'Stop calling us 'coloured' and denying us our diverse African identities' available at *https://mg.co.za/article/2018-08-02-stop-calling-us-coloured-and-denying-us-our-diverse-african-identities/* (accessed 15 May 2020)
[61] Jansen L and Le Fleur A 'The Khoisan in contemporary South Africa' available at *https://www.kas.de/documents/252038/253252/7_dokument_dok_pdf_35255_2.pdf/13558f4e-c812-7525-51f1-bed7b106f223?version=1.0&t=1539655331503* (accessed 15 May 2021)

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group to South Africa and claiming the rights and protection as afforded by the relevant legislation as discussed in this mini-thesis.[62] It must be borne that though this is not the solution to the challenges faced by the Khoisan, it is a step in the right direction towards recognition as indigenous people of South Africa.

2.6 Indigenous Law

The term 'indigenous' as defined paragraph 2.5 above, is consistent with the definition of 'indigenous' in the term 'indigenous law' in that it means naturally existing in a place or country rather than arriving from another place.[63] The culture and identity of people will impact the law and this is no different for indigenous law.

It is important to clarify the various forms of law, being Common law, Roman-Dutch law, foreign law and indigenous law. Common law is law that is practiced in South Africa but not written down as legislation. It comprises of Roman-Dutch law with principles of English law. It must be clarified that foreign law and indigenous law are two different forms of law and should not be confused. It was discussed above that indigenous law is made up of the culture, practices and customs of a group of people and in turn, these concepts rely on each other to support indigenous law. Foreign law is the law of another country whereas[64] international law is a body of rules that control or affect the rights of nations in their relations with each other.[65]

Despite South Africa being considered an indigenous land for the Black population[66], its indigenous law was only recognised as an equal form of law to the existing civil law with the advent of the Interim Constitution of South Africa[67] during 1993 and in the Constitution of South Africa in 1996.[68] Prior to this, South African indigenous law was viewed as a lessor form of law. At the advent of a democratic era, the Interim Constitution and the Constitution sought to recognise and protect indigenous law. One of the ways in which the Final Constitution sought to achieve the protection of indigenous law was through the recognition of traditional leadership.

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[62] Customary Marriages Act 120 of 1998 and Restitution of Land Rights Act 22 of 1996
[63] Cambridge Dictionary available at *http://dictionary.cambridge.org/dictionary/english/indigenous* (accessed 1 May 2020)
[64] The free dictionary by Farlex available at *https://legal-dictionary.thefreedictionary.com/foreign* (accessed 3 February 2021)
[65] Merriam-Webster available at *https://www.merriam-webster.com/dictionary/international%20law* (accessed 3 February 2021)
[66] This mini-thesis is limited to the legal measures of the indigenous cultures of the current majority of the Black population in South Africa.
[67] Constitution of South Africa, Act 200 of 1993
[68] Constitution of the Republic of South Africa, 1996

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Traditional leaders in South Africa are recognised and respected authorities who have a role to play in the recognition and protection of indigenous law.[69] They are seen by communities as being formed by God and an integrated part of a culture which defines the values and norms of communities that form the basis of the existence of traditional communities.[70] Traditional leaders therefore are an important link between themselves, the indigenous people they represent and their indigenous culture. It is through the traditional leader that customs, norms, and values, which form an indigenous culture, is maintained and conveyed to the community since time immemorial through custom and in so doing shape, influence or establish indigenous law.[71]

The recognition of traditional leadership by the Constitution[72] therefore one of the key ways in which the Constitution sought to recognise and protect indigenous law. Traditional leaders, when being viewed as a 'creation by God', are a further embodiment of the law as the traditional leaders' religious standing and existence is a part of a culture in which religion is not clearly distinct from law and social practices to which communities adhere.[73]

The Constitution recognises indigenous law through the recognition of traditional leadership in s 211 and s 212 as traditional leaders convey their indigenous customs from one generation to the next as well as make rulings in terms of indigenous law. These terms customary law and indigenous law are synonymously used.

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Section 211 of the Constitution states

> '(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
>
> (2) 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 customs.'

The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.[74]

[69] du Plessis W & Others 'The role and future of traditional leaders in South Africa' (1999) 2&3 *Koers Journal* 295
[70] du Plessis W & Others 'The role and future of traditional leaders in South Africa' (1999) 2&3 *Koers Journal* 295
[71] du Plessis W & Others 'The role and future of traditional leaders in South Africa' (1999) 2&3 Koers *Journal* 295
[72] Constitution of the Republic of South Africa, 1996
[73] du Plessis W & Others 'The role and future of traditional leaders in South Africa' (1999) 2&3 *Koers Journal* 295
[74] Constitution of the Republic of South Africa, 1996

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Section 212 goes on further to address the role of traditional leaders by clearly indicating the following:

> '(1) National legislation may provide for a role for traditional leadership as an institution at local level on matter effecting local communities.
>
> (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and 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.'[75]

It is therefore evident that by the inclusion of s 211 and s 212 in the Constitution, which is the supreme law of South Africa, indigenous law is a recognised form of law which should also be protected.

Section 39 of the Bill of Rights further entrenches the recognition and protection of indigenous law.[76] There is a mandate placed on Courts, tribunals or forums that when interpreting the Bill of Rights, foreign law[77] may be considered, and when 'interpreting any legislation, and developing the common law or customary law every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.[78] The section recognises that the Bill of Rights accepts the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, provided these laws are consistent with the Bill of Rights.

Constitutionally, it is evident that indigenous law is recognised to the extent that it is consistent with the Bill of Rights. The particular emphasis of the development of indigenous law in terms of chapter 12 of the Constitution will be explored in this chapter.[79]

[75] s 212 of the Constitution of the Republic of South Africa, 1996
[76] Constitution of the Republic of South Africa, 1996
[77] s 39(1) Constitution of the Republic of South Africa, 1996
[78] s 39(2) Constitution of the Republic of South Africa, 1996
[79] Constitution of the Republic of South Africa, 1996

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2.7 The Impact of Globalisation on Indigenous Law

The 6 April 1652 marked the date wherein the Dutch East Indian Company, in an expedition led by Jan van Riebeeck, declared ownership of the Cape territory.[80] The settlers from Netherlands brought with them their law, which was the Roman-Dutch law system, as practised in Netherlands at the time.[81] There is no evidence that the Dutch settlers recognised the local indigenous law during this particular period or interacted with the Black or Khoisan population by utilising indigenous law.[82]

In the year 1806 the British took control of the Cape from the Dutch and in 1814 the Cape was declared a crown colony.[83] Subsequent to British control of the Cape, English law was introduced and implemented in South Africa. It, however, was also during this time period that indigenous law in South Africa was given some form of recognition in another province of South Africa. The Natal Code of 1878 sought to codify the indigenous law of South Africa based on a few important principles in that it was simplified to the extent that 'native law' was law upon which all other aspects of the law derive.[84] This meant that indigenous law as limited to the Natal Code derived from those principles as set out in that code.

It heralded a change in the indigenous law as the original indigenous legal system was unwritten, fluid, dynamic and changed as the traditions, practices, values and principles of the community changed. The influx of settlers from Britain brought about the first written codification of indigenous law in South African, changing the fluidity of the indigenous law to one of codified stagnation.[85]

The Natal Code of 1878 was amended with the Natal Code of Native Law in 1891, which tried again to codify the indigenous law, thereby rendering indigenous law into a static, rigid

[80] South African History Online 'The Arrival of Jan van Riebeeck in the Cape – 6 April 1652' available at *http://www.sahistory.org.za/topic/arrival-jan-van-riebeeck-cape-6-april-1652* (accessed 27 April 2020)
[81] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)
[82] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)
[83] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)
[84] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)
[85] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)

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colonial version of indigenous law.[86] Despite such recognition to indigenous law, it remained conditional, as all indigenous practices were subject to the repugnancy clause.[87] The impact of the repugnancy clause limited the application of customary law as it was recognised, to the extent that the practice of the customs and traditions was not in conflict with any public policy or written law, nor were they against morality or justice.[88] It is interesting to note that the application of indigenous law to indigenous people was determined by what was acceptable in terms of the public policy, justice, morality and written law of the Dutch and British settlers.

A further change in the codification of South African indigenous law resulted from the South African war of 1899 -1902.[89] The result of the war created the Union of South Africa and during this period the application of indigenous law was regulated by the indigenous laws applicable to each territory.[90] This again depicts the fluid nature of indigenous law as it made provision for the indigenous people in each territory to apply the form of indigenous law that pertains to them, resulting in various forms of indigenous law. This system was determined to be a chaotic state, which required further codification in the form of written law.[91] It was at this stage that the various forms of indigenous law were consolidated into the Native Administration Act of 1927, which was later amended to the Black Administration Act.[92]

In terms of the Black Administration Act, indigenous law was given full recognition for the first time, however the application thereof was upon the presiding officer's discretion.[93] The Black Administration Act thereby created a dual legal system, which, instead of allowing for the recognition and development of indigenous law, it created a separate and inferior legal

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[86] McClendon T 'Tradition and Domestic Struggle in the Courtroom: Customary Law and the Control of Women in Segregation –Era Natal' (1995) 28 *The International Journal of African Historical Studies* 527

[87] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)

[88] Ndulo M 'African Customary Law, Customs and Women's Rights' available at *http://scholarship.law.cornell.edu/facpub/187/* (accessed 15 June 2020)

[89] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)

[90] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)

[91] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)

[92] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)

[93] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)

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system for the indigenous people.[94] The Black Administration Act laid down discriminatory principles against women and due to its inflexibility of the law could not be developed. The discriminatory principles disallowed Black women from the inheritance of estates, they were regarded as minors, irrespective of age or marital status and they had no legal rights over their children.[95] This Act, which emerged as the primary Act to codify the various indigenous law in South Africa, was ultimately used to pave the way for various other forms of legislation used in the Apartheid era, such as the Bantu Authorities Act of 1951 and the Promotion of Bantu Self- Government Act of 1959.[96]

In retrospect it can deduced from the above chronology that in codifying indigenous law, the dynamic and changing nature of indigenous law was rendered static. In doing so, the changing values, customs, norms and practices of the indigenous people were rendered futile as they became bound to a stagnant law which, as further time progressed, was inferior and under-developed.[97] It allowed discriminatory practices to became an entrenched form of law in an inferior legal system, which reduced traditional leaders to state agents that administered the law instead of developing the law. The advent of globalisation on indigenous law in South Africa, clearly did not seek to protect or develop the indigenous law of the country. It took the democratisation of South Africa to revive and restore indigenous law in South Africa. The following paragraph seeks to depict the constitutional development of indigenous law in South Africa.

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2.8 The Constitutional Development of Indigenous Law in South Africa Through Case Law

There has been extensive development in indigenous law through the Constitutional Court in South Africa. The four cases discussed in this section are not exhaustive but have been chosen as they are precedent setting and illustrate the current stance of the Constitutional Court toward indigenous law in South Africa. The cases discussed in this chapter are limited to those pieces

[94] Sibanda S 'When is The Past Not The Past? Reflections on Customary Law under South Africa's Constitutional Dispensation' (2010) 17 Human Rights Brief 30

[95] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)

[96] Wall D 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' available at *http://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ* (accessed 10 April 2020)

[97] Sibanda S 'When is The Past Not The Past? Reflections on Customary Law under South Africa's Constitutional Dispensation' (2010) 17 Human Rights Brief 30

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of legislation which have impacted on marriage and land. A brief summary of the facts of each case will be outlined and a short discussion on the case will follow.

The identified cases are cases *Bhe and Others v The Magistrate, Khayelitsha and Others* (hereinafter referred to as Bhe)[98] *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others* (hereinafter referred to as Nwamitwa),[99] *Alexkor Limited and Another v Richtersveld Community and Others* (hereinafter referred to as Richtersveld Community)[100] and *Mayelane v Ngwenyama and Others* (hereinafter referred to as Mayelane).[101]

2.8.1 *Bhe and Others v The Magistrate, Khayelitsha and Others*[102] *(*Hereinafter referred to as Bhe)

In the first case of Bhe, an application was brought by Ms Nontupheko Bhe on behalf of her two minor daughters, Nonkululeko Bhe and Anelisa Bhe. The material dispute was whether Nonkululeko and Anelisa were the extra-marital children of the deceased, Mr Vuyo Elius Mgolombane. The subsequent issue became whether they may inherit from their deceased father's estate even though they extra-marital children of the deceased. The deceased was in a relationship with Ms Bhe since 1990, they lived together and had two daughters, Nonkululeko and Anelisa until the deceased died intestate in October 2002.

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The deceased was employed as a carpenter and Ms Bhe was a domestic worker. They lived in an informal settlement in Khayelitsha, during which time the deceased obtained a state housing subsidy. This was used to purchase the property upon which they lived and building materials to build the home. Unfortunately, the deceased passed away before the home could be built.

In terms of intestate succession, two statutes govern intestate succession in South Africa. The first is the Intestate Succession Act 81 of 1987 and in the second is the Black Administration Act 38 of 1927 (Black Administration Act). The Black Administration Act deals exclusively with intestate succession of Black people and is administered in terms of s 23 of the Act, read with its Regulations. In terms of the Black Administration Act, the rule of male primogeniture excluded the two minor children from qualifying as heirs and instead the deceased's father was

[98] *Bhe and Others v The Magistrate, Khayelitsha and Others* 2005 1 SA 580 (CC)
[99] *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others* 2009 (2) SA 66 (CC)
[100] *Alexkor Limited and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC)
[101] *Mayelane v Ngwenyama and Others* 2013 (4) SA 415 (CC)
[102] *Bhe and Others v The Magistrate, Khayelitsha and Others* 2005 1 SA 580 (CC)

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declared the sole heir to the estate. The deceased's father intended to sell the immovable property, thus rendering Ms Bhe and the minor children homeless.

The Constitutional Court held that s 23 of the Black Administration Act and its regulations were discriminatory and in breach of the rights of equality[103], dignity[104] and children[105] in the South African Constitution. Section 23 and the regulations thereto were therefore struck down and also declared unconstitutional.[106] It was further held by the Constitutional Court that the manner in which the rule of male primogeniture in South African indigenous law was applied in matters of inheritance, unfairly discriminated against women and extra-marital children. This indigenous rule of male primogeniture which allows only a male related to the deceased to inherit, was declared unconstitutional and invalid.

It was undoubtedly a success that the indigenous rule of male primogeniture was declared invalid and unconstitutional. However, it was the learned words of Deputy Chief Justice Langa that provided the direction needed for the development of indigenous law in South Africa. The judge stated that previously customary law was seen through the common law lens and this led to the fossilisation and codification of indigenous law, which then led to the marginalisation of indigenous law. The Deputy Chief Justice further added that due to the marginalisation of indigenous law, it could not grow or change itself to changing circumstances.[107] In essence, the case of Bhe supports the assertion made that the codification of indigenous law stunted the growth and contributed to the marginalisation of indigenous law while also developing the indigenous law in line with Constitutional values.

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2.8.2 *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others* (Hereinafter referred to as Nwamitwa)[108]

The facts of this case revolve around Hosi Fofoza Nwamitwa, who died on the 24 February 1968 without a male heir. The term 'Hosi' is a traditional term for a chief of the Valoyi traditional community in Limpopo. Succession to the chieftainship was determined in terms of the principle of male primogeniture. The eldest child of Hosi Fofoza Nwamitwa, at the time of his death, was Ms Shilubana, however, she could not succeed him as she was a woman. Hosi

[103] s 9 Constitution of the Republic of South Africa, 1996
[104] s 10 Constitution of the Republic of South Africa, 1996
[105] s 28 Constitution of the Republic of South Africa, 1996
[106] *Bhe and Others v The Magistrate, Khayelitsha and Others* 2005 1 SA 580 (CC) para 73
[107] *Bhe and Others v The Magistrate, Khayelitsha and Others* 2005 1 SA 580 (CC) para 43
[108] *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others* 2009 (2) SA 66 (CC)

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Fofoza Nwamitwa's younger brother, Richard Nwamitwa succeeded Hosi Fofoza Nwamitwa as Hosi of the Valoyi.

During 1996, the Royal Family of the Valoyi, with the participation of Hosi Richard, unanimously agreed to pass the chieftainship to Ms Shilubana. It was thought that with the advent of a new Constitution of South Africa, it would now be permissible that a female could be an heir as she is equal to a male.[109] On the 17 July 1997, Hosi Richard acknowledged that Ms Shilubana was the heiress to the Valoyi chieftainship, subsequently the Valoyi Tribal Authority sent a letter to the Commission for Traditional Leaders of the Northern Province (now Limpopo) stating that Ms Shilubana had been selected as the Hosi. The Tribal Council later accepted the letter and it was confirmed that the powers of Richard Hosi would pass on to Ms Shilubana.

On the 25 February 1999, Hosi Richard withdrew his support for Ms Nwamita as Hosi, in a formal letter. Hosi Richard then died and on the 4 November 2001, the Royal Family confirmed that Ms Shilubana would be the new Hosi. On the 25 November 2001, Ms Shilubana was pronounced the new Hosi of the Valoyi at a meeting attended by the Royal Family, the Tribal Council, representatives of local government, civic structures and stakeholders of various organisations. In this manner, it appeared that the acceptance of Ms Shilubana as the new Hosi was accepted throughout various levels of the community. Mr Nwamitwa, who was Hosi Richard's eldest son, interdicted the inauguration ceremony of Ms Shilubana, as he contested that he should have succeeded his father. The High Court of Pretoria and the Supreme Court of Appeal agreed with Mr Nwamitwa and the case subsequently was brought before the Constitutional Court on Appeal. The Constitutional Court accordingly upheld the Appeal and Mr Nwamitwa was declared to have no vested right to succeed as Hosi from his father, the late Hosi Richard.

The Constitutional Court unanimously held that the High Court and the Supreme Court of Appeal failed to acknowledge the power of traditional authorities to develop customary law. Section 211(2) of the Constitution requires courts to respect the right of traditional communities to develop their own law.[110] In this case it is apparent that the Valoyi Tribal Authority, sought

[109] *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others* 2009 (2) SA 66 (CC) para 4
[110] *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others* 2009 (2) SA 66 (CC) para 89

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to develop its laws in line with the Constitution, based on equality.[111] In this light, together with the Bhe judgement discussed above, the development of indigenous law regains its fluidity and ability to change as the circumstances change. This allows for indigenous law to shed its fossilised, codified and subservient nature and fully embrace its position in a Constitutional era as a living law.

2.8.3 *Alexkor Limited and Another v Richtersveld Community and Others* (Hereinafter referred to as the Richtersveld Community)[112]

The Richtersveld Community claimed that they were dispossessed of a strip of their land after diamonds were discovered in the land during British rule. The mining rights to this particular strip of land was at this stage granted to a state-owned company, Alexkor Limited. The Richtersveld Community sought restitution of the land in terms of the Restitution of Land Rights Act 22 of 1994.

The importance of this case law lies in the manner in which the Constitutional Court came to its decision. The Constitutional Court upheld that the Richtersveld Community held ownership of the land under indigenous law, which included the rights to minerals and precious stones and not in terms of the Restitution of Land Rights Act 22 of 1994.[113]

This case made many important inroads into how indigenous law is applied and understood in the current Constitutional era. The Constitutional Court stated that the rights that the Richtersveld Community held in the land prior to annexation had to be determined by reference to indigenous law, which was the law that governed its land rights. These particular rights cannot be determined by reference to common law.

Prior to the Constitution, Indigenous Law was seen as an inferior law that was made to fit into a common law lens. It now however is an integral part of South African law, which must be developed in accordance with the Constitution. The Court further stated that Indigenous Law could be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary.[114] This method must be used with caution due to differing views and foreign contradicting concepts. The Constitutional Court further held that courts were obliged by s 211(3) of the Constitution to apply customary

[111] *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others* 2009 (2) SA 66 (CC) para 45 and s 9 of the Constitution of the Republic of South Africa ,108 of 1996
[112] *Alexkor Limited and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC)
[113] *Alexkor Limited and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC)para 62
[114] *Alexkor Limited and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC)para 54

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law when it was applicable, subject to the Constitution and any legislation that dealt with customary law.

The Richtersveld case, in short, utilised the recognition of an indigenous law to rectify a discriminatory act, while at the same time affirming the position of indigenous law under the new Constitution of South Africa. In relation to the cases of Bhe and Hosi, indigenous law was once again developed to bring it in line with Constitution and common law, further entrenching the need for indigenous law to be fluid and changeable as required to reflect the values of the common law as mandated by the Constitution.

All three of the discussed cases develop indigenous law within South Africa in a manner that blends Constitutional principles with indigenous law. The final case discussed in this chapter, once again, successfully blends the challenges of customary marriages and succession with constitutional principles.

2.8.4 *Mayelane v Ngwenyama and Others* (Hereinafter referred to as Mayelane)[115]

This matter revolves around the issues of recognition of customary marriages and succession and is similar to the Bhe case in that indigenous law must be developed in accordance with Constitutional principles.

In this case Ms Mayelane married her now deceased husband, Mr Moyane in accordance with Tsonga indigenous law during 1984. Mr Moyane passed away on the 28 February 2009. Subsequent to Mr Moyane's death Ms Ngwenyama alleged that she married Mr Moyane on the 26 January 2008. Both women sought registration of their marriages through the Recognition of Customary Marriages Act 120 of 1998. The Supreme Court of Appeal confirmed that both Ms Mayelane and Ms Ngwenyama had entered into valid customary marriages with the deceased however Ms Mayelane appeals to the Constitutional Court stating that she had never consented to the second marriage and as such the marriage between the deceased and Ms Ngwenyama was invalid.

The Constitutional Court, in arriving at its decision sought further evidence on Tsonga indigenous law. In terms of Tsonga indigenous law, the first wife must be informed of a subsequent customary marriage.[116] In this respect, as Ms Mayelane had indicated that she did not consent to the marriage between the deceased and Ms Ngwenyama and therefore, the

[115] *Mayelane v Ngwenyama and Others* 2013 (4) SA 415 (CC)
[116] *Mayelane v Ngwenyama and Others* 2013 (4) SA 415 (CC) para 71

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marriage was deemed invalid by the Constitutional Court. The Constitutional Court went further and stated that in its obligations to develop living customary law in a constitutionally consistent manner, it had to be developed in accordance with the rights of human dignity and equality.[117]

The decision of the Constitutional Court in this matter emphasises the nature of indigenous law as a law, which is well able to change as the values and norms of the community change to incorporate the values of the Constitution.

The cases of Bhe, Nwamitwa and the Richtersveld Community depict the recognition of indigenous law in South Africa, however in the matter of the Richtersveld Community, the rights were recognised in terms of indigenous law itself and not another piece of legislation or common law. The Mayelane matter together with the matters of Bhe, Nwamitwa and the Richtersveld Community have the commonality of the developing of indigenous law in accordance with Constitutional principles which in turn advance the protection of indigenous law.

2.9 Chapter Conclusion

The various definitions at the outset of this chapter indicated the interrelatedness the terms have with each other and upon elaboration of the concepts it is established that discussed concepts influence the accepted law which is also the norm for indigenous law. Therefore, the culture and the identity of an indigenous people will influence their indigenous law.

In the past, from the year 1652 to 1992, South African indigenous law became stagnant and unchanging, it was considered an inferior system of law, which created confusion and was ultimately used as a tool to disempower Black people and in particular Black women and create a basis for further discriminatory laws.

In the advent the Interim Constitution of 1993 and the Constitution of 1996, a Constitutional dispensation commenced which sought to reconcile the wrongs of the past by providing recognition to indigenous law through Constitutional provisions. The Constitutional Court developed indigenous law as discussed above and in doing so, allowed indigenous law to shed its fossilised nature to become a law that is developed as the values change. The cases of Bhe, Nwamita, the Richtersveld Community and Mayelane clearly indicate that indigenous law, is

[117] *Mayelane v Ngwenyama and Others* 2013 (4) SA 415 (CC) para 76

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given the flexibility, in the new Constitutional dispensation, to develop and change in accordance with the times, circumstances and norms, subject to the Constitution.

Though globalisation has changed the manner in which people across the world interact with each other, it has not degraded the indigenous law of South Africa. The usage and development of indigenous law in the Constitutional Court in South Africa supports such an assertion. In addition, various forms of legislation were enacted to ensure the continued protection of indigenous law. Despite the Constitution not explicitly recognising the Khoisan as indigenous people of South Africa, enacted legislation does not preclude the Khoisan from accessing and utilising such legislation, provided they, like all the others, adhere to and establish the existence of the necessary requirements. The following chapter discusses those identified Acts which protect indigenous law and allow for its further development.

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CHAPTER THREE

THE LEGAL MEASURES THAT PROTECT INDIGENOUS LAW IN SOUTH AFRICA WITH A FOCUS ON MARRIAGE AND LAND OWNERSHIP

3.1 Introduction

The previous chapter focused on the constitutional development of indigenous law in South Africa and briefly discussed four Constitutional Court judgements that recognised indigenous law in South Africa. The aim of this chapter is to identify and expand on the legal measures, that protect indigenous law in South Africa with a focus on marriage and land ownership. These legal measures are identified as the Recognition to Customary Marriages Act 120 of 1998 and the Restitution of Land Rights Act 22 of 1996 and the related case law thereto, that protect indigenous law in South Africa.

The selection of Acts discussed in this chapter are limited to those pieces of legislation which have impacted on marriage and land ownership. This is of particular significance due to the constant challenges to recognise customary marriages as well as the continual discussion of land expropriation in South Africa. The identified legislation discussed in this chapter does not discuss all the legislation on indigenous marriages or land restitution but are limited to those that recognise the rights of indigenous law in marriages and land restitution to indigenous people of South Africa. In this way, legal precedents are discussed to provide a holistic overview of the legal measures taken to protect indigenous law in South Africa, specifically in relation to indigenous marriages and land.

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The following Acts are discussed in relation marriage and land ownership, the Recognition to Customary Marriages Act 120 of 1998 and the Restitution of Land Rights Act 22 of 1996 and their respective amendments.

3.2. The Recognition of The Customary Marriages Act 120 Of 1998

Prior to the Recognition of the Customary Marriages Act 120 of 1998, hereinafter referred to as the Customary Marriages Act, there were many unequal positions in respect of African women in indigenous marriages. Marriage is an important aspect of law, including indigenous law. South Africa chose to acknowledge and give due legal regard to marriage concluded in terms of indigenous law through the Customary Marriages Act, which in turn, protected and promoted indigenous culture. It is important to understand the previous positions pertaining to

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indigenous marriages before the impact of the current Customary Marriages Act is elaborated upon.

3.2.1 Historical Legislative Provisions Prior to the Customary Marriages Act

In terms of s 11(3) of the now repealed Black Administration Act 38 of 1927, a woman in an indigenous marriage was deemed to be a minor, to have a status lower than that of her husband and subjected to marital power.[118] This section applied only to marriages concluded in terms of indigenous law marriages, as such, only Black women felt its impact. Due to marital power and the minor status attributed to Black women, this section had the effect of placing prohibitions on Black women, which included the inability to utilise the judicial system or to enter into certain contractual contracts independently from their husbands.

It became apparent that this legislation was unequal and restrictive. In an attempt to alleviate the oppression, the Zulu Code[119] which was applicable to only the Zulu Nation, was amended to state that women over the age of 21 were considered legal majorities.[120] Despite this amendment, marital control in terms of s 27 (3) of the Zulu Code remained in force, which imposed the control of a married woman by her husband thereby perpetuating martial control. Section 11A was incorporated into the Black Administration Act which allowed married Black women to acquire leasehold and ownership, however this section did not extend to their legal status. Despite the changes to legislation at the time, Black women were still subject to marital power and control by their husbands.

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3.2.2 The Current Legislative Provisions of the Recognition of Customary Marriages Act 120 of 1998

The Customary Marriages Act came into effect on the 15 November 2000 with the aim to improve the position of women in indigenous marriages and to give indigenous marriages the recognition they deserve.[121] Importantly, this Act also defined the terms customary law and customary marriage.[122]

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[118] Black Administration Act 38 of 1927
[119] KwaZulu Natal Act on the Code of Zulu Law 16 of 1985
[120] The Zulu codes refer to two different pieces of legislation which govern the Zulu nation. They comprise of The Natal Code of Zulu Law (Proclamation R151 of 1987) and The KwaZulu Act 16 of 1985 on the Code of Zulu Law.
[121] Law, Race and Gender Research Unit 'The Recognition of Customary Marriages in South Africa: Law, Policy and Practice available at *https://open.uct.ac.za/bitstream/item/2250/CLS_Factsheet_RCMA_Dec2012_Eng.pdf?sequence=1* (accessed 15 August 2020)
[122]The terms indigenous and customary are used synonymously however the Customary Marriages Act refers to the word customary and not indigenous.

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The Customary Marriages Act defines customary law as the 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples' and customary marriage is defined as 'a marriage concluded in accordance with customary law'.[123] These two definitions provide the needed clarification to remove the confusion that previously shrouded the terms of customary law and customary marriage.

Section 2 of the Customary Marriages Act immediately confirms the recognition of indigenous marriages, by recognising the following marriages as a customary marriage:

- A valid marriage at customary law and existing at the commencement of this Act,[124]
- A customary marriage entered into after the commencement of this Act which also complies with all the requirements of this Act,[125] and
- 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 recognised as valid marriages.[126]

Additionally, if a person is a spouse in more than one customary marriage, and these marriages were entered into after the commencement of this Act, only those marriages which comply with the provisions of this Act will be recognised as a valid marriage.[127]

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Though the Customary Marriages Act refers to 'a spouse' South African customary marriages are polygynous and a man may have more than one wife. It does not however mean that a woman may have more than one husband.

The requirements for a valid customary law marriage entered into after the commencement of the Customary Marriages Act are that the prospective spouses be both above the age of 18 years, both prospective spouses must consent to be married to each other under customary law and the marriage must be negotiated and entered into or celebrated in accordance with customary law.[128]

The Customary Marriages Act, aims to provide equal status and capacity to both spouses. It was mentioned above that a woman in an African customary marriage was categorised as minor

[123] s 1 of the Recognition of the Customary Marriages Act 120 of 1998
[124] s 2(1) of the Recognition of the Customary Marriages Act 120 of 1998
[125] s 2(2) of the Recognition of the Customary Marriages Act 120 of 1998
[126] s 2(3) of the Recognition of the Customary Marriages Act 120 of 1998
[127] s 2(4) of the Recognition of the Customary Marriages Act 120 of 1998
[128] s 3 of the Recognition of the Customary Marriages Act 120 of 1998

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and given a lessor status than that of her husband.[129] The Customary Marriages Act through s 6 sought to remedy the lessor status of women by recognising that a wife in a customary marriage has equal capacity and status as her husband. The section further provides instances wherein the spouses are equal and are not limited to capacity to acquire or dispose of assets, enter into contracts, litigate and the wife retains any rights that she would have in terms of customary law.

The majority status of women in a customary marriage is further confirmed by the Customary Marriages Act stating that despite the rules of customary law, the age upon which a person attains majority is determined by the Age of Majority Act 52 of 1972.[130] This is currently 18 years old. The Customary Marriages Act further determines the proprietary of the customary marriage, entered into after the commencement of the Act, to be a marriage in terms of community of property and of profit and loss.[131]

The Customary Marriages Act remains one of the most important pieces of legislation as it brought recognition to customary marriages and the consequent protection of African women as they chose to practice their culture, which is subject to customary law. The main aim of the Customary Marriages Act remains to place customary marriages on an equal footing as civil marriages in South Africa and to recognise and protects the rights of women within the customary marriage.[132]

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Despite the inroads made into the recognition of customary marriages through the Customary Marriage Act many challenges were resolved through the judiciary. In the following paragraphs some of the challenges that have been resolved since the promulgation of the Customary Marriages Act, through legal precedent and those that still remain to be resolved will be discussed. The cases chosen are those that have been brought before the South African Courts to rectify the inequality in indigenous marriage through the development of indigenous law and are considered precedent setting.

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[129] South African History Online 'Customary Marriages in South Africa. Understanding the Recognition of Customary Marriages Act of 1998' available at *http://www.sahistory.org.za/article/customary-marriages-south-africa-understanding* (accessed on 14 August 2020)
[130] s 9 of the Recognition of the Customary Marriages Act 120 of 1998
[131] s 7(2) of the Recognition of the Customary Marriages Act 120 of 1998
[132] Maithufi P 'The requirements for validity and proprietary consequences of monogamous and polygynous customary marriages in South Africa: Some observations' 2015 *De Jure* 261

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3.2.3. *Netshituka v Netshituka* 2011 (5) SA 453 (SCA) (Hereinafter referred to as Netshituka case)

In the Netshituka case, the issue to be revolved was the validity of a civil marriage[133] entered into before the operation of the Customary Marriages Act. The facts of this case were that the deceased was married to four wives in terms of indigenous law. The first wife was married on the 1 December 1956 and the remaining wives were married in the years thereafter. While married in terms of indigenous law to the first four wives, the deceased also married a woman in terms of a civil marriage. This civil marriage was dissolved by divorce on the 5 July 1984. The deceased again on the 17 January 1997 entered into a civil marriage with a sixth woman.

Rudzani Netsituka, the Appellant argued that upon a civil marriage being contracted into, any customary marriage is accordingly rendered invalid. The Court took into consideration the case of *Nkambula v Linda*.[134] It was held in the case of *Nkambula v Linda* that a man who is married in terms of customary law, who thereafter enters into a civil marriage with another woman, during the subsistence of the customary marriage, such man must be regarded as having deserted his customary wife.[135] The Appeal Court in the matter of *Nkambula v Linda* further held that under such circumstances, the customary wife is entitled to leave her husband without rendering her guardian liable for the refund of the lobola.[136]

In this matter of Netshituka, the customary wives did not leave their spouse, even after he entered into a civil marriage. The customary wives instead continued in their respective roles as customary wives in terms of indigenous law. This therefore led to the question of the status of the relationship between the supposed deserted customary law wives and their spouse after his civil marriage was terminated. The Appeal Court in answering this question took into consideration the customary law practices of desertion and *phutuma*.[137]

The Supreme Court of Appeal in this instance found in favour of the wives married in terms of customary law. The marriage entered into civilly on the 17 January 1997 was declared null. The Court came to this conclusion by taking into consideration the intention of the parties and application of customary law holistically, as the deceased and the customary law wives

[133] A civil marriage is governed and solemnised by the Marriage Act of 1961 and it is entered into between one man and one woman to the exclusion of all others.
[134] *Nkambula v Linda* 1951 (1) SA 377 (A)
[135] *Nkambula v Linda* 1951 (1) SA 377 (A)
[136] Lobola is the marriage payment made by a prospective husband or his family to the family of the bride. It is viewed as a mark of respect and appreciation.
[137] In customary law, *phutuma* is the principle wherein a husband is obliged to fetch his wife, who has left him, irrespective of who was at fault, unless he intends to abandon her.

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continued with their relationships after the divorce between the deceased and in so doing the customary marriages were revived by virtue of *phutuma.*

The Court then chose to address the issue on whether it was competent for the deceased to enter into a civil marriage with Joyce Munyadizwa Netshituka during his existing customary unions. S 22 of the Black Administration Act was amended by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 which came into effect on the December 1988. The amendments of s 22 are as follows:

(1) A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman.

(2) Subject to subsection (1), no person who is a partner in customary union shall be competent to contract a marriage during the subsistence of that union.

Further to this subsection (3) of the amendment prohibits a marriage officer from solemnising the marriage of an African unless the person getting married makes a declaration that he is not a partner in a customary union with any woman other than the woman he intends marrying.

This amendment was of force and effect as at the date of the civil marriage between the deceased and Joyce Munyadizwa Netshituka on the 17 January 1997. The Court therefore found that the civil marriage between the deceased and Joyce Munyadizwa Netshituka. was a nullity, as the deceased was a partner in an existing customary union.

The challenge which now remains is what happens if a man is married in terms of customary law prior to 3 December 1988 and then again enters into a civil marriage with a further woman. The law is unclear on this aspect and must be addressed.[138]

3.2.4 *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC) (Hereinafter referred to as Gumede)

This case focuses on the discrimination in s 7(1) and (2) of the Customary Marriages Act which prescribes the proprietary consequences of customary marriages and the contractual capacity of spouses. It reads as follows:

[138] Law, Race and Gender Research Unit 'The Recognition of Customary Marriages in South Africa: Law, Policy and Practice' available at *https://open.uct.ac.za/bitstream/item/2250/CLS_Factsheet_RCMA_Dec2012_Eng.pdf?sequence=1* (accessed 15 August 2020)

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'(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 another 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.'

The history of this matter relates to a customary marriage entered into between Mr and Mrs Gumede on the 29 May 1968. It was the only marriage to which Mr Gumede was a party and it endured for over 40 years. During the subsistence of the marriage, Mrs Gumede was not allowed to enter into formal employment because her husband had not permitted her to work, she therefore maintained the family household and was the primary care-giver to the children. The home in which she lived was purchased by her husband who was in formal employment. Over a period of time, the family acquired two homes, one in Umlazi Township in which Mrs Gumede resided and the other at Adam Mission, Amanzimtoti, where Mr Gumede resided.

The marriage had irretrievably broken down a while ago and Mrs Gumede, an aged pensioner, lived off the monthly government pension and the occasional financial support from her children. Mr Gumede however was in an entirely different financial position. He was a foreman and upon his retirement, commenced receiving a monthly pension. He further did not support Mrs Gumede in any form nor had he paid her any form of maintenance.

In January 2003, Mr Gumede, instituted court proceedings to end the marriage. Mrs Gumede agreed that the marriage had irretrievably broken down, however before the Divorce Court could grant a divorce order, she approached the High Court to declare the provision of s 7 (1) and (2) of the Customary Marriages Act invalid as they unfairly discriminate based on gender and race in relation to women who are married under customary law in KwaZulu - Natal. Mrs Gumede was successful at the High Court and approached the Constitutional Court to confirm the order of constitutional invalidity.

The Constitutional Court in arriving at its decision gave due cognisance to the customary law applicable in KwaZulu – Natal at that time and their application in terms of s 7(1) and (2) of the Customary Marriages Act. Mr and Mrs Gumede were married in 1968, therefore, in terms of the Customary Marriages Act, the proprietary consequences if the marriage are governed in

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terms of the applicable customary law. In this matter the applicable customary law is codified in terms of the KwaZulu Act[139] and the Natal Code.[140]

Had Mr and Mrs Gumede been married under customary law after the commencement of the Customary Marriages Act, the matrimonial property system would have been a marriage in community of property. This is not the case and as such, s 20 of the KwaZulu Act and s 20 of the Natal Code provide that a family head is the owner and has control of all family property in the home. Section 22 of the Natal Code places all members of a kraal in respect of all family matters under the control of the family head. In return all members of the family owe obedience to the head. It must be pointed out that the head is a male.

The Constitutional Court stated that the 'impact of this legal arrangement is that the affected wives in indigenous marriages are considered incapable or unfit to hold or manage property.'[141] The Court further made a distinction between 'old' marriages and 'new' marriages. The 'old' marriages were those customary marriages that were entered into before the Customary Marriages Act was in effect and the 'new' marriages refer to those customary marriages which were entered into after the Customary Marriages Act came into effect.

Sections 7 (1) and (2) of the Customary Marriages Act, s 20 of the KwaZulu Act and s 20 and s 22 of the Natal Code were all confirmed to be constitutionally invalid as the discrimination was on a listed ground and the government could not show why it was fair or justifiable. Despite the welcomed ruling in the Constitutional Court it is the Court's perception on indigenous law that was of equal importance.

In relation to the codification of indigenous law and the effect thereof, the Constitutional Court took a very strong stance and stated,

> '…a prominent feature of the law of customary marriage, as codified, is male domination of the family household and its property arrangements. Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage.'[142]

[139] KwaZulu Act on the Code of Zulu Law 16 of 1985
[140] Natal Code of Zulu Law published in Proclamation R151 of 1987
[141] *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC) para 35
[142] *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC) para 17

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It has been argued that even in pre-colonial communities, group interests were in favour of men and therefore it should not be said that the advent of colonialisation and the subsequent codification of customary law contributed to the vulnerability of women. This point was also dealt with by the Constitutional Court as follows:

> '…during colonial times, the great difficulty resided in the fact that customary law was entirely prevented from evolving and adapting as the changing circumstances of the communities required. It was recorded and enforced by those that neither practiced it nor were bound by it. Those who were bound by customary law had no power to adapt it. Even when notions of spousal equality and equity and the abolition of the marital power of husbands over wives were introduced to reform the common law, 'official' customary law was left unreformed and stone-walled by static rules and judicial precedent, which had little or nothing to do with the live experience of spouses and children within customary marriages. With the advent of democracy much had to give way.'[143]

It is clear from the above extract that the Constitutional Court is of the view that the codification of indigenous law led to its stagnation as it was unable to evolve as the social norms and values evolved. In expressing an opinion, the Constitutional Court not only protected the rights of spouses in indigenous marriages but also ensured that the ongoing development of indigenous law is brought to the fore.

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The Constitutional Court, in this case ruled that in monogamous indigenous marriages, the matrimonial property regime would be in community of property unless a specific contract was entered into prior to the marriage. In respect of polygamous customary marriages, the division of property is dependent on the date upon which the marriage was concluded. Should a polygamous customary marriage have been entered into before the 15 November 2000, the marriage property would be divided in terms of customary law. Should the marriage have been concluded after the 15 November 2000, the marriage property will be divided in terms of a court approved contract obtained by the husband before entering into a polygamous marriage.[144]

The issue therefore remains whether the application of s 7(1) of the Customary Marriages Act is discriminatory to those women who have been married in a polygamous indigenous marriage prior the 15 November 2000. The Women's Legal Centre (WLC) has advanced that thousands

[143] *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC) para 19

[144] Law, Race and Gender Research Unit 'The Recognition of Customary Marriages in South Africa: Law, Policy and Practice available at *https://open.uct.ac.za/bitstream/item/2250/CLS_Factsheet_RCMA_Dec2012_Eng.pdf?sequence=1* (accessed 15 August 2020)

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of vulnerable women in South Africa are living in polygamous marriages and due to this they do not have equal control over property within their marriages. This renders them vulnerable to homelessness, eviction and destitution.[145]

Legislature has enacted the Recognition of Customary Marriages Amendment Act 1 of 2021, which addresses the concerns raised in this case, as well as the concerns raised by the WLC to recognise polygamous indigenous marriages and their proprietary consequences irrespective of the date of the marriage. Section 2 of the Recognition of Customary Marriages Amendment Act regulates the proprietary consequences of indigenous marriages in which a person is a spouse in more than one customary marriage by recognising that each spouse in such a customary marriage has joint equal and rights, including but not limited to ownership and rights of management and control over marital property.

3.2.5 *Ramuhovhi v The President of the Republic of South Africa and Others* 2016 (6) SA 210 (CC) (Hereinafter referred to as the Ramuhovhi case)

This case has come to the forefront of matrimonial property rights in indigenous marriages as it challenged the constitutionality of the proprietary consequences in indigenous marriages concluded before the Customary Marriages Act was enacted.

During the deceased's lifetime he had entered into three polygamous customary marriages with Tshinakaho Netshituka (Tshinakho), Masindi Netshituka (Masindi) and Diana Netshituka (Diana). The deceased also entered into civil marriages with Martha Mosele Netshituka (Martha) and Munyadziwa Joyce Netshituka (Munyadziwa).

This case is related to the original Netshituka matter as discussed above.[146] The Applicants are the children born from the polygamous marriages between the deceased and Tshinakaho and Masindi, who argued that due to the application of s 7(1) of the Customary Marriages Act, their mothers were excluded from the estate.

At the time of passing, the deceased's marriage to Martha was dissolved by divorce on 5 July 1984 and his marriage to Masindi had terminated upon her death during 1995. The marriage to Diana was unclear however she passed on by the time this matter was heard and Tshinakaho passed away on the 9 November 2011. The civil marriage between the deceased and

[145] Fin24 'Women's rights in customary marriages' available at *http://www.fin24.com/Money/Property/womens-rights-in-customary marriages-20170519* (accessed 15 August 2020)
[146] *Netshituka v Netshituka* 2011 (5) SA 453 (SCA)

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Munyadziwa was declared null and void by the Supreme Court of Appeal.[147] The reason for such a decision was that the deceased could not enter into a civil law marriage while in two existing polygamous customary marriages.

Upon the deceased's death, his will stated that Munyadziwa was named as a beneficiary in the will as well as the Executrix. The deceased referred to Tshinakaho as his first wife, Diana as his second wife and Munyadziwa as his third wife. The SCA held the will to be valid. In terms of the will, the deceased bequeathed his half share of the joint estate to his wives and children.

Section 7 (1) of the Customary Marriages Act states that, the proprietary consequences of a customary marriage entered into prior the commencement of the Customary Marriages Act, is governed by the applicable indigenous law. The case of Gumede successfully dealt with the protection of monogamous customary marriages prior to the commencement of the Customary Marriages Act while also stating that a *lacuna* exists in that there was no protection afforded to pre-Act customary marriages, which were polygamous.[148]

The Applicants in this matter approached the court *a quo*, to declare s 7(1) of the Customary Marriages Act[149] inconsistent with the Constitution, the court *a quo* being the Limpopo High Court.[150] The court *a quo* found that s 7(1) of the Customary Marriages Act was unconstitutional and discriminatory based on gender, race, ethnicity and social origin.[151] This judgement as delivered by the High Court was brought before the Constitutional Court for confirmation of constitutional invalidity.

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The Constitutional Court upheld the decision by the court *a quo* in declaring s 7(1) of the Customary Marriages Act unconstitutional and discriminatory and decided to grant interim relief to allow the Legislature the opportunity to address the unconstitutional provision. The importance of the interim relief granted is viewed as a further protection of indigenous law as the various forms of marital property are taken into consideration.

In this respect the judgment addressed the unique consequences on marital property upon the termination of indigenous marriages.[152] The judgement reflects on the indigenous cultural values in that a house does not only comprise of a wife, but also by the children who are born

[147] *Netshituka v Netshituka* 2011 (5) SA 453 (SCA)
[148] *Ramuhovhi v The President of the Republic of South Africa and Others* 2016 (6) SA 210 (CC) para 3
[149] Recognition of Customary Marriages Act 120 of 1998
[150] Constitution of the Republic of South Africa 1996
[151] *Ramuhovhi v The President of the Republic of South Africa and Others* 2016 (6) SA 210 (CC) para 9
[152] *Ramuhovhi v The President of the Republic of South Africa and Others* 2016 (6) SA 210 (CC) para 60

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of the marriage into the house.[153] This denotes that though an indigenous marriage may end due to death or dissolution, the house may remain intact and in existence.[154]

This concept, that the house itself has certain proprietary rights and interests is more clearly explained in the judgement:

> 'the most important asset that each house has is the homes that its members occupy. Second, house property that accrued after the house had come into existence continues to exist and to attach to that house. Third, only members of that house have an entitlement to enjoy benefits that flow from the existence of the house property, including rights of inheritance to the house property. That must mean, for example, the family head cannot lawfully divest a house of its home and purport to bequeath it as an inheritance to members of another house.'[155]

It is clear that those who have entered into customary marriage prior to the Customary Marriages Act, must share equally in the right to ownership as well as the rights to family property, the management and control of family property and the husband and all wives must have similar rights in respect of the house property.

Should the polygamous customary marriage, which was entered into prior to the commencement of the Customary Marriage Act, be terminated, the property of that house must be shared equally among the members of that house only. This is a clear indication of not only the recognition of indigenous law, but also that of indigenous culture through the Constitutional Court.

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3.2.6 Synopsis of Case Law: Customary Marriages Act

In the matter of Netshituka, the application of the principle of *phutuma* was taken into consideration when the Court had to decide on the termination of an indigenous marriage. Due to the Court's consideration of the indigenous principle of *phutuma*, the marriages were declared valid and the subsequent civil marriage was declared invalid.

The marital regime of monogamous customary marriages was declared by the Constitutional Court to be in community property in the matter of Gumede. This was seen as a needed development within customary marriages and it successfully blended the recognition of the indigenous marriage while upholding the constitutional principle equality.

[153] *Ramuhovhi v The President of the Republic of South Africa and Others* 2016 (6) SA 210 (CC) para 60
[154] *Ramuhovhi v The President of the Republic of South Africa and Others* 2016 (6) SA 210 (CC) para 60
[155] *Ramuhovhi v The President of the Republic of South Africa and Others* 2016 (6) SA 210 (CC) para 60

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The Ramuhovhi matter brought into consideration the indigenous cultural value of house which does not only comprise of a wife but also by the children who are born of the marriage into the house. In this regard, the family head cannot bequeath the house property to members of another house unless there is a lawful reason to do so. This matter again protects indigenous law by recognising this cultural value but the Court ensured that the application of same remained lawful.

These three cases developed, protected and recognised indigenous law, as well as, ensuring the constitutional principles were upheld.

3.3 The Restitution of the Land Rights Act 22 of 1996

Land rights remain a controversial point of discussion in South Africa, even more so currently, given the South African National Assembly's adoption of a motion for the constitutional review to allow the expropriation of land without compensation.[156] The Restitution of Land Act was promulgated with the intention to provide for the restitution of land rights to those persons or communities who were disposed of land due to past racially discriminatory laws or practices in South Africa. It is interesting that expropriation of land without compensation and the Restitution of Land Act entail the same outcome, however in different manner, with different qualification criteria.

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There are various categories of persons who are entitled to restitution of land in terms of the Restitution of Land Act. Section 2 of the Restitution of Land Act states the following persons shall be entitled to restitution of a right in land if a) the person was dispossessed of a right in land after 19 June 1913 due to past racially discriminatory laws practices; b) it is a deceased estate dispossessed a right in land after 19 June 1913 due to past racially discriminatory laws practices; c) The person is a direct descendent of a person referred to in (a) above who has died without lodging a claim and has no ascendant who is a direct descendent of a person referred to in para (a) and has not lodged a claim for restitution of land; d) it is a community or part of a community dispossessed of aright in land after 19 June 1913 due to past racially discriminatory laws practices; e) and the claim is lodged before the gazetted date.

[156] Magubane K 'Understanding the ABCs of SA's land expropriation debate' available at *https://www.fin24.com/Economy/understanding-the-abcs-of-sas-land-expropriation-debate-20180313-2* (accessed 9 April 2021)

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This mini-thesis focuses on a restitution claim by a community or part of a community[157] which has been dispossessed of a right in land after 19 June 1913 as a result of racially discriminatory laws or practices.[158]

In terms of the provisions of the Restitution of Land Act, the claim for the restitution of a right in land must be lodged with the Commission on Restitution of Land Rights by no later than the 30 June 2019 and the dispossession must have occurred after the 19 June 1913.[159] The Constitutional Court in the case of *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*[160] confirmed that the requirements for a restitution claim by a community must include the following:

a. A claim by a person, a community or a part of a community;

b. The person, community or part of the community had a right in land;

c. The dispossession of this right after 19 June 1913;

d. The dispossession was a result of the racially discriminatory law or practices in existence at the time;

e. The claim was lodged within the prescribed time; and

f. No just and equitable compensation was received for the dispossession.

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This judgement explicitly states that a community does include a tribal indigenous community. The definition of community in the Land Restitution Act is any group of persons whose rights in land are derived from shared rules determining access to land held in common by such a group and includes part of any such group. In the following paragraphs the application of the Restitution of Land Act is discussed. Though the Goedgelegen case was briefly discussed above to define the requirements to establish a restitution claim, the merit and judicial precedent of the case is discussed fully in the paragraphs below, as with the other identified cases.

The case law below was selected for discussion due to their precedent setting nature and provide guidance on the interpretation and implementation of the Restitution of Land Act. In

[157] The focus on a community or part of a community is to limit this mini thesis to the indigenous community and to determine the manner in which an indigenous person or community has been protected by this measure.
[158] s 2(1)*(d)* The Restitution of Land Rights Act 22 of 1994
[159] s 5 of the Restitution of land Rights Act 22 of 1994 as amended.
[160] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC)

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arriving at a decision, the judges, in the four selected cases considered indigenous law when delivering their respective judgements.

3.3.1 *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) (Hereinafter referred to as the Richtersveld case)

The claimants in this matter are descended from the Nama people who form a part of the Khoisan tribes.[161] The claim was for a narrow strip of land, which is part of the greater Richtersveld area.[162] The claim was based on s 2(1)*(d)* of the Restitution of Land Act, which states that a person is entitled to claim restitution of a right in land, if it is a community or part of a community which was dispossessed of a right in land, due to past racially discriminatory laws or practices after 19 June 1913. This particular strip of land was and continues to be mined for alluvial diamonds however the importance of this case rests not upon the mining of the diamonds, but with the dispossession of the Richtersveld community after the discovery of the diamonds.

During the 1920s, diamonds were discovered on this strip of land, which resulted in the government dispossessing the Richtersveld Community and granting full rights of ownership to Alexkor Limited.[163] Upon effect of the Restitution of Land Act,[164] the Richtersveld Community launched an application claiming that it was dispossessed of ownership of the land or the right to the exclusive beneficial occupation and use of the land as well as the exploitation of the natural resources. The case was heard by the Land Claims Court, the Supreme Court of Appeal and finally it was brought before the Constitutional Court, in which various issues were dealt with in detail.

In this case the three issues, which are of significance to the recognition and protection of indigenous law, are the nature of land rights after the annexation of land by the British Crown, whether the subsequent dispossession of the Richtersveld Community was due to racially

[161] Patterson S 'The Foundations of Aboriginal Title in South Africa? The *Richtersveld Community v Alexkor Ltd* Decisions' available at http://www.classic.austlii.edu.au/au/journals/IndigLawB/2004/18.html (accessed 12 September 2021)
[162] *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 5
[163] *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 9
[164] The Restitution of the Land Rights Act 22 of 1996

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discriminatory laws or practices and third, whether an aboriginal title claim is applicable to the claimants.

The British Crown in terms of the Annexation Proclamation annexed the portion of land as claimed by the Richtersveld Community in 1847. This portion of land became a part of the Cape Colony and in terms of the Annexation Proclamation, the British Crown had the power to make new laws, create new rights, recognise existing rights or terminate the existing rights[165]. The Constitutional Court in this judgement stated that the nature of land rights held by the Richtersveld Community, prior to annexation, must be determined with reference to indigenous law as that was the law, which governed the land rights of the Richtersveld Community at that time.[166]

In this regard, the claimants, advanced testimonies that prior to the annexation of land by the British Crown, the Nama people, under indigenous Nama law, collectively owned the land communally. The community members had a right to occupy and use the land. Further copper mining by the community was undertaken for purposes of making copper beads and copper plates. In terms of this, the determination of the nature of land rights by the Richtersveld Community after the annexation of land by the British Crown must be based on indigenous law and not the common law.

Alexkor however advanced the argument that once the British Crown became the owner of all land, the Richtersveld Community lost their rights to the said land. The Constitutional Court rejected this argument as the Proclamations gave the British Crown the power to make new laws, recognise existing laws and rights or extinguish existing rights and create new rights.[167] None of the Proclamations extinguished the rights of the Richtersveld Community and the Constitutional Court went so far as to list the various ways in which the British Crown could have extinguished the indigenous right of ownership by the Richtersveld Community over the subject land.[168] As none of these were exercised by the British Crown, the Richtersveld

[165] *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 66
[166] *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 50
[167] *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 66
[168] *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 70

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Community remained the owners of the land through indigenous rights which were consequently intact prior 19 June 1913.[169]

The second issue was whether the dispossession was a result of racially discriminatory laws or practices. The Constitutional Court noted that upon discovery of the diamonds on the land, the government utilised the Precious Stones Act 44 of 1927 (Precious Stones Act), to fence off the subject land and to remove the Richtersveld Community from the subject land in 1926.[170] The Constitutional Court held that the Precious Stones Act did not recognise Indigenous Law ownership and differentiated between Indigenous Law ownership and owners of land whose ownership was registered at the deed offices. Registered ownership of land was predominantly held by white, while the land which was under Indigenous Law ownership was treated as state land.[171]

In this manner, owners with registered title of land at a deeds office, where allowed access to the land, keep their homesteads and they were entitled to a share of the mineral wealth of the land, whereas indigenous law ownership was not recognised.[172] Due to the non-recognition of indigenous law ownership Constitutional Court held that the racial discrimination lay in the failure to recognise and accord protection to indigenous law ownership while, on the other hand, according protection to registered title. The Constitutional Court rejected the restrictive view that for a law to be determined to be racially discriminatory in terms of the Land Restitution Act, the law must have sought to specifically achieve the apartheid era ideal of segregation of each race to a particular area.[173]

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The Constitutional Court further addressed this issue as follows:

> 'Although it is correct that the Precious Stones Act did not form part of the panoply of legislation giving effect to "spatial apartheid", its inevitable impact was to deprive the Richtersveld Community of its indigenous law rights in land while recognising, to a

[169] *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 82
[170] *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 93
[171] *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 95
[172] *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 95
[173] *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 97

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significant extent, the rights of registered owners. In our view, this is racially discriminatory and falls squarely within the scope of Act.'[174]

In this regard the Constitutional Court held that the nature of the rights was not merely extinguished because of annexation, but rather how were the indigenous and rights managed and impacted upon after the annexation by the British Crown. This will determine the nature of the right exercised. The second issue was based on dispossession. The dispossession as referred to in the Restitution of Land Act, is not limited to only spatial dispossession in terms of race, but dispossession in the sense racially discriminatory laws treated different races differently in various situations and as such it is not limited to spatial dispossession. The decision by the Constitutional Court in this case helped pave the way for future land claims and impacted on future decisions as seen in the case discussed below.

3.3.2 *Johanna Magdelena Cornelia Prinsloo Others v The Ndebele-Ndzundza and Others* 2005 (6) SA 144 (SCA) (Hereinafter referred to as the Ndebele-Ndzundza Community case)

The Ndebele-Ndzundza Community claim restitution of a farm named Kafferskraal (the farm) situated in Mpumalanga. The name of the farm was noted by the Supreme Court of Appeal to be 'opprobrious' however the Ndebele-Ndzundza Community were adamant that the name be used as the name itself confirms that the land belonged to the Ndebele-Ndzundza Community and 'survived the superimposition of white registered title.'[175]

The integral questions before the Supreme Court of Appeal in this matter were whether the Ndebele-Ndzundza Community, as claimants to the farm, constituted a community in terms of the Restitution of Land Act and whether they were dispossessed of any rights in the land. In answering these questions, the Supreme Court of Appeal referred to the oral tradition of history as followed in the Ndebele custom, literary texts, case law as well as the facts of the case. In addition, the 'bonds of custom, culture and hierarchical loyalty' may be helpful to determine the Community's shared rights.

In brief, the first form of human habitation of the land was traced back to the first half of the seventeenth century through oral history, in which, Chief Ndzundza and his followers settled

[174] *Alexkor Limited and The Government of the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 99
[175] *Johanna Magdelena Cornelia Prinsloo Others v The Ndebele-Ndzundza and Others* 2005 (6) SA 144 (SCA) para 1

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near the farm in 1636.[176] Various wars were fought, including the Mapoch war and in 1883, thirty-six thousand hectares of land were distributed to white farmers by the Volksraad of the Transvaal Republic. The farm that is claimed formed a part of the thirty-six thousand hectares that was distributed. During the beginning of the twentieth century Madzidzi, one of the leaders, escaped imprisonment and settled again on the farm to ensure the preservation of the male initiation ritual, this ritual is viewed as crucial to the Ndebele culture and the preservation thereof.[177]

Due to the distribution of the land by the Volksraad, the Ndebele-Ndzundza Community were assimilated as indentured labourers settled on various pieces of land, which led to the further dispersion of the Ndebele. However due to the actions of Madzidzi, the farm remained the land where the male initiation rites continued for this community. In 1938, a farm named Goedgedacht was purchased for the Ndebele-Ndzundza Community and the members of this community were relocated there during 1939 and 1940.

The Appellant advanced the argument that the Ndebele-Ndzundza Community lost their traditional rights in the land after the Mapoch war and these rights were never regained. The Ndebele-Ndzundza Community stated that they:

> 'remained at Kafferskraal as our land. We were under nobody. We were just inhabitants of that place. After some years a white person came, his name was Henwood. He then told us that the place belonged to him and that we should pay an amount per year and then they started to let these Madzizi people pay a certain amount.
>
> There were no white people. The [community] were working for themselves, they were ploughing and there were also herds of cattle.'[178]

The owners of the farm did not reside on the farm and in 1902, Mr Madzidzi was formely installed as a chief. Further the owner, Mr J W Henwood, was willing to sell the farm to *C*hief Fene Andies Mapoch in 1921. The owner was keen to sell the farm as a number of Madzidzi's followers were living on the farm. The sale was not concluded as the neighbouring farmers and a Member of Parliament for the area strongly opposed the sale.[179] The area was not a designated

[176] *Johanna Magdelena Cornelia Prinsloo Others v The Ndebele-Ndzundza and Others* 2005 (6) SA 144 (SCA) para 2
[177] *Johanna Magdelena Cornelia Prinsloo Others v The Ndebele-Ndzundza and Others* 2005 (6) SA 144 (SCA) para 3
[178] *Johanna Magdelena Cornelia Prinsloo Others v The Ndebele-Ndzundza and Others* 2005 (6) SA 144 (SCA) para 14
[179] *Johanna Magdelena Cornelia Prinsloo Others v The Ndebele-Ndzundza and Others* 2005 (6) SA 144 (SCA) para 23

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black area[180] and as such this may have been the reason for the objections.[181] Further attempts by latter chiefs to purchase the land was met with the same result. On the 5 August 1938, the son of Mr J W Henwood wrote to the secretary for Native Affairs, stating that he would like to sell the farm and that no white people had ever lived on the farm, 'and it is, and always been, entirely a Native farm'.[182]

In analysing the above facts, the Supreme Court of Appeal found that the claimants formed a 'community' within the Restitution of Land Act for the following reasons:

a) The claimants' predecessors comprised of a group of people that lived and worked on the farm for a continuous period until they were relocated;

b) The said predecessors lived under the authority of a chief, the first of whom was Chief Madzidzi;

c) The land was held as a collective group with each other;

d) There was no control in the form of direct control or supervision by the white land owners and they therefore occupied the land in terms of the Ndebele–Ndzundza traditions;

e) Through the revival of the male initiation rites on the farm, the link between the farm and the customs of the Ndebele-Ndzundza was shown.[183]

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The next issue of whether the Ndebele-Ndzundza Community was dispossessed, the Court considered that the farm Goedgedacht was purchased to relocate the Ndebele-Ndzundza Community. This however was not to be permanent, but a measure put in place until the Community could again be moved to an area demarcated to their race. The son of Madzidzi, Chief Jafta Mahlangu, settled on the Goedgedacht farm with his followers during the 1940s and upon cross-examination it was stated that the relocation was forced despite there being no physical coerced removal.[184]

[180] The Group Areas Act of 1950 created designated areas for each race group to reside in and as such a designated black area was an area allocated for only Black people to work or reside on.
[181] *Johanna Magdelena Cornelia Prinsloo Others v The Ndebele-Ndzundza and Others* 2005 (6) SA 144 (SCA) para 21
[182] *Johanna Magdelena Cornelia Prinsloo Others v The Ndebele-Ndzundza and Others* 2005 (6) SA 144 (SCA) para 125
[183] *Johanna Magdelena Cornelia Prinsloo Others v The Ndebele-Ndzundza and Others* 2005 (6) SA 144 (SCA) para 29-30
[184] *Johanna Magdelena Cornelia Prinsloo Others v The Ndebele-Ndzundza and Others* 2005 (6) SA 144 (SCA) para 43

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The Court took in to account *Abrams v Allie NO*[185] in deciding that a lack of physical forced removal does not mean that there was no dispossession. The Court reviewed the facts in this matter in that the Community had no choice but to move or remain working on the farms under conditions which had significantly changed. No compensation was paid to the Community, even though they had no control over the land or unrestricted use as they had enjoyed for many years. In this respect, the Court concluded that dispossession had occurred.

The Court held that the Ndebele-Ndzunzda Community met the requirements for restitution. The Court, however, considered various factors to arrive at its decision including the admittance of oral evidence and indigenous cultural practices. Most indigenous communities do not have a codified system which contains the written rules, customs and laws of the group of people conveyed through oral history from generation to generation. This form of oral history was allowed and taken into consideration. In addition, the cultural practices of initiation rites practised by the Community were considered when deciding on whether the claimants were a community for the purposes of the Land Restitution Act.

The Court ultimately decided that the Ndebele-Ndzundza Community is a community in terms of the Land Restitution Act and entitled to restitution. The matter was referred back to the relevant Land Claims Court to determine a just and equitable form of restitution.

3.3.3 *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) (Hereinafter referred to as the Goedgelegen case)

The Goedgelegen case raised legal issues pertaining to land rights and the restitution thereof in terms of the Restitution of Land Act. The Applicants in this matter identify as members of the Popela Community whose ancestors originally settled on the Boomplaats farm in the 1800s - an exact date could not be provided. The individual Applicants have the same ethnic lineage and bear the Maake surname, except for one.[186] Upon settling on the farm, the Popela Community's ancestors enjoyed undisturbed indigenous rights to the land, which included raising their families, performing spiritual rituals and burying their deceased. The land was cultivated and parts of it were used for the grazing of their livestock. These indigenous rights are linked to the cultural practices of the Popela Community. This lifestyle was interrupted

[185] *Abrams v Allie NO* 2004 (4) SA 534 (SCA)
[186] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 2

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when white settlers arrived and the Farm Boomplaats was registered for the first time to a settler in 1889.[187]

During the course of time, the farm was transferred to various owners and was ultimately registered to the Altenroxels who later sold the farm to the company Goedgelegen Tropical Fruits (Pty) Ltd also known as the Respondent.[188] Due to the successive transfer of land, the Popela Community was reduced to labour tenants. In this respect, they worked for the registered owner and in return, they were allowed to reside on the farm.[189] This changed the dynamic between the Popela Community and their indigenous rights to the land.

In testimony Mr Altenroxel confirmed that in 1969 he and his brother decided to terminate the labour tenancy of the individual Applicants, this was subsequently done and no compensation was paid to the Popela Community for their loss of rights to Boomplaats. This meant that the Applicants' families would have to become wage earners and those that did not accept the new employment terms would leave to the 'homeland reserved for black people'.[190]

Upon a brief overview of the facts, it appears that the dispossession of indigenous communal ownership occurred prior to 19 June 1913 and upon the strict interpretation of the Restitution of Land Act, the Popela Community should not have been entitled to restitution or redress except within the confines of the Act itself.[191] The Constitutional Court in this matter explicitly stated that this does

> '… not mean to convey that registered ownership of land always enjoys primacy over indigenous title. To do that would be to elevate ownership notions of the common law to the detriment of indigenous law ownership for purpose of restitution of land rights. Rights acquired under indigenous law must be determined with reference to that law subject only to the Constitution. In appropriate cases, under the jurisdiction crafted by the Restitution Act, registered ownership in land will not be held to have extinguished rights in land recognised under indigenous law.'[192]

The Restitution of Land Act allows a Court to order the restitution of a right in land, which includes the power to adjust the nature of the right previously held and to determine the form

[187] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 11
[188] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 12
[189] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 13
[190] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 17
[191] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 21
[192] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 22

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of title under which the right may be held in future.[193] The above excerpt from the court judgement further advances this power of an applicable Court.

The Popela Community in this matter sought relief based on the labour tenancy claims and not in terms of the restoration of a title. The Court in its judgement expressed strongly that the history of dispossession of property preceding the cut off date is not of 'mere passing interest.'[194]

The Court further pronounced on whether the Popela Community was dispossessed of a right in land. In determining whether a community exists at the time of a claim, two features are taken into consideration. The first is a determination of whether a sufficiently cohesive group of people exists to show that there is a community, or part of a community. In this regard further consideration must be given to the nature and likely impact of the original dispossession on the group. The second consideration to determine the existence of a community is the commonality between the claiming community and the community which was dispossessed.

The Court emphasised that there is no justification to limit the meaning of the word 'community' by inferring a requirement that the group concerned must show an accepted tribal identity and hierarchy.[195] In so doing, the protection of indigenous culture and indigenous law are not limited and adequate measures may be undertaken to protect both. In considering this point, the Constitutional Court allowed for the development of indigenous law to extend to common practices that allow for the flexibility of indigenous law as it develops and moves away from the rigidity of the colonial past, as was the instance with the Black Administration Act.[196]

In this manner the Constitutional Court has clearly laid the threshold as to what constitutes a community or a part of a community in that the threshold is low and should not be measured in terms of other legislation.[197] In this instance, the Constitutional Court agreed with the views of the Supreme Court of Appeal as expressed in the Ndebele-Ndzundza Community case[198] in that, to prove an indigenous community existed, it is not necessary to prove that an accepted tribal identity exists or that a community lived under the authority of a chief designated by tribal hierarchy. In proving that a group of people are considered a community in terms of the

[193] s 35(4) Restitution of Land Rights Act 22 of 1994
[194] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC)
[195] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 40
[196] The Black Administration Act 38 of 1927
[197] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 42
[198] *Johanna Magdelena Cornelia Prinsloo Others v The Ndebele-Ndzundza and Others* 2005 (6) SA 144 (SCA)

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Restitution of Land Act, the threshold has been set in s 1 the Restitution of Land Act as any group of persons whose rights in land are due to the shared rules in terms of access to land held by the group in common.

In applying the above standard on the determination of the whether the Popela group of people were a community, the past and present circumstances must be considered. The ancestors of the current Popela Community lived on the farm prior to the first registered owner of the land in 1889. Mr Hattingh and some of the descendants thereof still reside on the farm.[199] A new induna, Mr Petrus Maake was selected after the demise of the Mr Popela Maake. His responsibilities included pointing out the areas in which a person could build or plough, thereby exercising factual possession of the land.[200] Aerial photos from 1938 onwards depict members of the Popela Community ploughing the areas of the farm and residing in individual huts on the farm. The community further shared a common grazing area, a communal graveyard and a variety of functions were performed collectively, such as fetching water or gathering fire-wood.[201]

Once the white owners took possession and forced the Popela Community to became labour tenants, the Popela Community lost their indigenous ownership. They, however, continued to exercise their rights to occupy the land, graze and raise crops. In so doing they retained their identity and therefore are a community for the purpose of the Restitution Act.

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In taking the various circumstances and facts into account, the Court made a declaratory order that the individual members of the Popela Community were dispossessed of their right in land. Despite the loss of indigenous ownership, the indigenous cultural practices were considered among other factors, as to whether the Applicants were dispossessed of a right in land after 19 June 1913.

3.3.4 *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC) (Hereinafter referred to as the Salem case)

The land claimed in this matter is known as the Salem Commonage and forms part of the Zuurveld in the Eastern Cape. This matter was brought on appeal from the Supreme Court of Appeal by the Salem Party Club and other landowners. The Salem Community are the claimants who claim that they are the descendants of the black people who occupied Salem

[199] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 35
[200] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 36
[201] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 36

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Commonage but were later dispossessed due to the laws of the country at the time of dispossession.[202] The original claim was larger, however, owners of certain properties that form a part of the Salem Commonage settled with some of the members of the Salem Community, whereas the landowners that did not settle, brought this Appeal.

The Salem Community allege that their ancestors had lived on the land and exercised their indigenous rights during the early 1800s, as the exact date cannot be determined. British colonial governors granted the landowners' predecessors Salem Commonage during 1836 and 1847 respectively.[203]

In 1884 it was recorded that 130 black people lived on Salem Commonage in 24 huts and the group had 70 cattle. The Natives Land Act 27 of 1913 thereafter came into effect, which prohibited black people from acquiring title to land outside the 'native' areas.[204] This led to the promulgation of the Salem Village Management Board Location Regulations, in June 1917, with the purpose to control black inhabitants at Salem.

Despite the formation of the Salem Village Management Board, the white inhabitants of Salem remained unhappy with the use and management of the Commonage. Farmers still leased land which was part of the Commonage to outsiders for grazing purposes, while others were charged grazing fees for the grazing of cattle belonging to the 'Native servants' stock'.[205]

During 1940, an application was brought before the Grahamstown High Court to consolidate the two portions of the Commonage with the intention of subdividing the consolidated property among the Settlers.[206] This application was granted on the 8 August 1940 and it was around this time that the Native Commissioner made a special visit to Salem and noted that the population of black people approximately comprised of 500 people.[207] The Salem Community claimants affirm that it was at this point that the dispossession of their land rights commenced.

The success of the claim by the Claimants rested on whether a community, that held a right in land existed, of which they were dispossessed through racially discriminatory laws after 19 June 1913. The Land Claims Court found that there were shared rules and practices among the Claimants' ancestors in that they were left to regulate their own lives in relation to their practices, including cultural practices. In this regard, the Land Claims Court as well as the

[202] *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC) para 4
[203] *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC) para 1
[204] *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC) para 18
[205] *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC) para 24
[206] *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC) para 26
[207] *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC) para 27

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Supreme Court of Appeal found that the Claimants were entitled to restitution in terms of the Restitution of Land Act.

The landowners based their appeal to the Constitutional Court on the court *a quos* approach to historical evidence, the interpretation thereof as well as the usage of oral evidence. It was further argued on behalf of the landowners that there was no reliable evidence presented by the Salem Community that a community with rights had existed, nor that any rights were dispossessed. The Salem Community argued that the approach to the evidence was correct and it confirmed that there was a community and it had been dispossessed of its rights in land.

The Constitutional Court stated that

> 'understanding history, like adjudication, is a necessarily value-laden task. This does not free us from the constraints of the evidence in seeking the truth or truths the materials and sources yield. We are guided by the Restitution Act, together with the usual techniques available to any court in assessing expert evidence.'[208]

Section 30 of the Restitution of Land Act specifically addresses the admissibility of evidence and at the outset states that the Court may admit any evidence, including oral evidence, if it considers the evidence to be relevant and cogent to the matter, irrespective of whether such evidence would be inadmissible in another court of law.[209]

In addition to the above during oral argument, an aerial photograph, taken during 1942, was produced, which depicted 26 clusters of dwellings all within the Commonage or walking distance of the Commonage. This evidence corroborated that there were approximately 500 black people on the Commonage.

An expert witness for the Salem Community, Professor Legassick, in his report observed that people

> 'occupying the land in a given place for two to three generations must interact with one another, visit each other, do things together establish rules of behaviour, including those determining access to land, and, in other words, must constitute a community.' [210]

Further, the Salem Community asserted that lime from the lime quarry found at the Commonage was used by their ancestors for initiation rituals, cosmetic and medicinal purposes.

[208] *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC) para 69
[209] s 30(1) of the Restitution of Land Rights Act
[210] *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC) para 106

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This information confirmed that 'the Black people living on the Commonage sustained and practised initiation rituals there. These are known to be profoundly central to Xhosa culture.'[211]

Due to the evidence presented before the Constitutional Court, it was found that a community had existed by analysing the evidence and taking into consideration the cultural practices of the black people at the Commonage. This is not only the protection of indigenous culture by the Constitutional Court, but also the protection of rights due to the recognition of indigenous culture.

The Court further held that subdivision and subsequent allocation of the Commonage to settlers without due consultation or care of the black people that were living or using the land was a racially discriminatory act of dispossession. The conclusion reached by the Constitutional Court was of utmost importance as it brought about the recognition of parallel rights. Neither the Applicants nor the Claimants had unblemished usage or ownership of the Commonage. Both the Applicants and the Claimants' ancestors had equal rights to the commonage and until dispossession, neither party's rights could be exercised as exclusive ownership.[212]

In reaching this conclusion, the Constitutional Court upheld the decision of the Supreme Court of Appeal, however, the rights accrued by both parties would have to be accounted for in order for a fair order to be made and the matter was referred to the Land Claims Court to do so.

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3.3.5 Synopsis of Case Law: Restitution of Land Act

The cases discussed in the preceding paragraphs have a common theme as each one has the relevant court interpreting legislation to recognise indigenous law and implement same where applicable to the Restitution of Land Act.

In the matter of Richtersveld, the indigenous rights of the Nama people survived the British annexation of their land to the extent that subsequent to the annexation of the land, the annexation did not extinguish the indigenous rights which were exercised even after the annexation.

The judgement of the Ndebele-Ndzunzda Community case took into consideration the oral evidence as most indigenous tribes do not have a codified system of law, nor of their history. In considering oral evidence, the court applied indigenous law by allowing and considering oral evidence of the Ndebele-Ndzunzda Community.

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[211] *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC) para 110
[212] *Salem Party Club and Others v Salem Community and Others* 2018 (3) SA 1 (CC) para 158

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Indigenous ownership and the accompanying indigenous rights were also at the heart of the Goedgelegen matter. Despite the termination of indigenous ownership by the Popela Community, the indigenous rights again were and are presently practised by the Popela Community. The court recognised such indigenous rights to the extent that the Popela Community was further recognised as a 'community' in terms of the Land Restitution Act. The Salem matter further entrenched the usage of oral evidence particularly in establishing the existence of a 'community' as per the Land Restitution Act.

Each of the four selected cases referenced indigenous law when arriving at a decision and in so doing recognised indigenous law and the practice to the extent that the applicable indigenous law was also protected.

3.4 Conclusion

The Customary Marriages Act and the Land Restitution Act are two pieces of legislation that South Africa has promulgated, amongst others, as a means of redressing the wrongs of the past which included the disregard of indigenous law.

The Customary Marriages Act and its amendments seek to recognise, legalise and protect not only those marriages solemnised in terms of indigenous law but also the rights attributed to the parties to such a marriage, be it a polygamous customary marriage or not. This has shown success in the matters of Gumede and Ramuhovhi.

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The Restitution of Land Act intends to provide for the restitution of land rights to those communities or persons who were dispossessed of land due to past racially discriminated practices in South Africa. A community also includes a tribal indigenous community, and in assessing this, due regard is had to the indigenous rights and indigenous ownership to the dispossessed land. In this way not only are the wrongs of the past addressed but the rights of indigenous people to their land are protected. This has achieved the consequent success in the matters of Richtersveld and the Ndebele-Ndzunzda Community case.

It is yet to be seen how the amendments to the Recognition of the Customary Marriages Act will be implemented or how the current debate on expropriation of land without compensation will impact the Restitution of Land Act and the existing claims thereto. The success and future need for legal protection of indigenous law within South Africa may be commented upon once a discussion is undertaken of Hong Kong and Australia to that of South Africa. In this regard a discussion of the legal protection of indigenous law in Hong Kong and Australia is undertaken in the next chapter.

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CHAPTER FOUR

THE DISCUSSION OF LEGAL MEASURES THAT PROTECT INDIGENOUS LAW IN SOUTH AFRICA WITH A FOCUS ON MARRIAGE AND LAND OWNERSHIP TO THOSE IN AUSTRALIA AND HONG KONG

4.1 Introduction

The previous chapter discussed the Recognition of Customary Marriages Act 120 of 1998, the Restitution of Land Rights Act 22 of 1996 and precedent that protect marriages and land rights in accordance with indigenous law. The legal precedents discussed include among others, the recognition of the matrimonial property of customary wives and the instances in which an indigenous community would have a right to their dispossessed indigenous land.

A discussion of the measures in South Africa, Australia and Hong Kong to protect indigenous law may be undertaken once the protection of indigenous law with a focus on marriage and land ownership in Australia and Hong Kong is discussed.

The practices of Australia and Hong Kong were chosen as comparators with South Africa due to their past colonial history and current cultural diversification in each country. Australia's statistics indicate 46 percent of the Australian population were born overseas and 20 percent of Australians speak another language instead of English at home.[213] Hong Kong released statistics which indicate that the number of non-Chinese ethnic people living in Hong Kong has increased by 70.8 percent, thereby increasing the cultural diversity at a fast pace.[214] The range of cultural diversification is a common factor in South Africa, Australia and Hong Kong, which is why the practices in each of these countries in protecting indigenous law are discussed.

It was discussed in Chapter Two that culture is the learned and shared behaviour of a community, thereby shaping a community's indigenous law.[215] Due to the cultural diversity present in Australia and Hong Kong, this chapter will focus on the legislation protecting marriages solemnised in terms of indigenous law and the restitution of land to the indigenous

[213] Australian Human Rights Commission available at *https://www.humanrights.gov.au/our-work/education/face-facts-cultural-diversity* (accessed on 21 June 2021)
[214] Cheung E 'Just how much of a melting pot is Hong Kong, Asia's World City?' available at *https://www.scmp.com/news/hong-kong/community/article/2126710/just-how-much-melting-pot-hong-kong-asias-world-city* (accessed 22 November 2020)
[215] See 2.2

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people in Australia and Hong Kong before the considered legislation of Australia, Hong Kong and South Africa are discussed.

4.2 Legal Measures That Protect Indigenous Law in Australia

The Australian legal system is structured differently from South Africa. As such, it is important to briefly explain this structure to ensure the practices are measured correctly between the countries.

Australia comprises of States and Territories, each with their own parliament, constitution and courts, thereby allowing each State or Territory to self-govern.[216] The High Court of Australia is the highest court in Australia and among its powers, it has the authority to interpret and apply the law and to determine the constitutional validity of any law within Australia.[217]

Australia's Constitution does not include a bill of rights which protects the human rights of its citizens which would include the rights of equality and culture as is included in the South African Constitution.[218] Further, the self-governing structure of the Australian government does not allow for unanimous legislation across Australia on the recognition of indigenous law, however the judgements by the High Court of Australia are binding throughout Australia.

4.3 The Protection of Indigenous or Customary Marriages in Australia

In understanding the current role of indigenous law in Australia, the impact of colonisation by the British on the indigenous Australian community must be borne in mind. Upon the colonisation of Australia by Britain, indigenous Australian law, referred to as Aboriginal law, was not regarded as a valid legal system and Australian land itself was deemed *terra nullius* (land belonging to no one).[219] Due to the invalidation of Aboriginal law, Aboriginal marriages became invalid and unlawful. Despite the formation of various colonies and states in Australia, Aboriginal marriages remain unrecognised.[220]

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[216] Parliament of Australia 'The Australian System of Government' available at *https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government* (accessed 10 October 2020)

[217] High Court of Australia 'Role of the High Court' *https://www.hcourt.gov.au/about/role-of-the-high-court* (accessed 10 October 2020)

[218] Keller L 'Australia doesn't have a bill of rights and we need one' available at *https://hatch.macleay.net/australia-doesnt-have-a-bill-of-rights-and-we-need-one/* (accessed 3 December 2020)

[219] Vines P *Law and Justice in Australia: Foundations of the Legal System* 3 ed (2013) 126

[220] Quinlan M 'Marriage, Tradition, Multiculturalism, and the Accommodation of Difference in Australia' (2016) 18 *UNDALR* 71 123

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Colonial courts, as seen in the *R V Neddy Monkey* case, were reserved in their recognition of indigenous marriages which are also referred to as customary marriages.[221] Justice Barry, in the matter decided that without evidence of the marital ceremonies, it could not be assumed that a marriage did in fact occur.[222] A slight loophole presented itself, as it could be argued that with witnesses, the customary marriage would be recognised. This loophole was closed as Chief Justice Martin in his decision in the matter of *R v Cobby* ruled in his judgement,

> 'We may recognise a marriage in civilised country but we can hardly do the same in the case of the marriages of these Aborigines, who have no laws of which we can take cognisance. We cannot recognise the customs of these Aborigines so as to aid us in the determination as to whether the relationship exists of husband and wife.'[223]

The non-recognition of Aboriginal indigenous marriages continues to date as the Australian Marriage Act of 1961 deems a valid marriage to be one in which there is a voluntary union between a man and a woman, entered into according to the law of Australia, for life.[224] This definition is based on the Western concept of marriage and does not take into consideration the indigenous law of the Aboriginal communities. Even though the Aboriginal communities' customary marriages are not recognised by Australian law, the Aboriginal people themselves draw a clear distinction between marriage and other unions. A customary marriage in Aboriginal law is a socially sanctioned agreement which is expected to be permanent.[225]

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Although a customary marriage is not recognised by the Australian government, currently there are instances in which a court may recognise a customary marriage for a particular purpose such as the adoption of a child, the Adoption of Children Act (Northern Territory, or compensation should a partner die. Such recognition is limited and no general recognition of customary marriages has been advanced for marriages in terms of Aboriginal law.

The loophole in recognising indigenous marriage as referred to above in the *R v Neddy* case was further closed by the understanding of marriage in the Marriage Act of 1961. This is interesting as a minimum of 90 percent of marriages by Aboriginal people are customary marriages and in determining law, the prevailing customs should be taken into consideration.

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[221] *R v Neddy Monkey* (1861) 1 W and W (L) 40, 41
[222] *R v Neddy Monkey* (1861) 1 W and W (L) 40, 41
[223] *R v Cobby* (1883) 4 LR (NSW) 355, 356
[224] Quinlan M 'Marriage, Tradition, Multiculturalism and the Accommodation of Difference in Australia' (2016) 18 *The University of Notre Dame Australia Law Review* 71 123
[225] Quinlan M 'Marriage, Tradition, Multiculturalism and the Accommodation of Difference in Australia' (2016) 18 *The University of Notre Dame Australia Law Review* 71 123

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Australia has yet to recognise the marital regime of the Aboriginal community who are the indigenous people of Australia. The recognition of customary marriages in Australia continues to move at a slow pace. However, the restitution of land to the Aboriginal Communities has gained more momentum with the Australian High Court judgement of *Northern Territory v Griffiths (Deceased) and Jones on behalf of the Ngaliwurru and Nungali People* on the 13 March 2019.[226]

4.4 The Restitution of Land to the Aboriginal Community in Australia

The Native Title Act of 1993 of Australia (NTA) protects the land rights of the Aboriginal Community. This Act was promulgated as a result of the *Mabo v Queensland* case.[227] This case is discussed first below, before the relevant sections of the NTA are expanded upon.

4.4.1 *Mabo v Queensland (No 2)* [1992] HCA 23 (Hereinafter referred to as the Mabo case)

Mr Eddie Mabo and four other people, all of which identified as Meriam people, sought confirmation at the High Court of Australia of their traditional land rights, through the commencement of legal proceedings in 1984.

The Meriam Community claimed that Murray Island and the surrounding islands and reefs were continuously possessed and inhabited by the Meriam people despite the colonisation by Britain. This is the basis upon which the Meriam people claimed that their rights to the land had not been validly extinguished and those same rights which continue till date of the legal proceedings, should be recognised by the law.[228]

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Ten years after the commencement of legal proceedings in the Mabo case, the Australian High Court upheld the claim by the Meriam Community and recognition was granted to the indigenous rights of the Meriam Community. The Australian High Court, in a precedent setting judgement, found that Australia was not *terra nullius* when European settlement occurred and the Meriam Community was 'entitled as against the whole world to possession, occupation, use and enjoyment of (most of) the lands of the Murray Islands.'[229]

This decision is precedent setting for two reasons. The first is that the Mabo case completely overturned the principle of *terra nullis* by recognising that Australia was inhabited by indigenous Aboriginal Communities prior to colonisation by European settlers. The second

[226] *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7
[227] *Mabo v Queensland (No 2)* [1992] HCA 23
[228] Year Book Australia, 1995 (ABS Catalogue No. 1301.0)
[229] *Mabo v Queensland (No 2)* [1992] HCA 23

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reason is that the Australian High Court recognised the rights of the indigenous Aboriginal Community in current day by having found that their indigenous rights survived colonisation and going forward the rights of the indigenous Australian people are recognised.[230]

In effect, the Mabo case recognised indigenous law for the first time by the Australian government. Due to the Mabo case new legislation was enacted to protect indigenous rights and land management thereof in line with the judgement of the High Court of Australia. This legislation is the Native Title Act which is discussed below.

4.4.2 Native Title Act of 1993 of Australia (NTA)

The NTA came into effect on the 1 January 1994 to address the native title rights of the indigenous Australian communities by recognising and protecting native title. Native title is defined in s 223 of the NTA as

> '(1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.'

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These rights include hunting, gathering, or fishing rights and interests.[231]

The definition of native title sets out the requirements to prove that native title exists. The indigenous community must first show that their rights and / or interests are flowing from their traditional laws and customs. Thereafter the indigenous community must prove that there is a connection between those rights and / or interests to the land and / or water claimed. The 'connection' referred to in s 223(1)(*b*) is not limited to a physical connection as it may also be a spiritual one.[232]

[230] *Mabo v Queensland (No 2)* [1992] HCA 23
[231] s 223(2) Native Title Act 1993 of Australia
[232] *Mabo v Queensland (No 2)* [1992] HCA 23

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Through the precedent of the Mabo case, indigenous law was recognised in the Australian legal system, which led to the recognition of indigenous rights and restitution to the qualifying indigenous communities in form of land or monetary compensation. It is at this point that challenges arose in the determination of the recognition of indigenous tradition and custom.[233]

In the case of *Members of the Yorta Yorta Aboriginal Community v Victoria*[234] the judges held that indigenous rights and / or interests accruing at the creation of a new indigenous legal system order after the sovereignty of the Crown was established, cannot be recognised for the purposes of the NTA.[235] The challenge herein is that, although the Court may acknowledge that traditions do change and evolve as the social norms and values dictate, this may be a double edged sword. The Court may also find that the evolution of the traditions and customs has changed to such an extent so as to interrupt the succession of native title. This results in denying the indigenous community of the recognition of its rights and / or interests.[236]

Despite the setback in the Yorta Yorta case, the matter of *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* (hereinafter referred to as the Griffiths and Lorraine Jones case) decided in 2019, again set an important precedent for the protection of rights of indigenous communities within Australia.[237] In this matter the High Court of Australia examined the compensation provisions of the NTA and provided the general principles for calculating native title claims, where there has been native title extinguishment. This case is equally as important as the Mabo case discussed above. The facts are briefly discussed below.

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In the Griffiths and Lorraine Jones case, the Ngaliwurru and Nungali people brought an application for compensation against the Northern Territory and Commonwealth of Australia for the loss or reduction of their native title in their town of Timber Creek. This loss or decrease in rights in terms of their native title included certain government grants of historic pastoral leases, other land titles and public works on their non-exclusive native title. The Crown Law defines a non-exclusive native title as those rights or interests which a native title holder

[233] Strelein L 'From Mabo to Yorta Yorta: Native Title Law in Australia' (2005) 19 Washington University Journal of Law and Policy 225, 271
[234] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58
[235] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58
[236] Strelein L 'From Mabo to Yorta Yorta: Native Title Law in Australia' (2005) 19 *Washington University Journal of Law and Policy* 225
[237] *Northern Territory v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7

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continues to exercise in accordance with traditional laws and customs yet, it does not allow the native title holder to control access to the land or the specified form of property.[238]

The matter has a long litigious history with the Federal Court awarding the Ngaliwurru and Nungali people compensation of three million and three hundred Australian dollars. Spiritual loss was calculated at one million and three hundred Australian dollars with the remaining amount attributed to economic loss at 80 percent of the freehold value of the disputed property and simple interest. The matter was taken on appeal to the Full Federal Court, which reduced the compensation from three million and three hundred thousand Australian dollars to two million and nine hundred thousand Australian dollars.[239] The Full Federal Court reduced the economic loss calculation from eighty percent of the freehold value of the property to sixty five percent, thereby reducing the total compensation payable.

It was on this issue that the matter was taken on further appeal in the now known Griffiths and Lorraine Jones case as the main issue to be decided was the calculation of compensation. The High Court held that the valuation methodology used by the Full Federal Court was correct. The High Court, however reduced the economic loss from sixty five percent to fifty percent of the freehold property value of the disputed land. Further, the High Court found that one million and three hundred thousand Australian dollars awarded for compensation towards the cultural loss was reasonable.

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The importance of the Griffiths and Lorraine Jones case is diverse and revolves around one common point, compensation. It is advanced that the NTA limited the compensation for extinguishment of exclusive native title to the value payable for the compulsory acquisition of freehold estate in land. Possession of native title does not preclude non-exclusive possession of native title, however, non-exclusive possession native title is a lesser right to the land as the native title holder lacks the authority to exclude or control the behaviour of others on the land. In this respect, a fifty percent adjustment is applied to the freehold value of the disputed land, thus calculating economic loss.

The NTA contains compensation provisions focused on exclusive possession of native title, whereas the Griffiths and Lorraine Jones case focused on compensation for non-exclusive possession of native titles. The compensable acts (compensation for extinguishment of

[238] Cannon F and Morrison G 'NON-EXCLUSIVE NATIVE TITLE RIGHTS RECOGNISED IN TORRES STRAIT' available at *https://www.crownlaw.qld.gov.au/resources/publications/non-exclusive-native-title-rights-recognised-in-torres-strait* (accessed 15 October 2020)
[239] *Northern Territory v Griffiths* [2017] FCAFC 106

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exclusive native title) did not fall within s 51(3)[240] and s 240[241] of the NTA as the non-exclusive possession of native title is not the same as an exclusive possession of native title, which has been discussed in the above paragraphs.

Despite the lack of clarity in the NTA in respect to the possession of non-exclusive native title, the High Court held that compensation must be assessed on a case-by-case basis where an estimation of any 'single non-economic or cultural loss' caused to the native title holder by the extinguishing act(s) should also be applied, if applicable, with simple interest to the final calculated amount and not compound interest.

While the decision in the Griffiths and Lorraine Jones case is a step in the right direction, the Court did not determine the principles for economic calculations in those matters in which the native title holders' rights or interests are only impaired and not extinguished. It is anticipated that as the claims are brought before the Courts, the law will develop, thus protecting those that require it.

4.4.3 Review of the Protection of Indigenous Law in Australia with a Focus on Marriage and Land

There has been development in the protection of indigenous law in Australia in both the areas of marriage and land. It may be argued, however, that development on the restitution of land to indigenous communities has developed further in Australia than their recognition of indigenous marriage.

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Indigenous or customary marriages largely remain unrecognised and therefore unprotected. The recognition and protection of land has developed further as it is now accepted that Australia

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[240] s 51 (3) of the Native Title Act
Compensation where similar compensable interest test satisfied
(3) If:
(a) the act is not the compulsory acquisition of all or any of the native title rights and interests; and
(b) the similar compensable interest test is satisfied in relation to the act;
the court, person or body making the determination of compensation must, subject to subsections (5) to (8), in doing so apply any principles or criteria for determining compensation (whether or not on just terms) set out in the law mentioned in section 240 (which defines similar compensable interest test)

[241] s 240 of the Native Title Act
Similar compensable interest test
The similar compensable interest test is satisfied in relation to a past act, an intermediate period act or a future act if:
(a) the native title concerned relates to an onshore place; and
(b) the compensation would, apart from this Act, be payable under any law for the act on the assumption that the native title holders instead held ordinary title to any land or waters concerned and to the land adjoining, or surrounding, any waters concerned.

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was never *terra nullis.* Consequently, measures like the NTA have been legislated and implemented to protect indigenous land and the rights of indigenous people to such land.

4.5 Legal Measures That Protect Indigenous Law in Hong Kong

Hong Kong was originally a part of China before it was separated and ceded to Great Britain as a British colony in 1842.[242] Despite being a British colony, Hong Kong continued to be closely intertwined with China on a financial and social basis. Many Chinese entered Hong Kong as refugees due to the political instability or to seek employment as there was no formal border separating the two countries from each other.[243] These people returned to China, and Hong Kong was only a transit destination until they returned home. However, after the Chinese Communist Revolution in 1949, the Chinese who entered Hong Kong as refugees were unable to return to China.[244]

New controls were put into place to ensure that the influx of mainland Chinese nationals were stopped, such as the construction of fences along the Hong Kong and mainland China border. Further controls included the codification of indigenous law which had the impact that while other Chinese cities without a codified indigenous law system evolved their laws to include equal inheritance and recognition between men and women, this did not occur in Hong Kong.[245] In addition, the British authorities implemented policies to maintain their control over Hong Kong known as 'de-nationalisation polices'.[246] Due to these policies[247] and the control of the security at the border between China and Hong Kong, society in Hong Kong developed a new identity, independent of China, which continues to exist today. On July 1, 1997, the lease between China and Great Britain ended and the government of Great Britain transferred control of British Hong Kong and the surrounding territories to China.[248]

[242] So A 'One Country, Two Systems' and Hong Kong-China National Integration: A Crisis-Transformation Perspective' (2011) 41 *Journal of Contemporary Asia* 99 116
[243] So A 'One Country, Two Systems' and Hong Kong-China National Integration: A Crisis-Transformation Perspective' (2011) 41 *Journal of Contemporary Asia* 99 116
[244] Hambro E 'Chinese Refugees in Hong Kong' (1957) 18 *The Phylon Quarterly* 69
[245] Merry S and Stern R 'The Female Inheritance Movement in Hong Kong' (2005) 46 *Current Anthropology* 387
[246] So A 'One Country, Two Systems and Hong Kong-China National Integration: A Crisis-Transformation Perspective' (2011) 41 *Journal of Contemporary Asia* 99 116
[247] The policies with the greatest impact in creating a new identity for the people of Hong Kong were based on the economy and the language of the country. Hong Kong was delinked from the Chinese economy and the English language was used as the chosen language of education. These policies are discussed more fully by Alvin So in his journal article referenced in *fn 28* above.
[248] Szczepanski K ' Why did China lease Hong Jong to Britain and why Britain handed over Hong Kong to China in 1997?' available at *https://www.thoughtco.com/china-lease-hong-kong-to-britain-195153* (accessed 13 November 2020)

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In advance of the 1997 handover, China maintained that Hong Kong would have a high degree of autonomy for fifty years, under a constitution known as the Basic Law, which is valid until the year 2047.[249]

The Basic Law of Hong Kong is similar to a constitution as it sets out the rights and protections of the people within Hong Kong, having the status as a Chinese national law.[250] Article 40 of the Basic Law protects traditional rights of the indigenous inhabitants by declaring that 'lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administrative Region'.[251] It is against Article 40 that the protection of indigenous law pertaining to marriages and land is discussed below.

4.6 The Protection of Indigenous or Customary Marriages in Hong Kong

The Marriage Ordinance clearly requires a Christian marriage or the civil equivalent of a Christian marriage, to have occurred, for the marriage to be legally recognised in Hong Kong.[252] This implies that the union must be a voluntary union for life between one man and one woman to the exclusion of all others.[253]

In terms of the Marriage Ordinance two types of indigenous marriages are recognised as valid if they were entered into before 7 October 1971.The first type is regarded as a Chinese customary marriage which is entered into and celebrated in terms of traditional Chinese customs. These customs must have been accepted at the date of the marriage which must have occurred in Hong Kong or in the parties' family land of origin, that is predominantly China.[254]

The second form of an indigenous marriage recognised is known as the modern marriage or a validated marriage. This marriage occurs when an unmarried man and unmarried woman, both either 16 years old or older have an open ceremony in the presence of a minimum of two

[249]Demick B 'China's Clampdown on Hong Kong' available at https://www.nybooks.com/articles/2020/11/19/china-clampdown-hong-kong/ (accessed 11 November 2020)1

[250] Geping R 'Two Views of Hong Kong's Basic Law: From Beijing, "One Country must " Must Dominate the Two Systems' available at https://carnegieendowment.org/hkjournal/PDF/2006_spring/rao.pdf (accessed 13 November 2020)

[251] Chapter III: Fundamental Rights and Duties of the Residents, The Basic Law of the Hong Kong of the Special Administrative Region of the People' Republic of China

[252] Marriage Ordinance - 30/06/1997 Chapter 181

[253] Equal Opportunities Commission *The Recognition and Treatment of Relationships under Hong Kong Law* (2019) 41-42

[254]Alfred IP 'Family Focus Week: Different Types of Marriages in Hong Kong' available at https://www.hugillandip.com/2019/01/family-focus-week-different-types-of-marriages-in-hong-kong/ (accessed 1 November 2020)

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witnesses in a manner which would make any reasonable person believe that a marriage has been celebrated.[255]

A validated marriage is based on the occurrence of an open ceremony which means that the solemnisation of the marriage must have been known or could be seen by any person who might have been present at the ceremony but was not invited to participate in the wedding ceremony itself. [256]

Although the Marriage Ordinance has acknowledged the various types of marriages in Hong Kong, the limited recognition of customary marriages that occur after the 7 October 1971 would require further protection, should they be practised.

4.7 The Restitution of Land to the Indigenous Community of Hong Kong

Purchasing a home in Hong Kong is considered expensive as it is considered the world's most expensive city in which to purchase a home.[257] In addressing the housing need by the indigenous inhabitants of Hong Kong, the British formulated the New Territories Small House Policy (Small House Policy), while Hong Kong was still under the control of Great Britain.[258] The Small House Policy was implemented during December 1972 and it allows male indigenous villagers to purchase a property in their village without paying an additional premium to the Government, which is also referred to as *Ding* rights.[259]

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The term 'indigenous villager' is defined as a male person of at least 18 years old who is descended through the male line from a resident in 1898 of a recognised village.[260] This definition as well as *Ding* rights have come under scrutiny in the case *Kwok Cheuk Kin and Anr v Director of Lands and Ors* (hereinafter referred to as the Kwok Cheuk Kin case).[261]

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[255]Alfred IP 'Family Focus Week: Different Types of Marriages in Hong Kong' available at *https://www.hugillandip.com/2019/01/family-focus-week-different-types-of-marriages-in-hong-kong/* (accessed 1 November 2020)

[256]Alfred IP 'Family Focus Week: Different Types of Marriages in Hong Kong' available at *https://www.hugillandip.com/2019/01/family-focus-week-different-types-of-marriages-in-hong-kong/* (accessed 1 November 2020)

[257] Taylor C 'Hong Kong named world's most expensive city to buy a home' available at *https://www.cnbc.com/2019/04/12/hong-kong-average-house-price-hits-1point2-million.html* (accessed 1 May 2021)

[258]Kwan S 'Hong Kong's women are fighting for housing equality' available at *https://www.aljazeera.com/economy/2019/6/27/hong-kongs-women-are-fighting-for-housing-equality* (accessed 6 February 2020)

[259]Hong Kong Land's Department 'Small House Policy' available at *https://www.landsd.gov.hk/en/images/doc/NTSHP_E_text.pdf* (accessed 10 November 2020)

[260] Hong Kong Land's Department 'Small House Policy' available at *https://www.landsd.gov.hk/en/images/doc/NTSHP_E_text.pdf* (accessed 10 November 2020)

[261] (2019) HKCFI 867

http://etd.uwc.ac.za/

The Applicants (Kwok Cheuk Kin and Anr) in the Kwok Cheuk Kin case challenged the patriarchal nature of *Ding* rights granted to indigenous male villagers encapsulated in the Small Housing Policy. The Applicants raised Article 25 of the Basic Law in support that the Small Housing Policy is unconstitutional, as Article 25 states 'all Hong Kong residents shall be equal before the law' and in applying the Small Housing Policy, the government was discriminating on the basis of birth or social origin.[262]

In argument, Article 40[263] of the Basic Law was relied upon as a defence because the *Ding* rights are viewed as protecting the indigenous rights of the indigenous people of Hong Kong.[264] The Court held that the *Ding* Right in the form of granting a Free Building Licence was valid in terms of Article 40 as these licenses were granted to preserve customs of the indigenous people and could be traced back to 1898. It was successfully argued that the *Ding* Right of Private Treaty Grants and the Right to an Exchange in the Small House Policy could not be traced to such a traditional right and was deemed discriminatory in nature. The application and enforcement of the judgement was suspended for six months should the matter be appealed to the Court of Final Appeal.

This matter was brought on appeal before the Court of Final Appeal on the 11 August 2020 with judgement delivered on the 13 January 2021.[265] The Court of Final Appeal allowed the Government's appeal and dismissed the appeals of the Applicants and of the Interested Party, Mr Heung Yee Kuk, on the basis that the *Ding* Rights were embedded in legislation in the form of government policy. This allowed the *Ding* Rights and the Small Housing Policy to be recognised as lawful and constitutional, giving rise to legal consequences that are enforceable.

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[262] Gregoire P 'Deciding which "traditional rights" are constitutionally protected in Hong Kong: the role of judicial review' available at *https://adminlawblog.org/2019/06/04/deciding-which-traditional-rights-areconstitutionally-protected-in-hong-kong-the-role-of-judicial-review/* (accessed 9 November 2020)

[263] Chapter III: Fundamental Rights and Duties of the Residents, The Basic Law of the Hong Kong of the Special Administrative Region of China Article 40 of the Basic Law states that *'the lawful traditional rights and interests of the indigenous inhabitants of the "New Territories" shall be protected by the Hong Kong Special Administrative Region'*

[264]Gregoire P 'Deciding which "traditional rights" are constitutionally protected in Hong Kong: the role of judicial review' available at *https://adminlawblog.org/2019/06/04/deciding-which-traditional-rights-are-constitutionally-protected-in-hong-kong-the-role-of-judicial-review/* (accessed 9 November 2020)

[265] *Kwok Cheuk Kin and Anr v Director of Lands, Security for Justice and Heung Yee Kuk* [2021] HKCA 54

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4.8 Review of the Protection of Indigenous Law in Hong Kong with a Focus on Marriage and Land Ownership

The Marriage Ordinance in Hong Kong recognises three forms of marriages, the civil marriage, the Chinese customary marriage and the modern marriage also known as the validated marriage. Indigenous marriages in Hong Kong have limited recognition in that only those indigenous marriages entered into prior 7 October 1971 are given recognition, thereby invalidating all indigenous marriages entered into after the specified date.

In reference to the restitution of indigenous land to the indigenous people of Hong Kong, though there is a form of providing land to the indigenous inhabitants of Hong Kong, it has been seen to be discriminatory. It is perceived as discriminatory, not only in terms of social origin, but also between genders as it is openly acknowledged by the media that the 'rights of male indigenous villagers are well shielded on the legal front' to the extent that many women in Hong Kong have accepted the inequality between themselves and their male counterparts.[266]

The Small Housing Policy is perceived as discriminatory between men and women as only men benefit from the grant. In terms of social origin, it is perceived as discriminatory as only men from specified and proven areas may qualify as a recipient for the Small Housing Policy. In as much as the Small Housing Policy aims to provide land restitution to qualifying indigenous male villagers, it prohibits women from accessing the same grants or exemptions to housing as well as other men, which not only worsens a housing issue, but deepens a gender inequality issue as well.

4.9 A Discussion of Legal Measures that Protect Indigenous Law in South Africa to Australia and Hong Kong

In discussing the legal measures that protect indigenous law in the selected countries to that of South Africa, each country will be discussed per topic, commencing with marriage, then the restitution of land and finally a brief conclusion.

[266] Kwan S 'Hong Kong's women are fighting for housing equality' available at *https://www.aljazeera.com/economy/2019/6/27/hong-kongs-women-are-fighting-for-housing-equality* (accessed 6 February 2020)

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4.9.1 A Discussion of Legal Measures that Protect Indigenous Marriages

South Africa has a myriad of case law pertaining to the protection of customary marriages to not only protect customary marriages but strengthen the recognition of customary marriages, that include the Customary Marriages Act.[267]

The Customary Marriages Act itself at the outset recognises that a wife in a customary marriage has equal capacity and status as her husband.[268] This was further entrenched in the resulting case law of Gumede.[269]

In addition to the status afforded to the spouses, the actual customary marriage itself is recognised and protected by South African law, provided that it complies with the legislative requirements.[270] The law in regards to the protection of customary marriages within South Africa has developed to such an extent so as to secure the matrimonial property of the customary law wife should her customary law husband die or divorce her.[271]

Further, the Judicial Matters Amendment Act 12 of 2020 provides additional protection to South Africans who married out of community of property in the country's former homelands following the judgements of Gumede and Ramuhovhi by legislating that, the matrimonial property in customary marriages revert to the wife, upon the death or divorce of the husband.[272]

The Australian Marriage Act does not recognise indigenous marriages however limited recognition is given to those who were married in terms of their indigenous Aboriginal law. This is different from the recognition granted to indigenous marriages in South Africa as indigenous marriages are given full recognition by the law and have an equal status to the normal monogamous civil marriage.

Hong Kong currently recognises a Christian marriage or the civil equivalent of a Christian marriage as a valid legal marriage in terms of the Marriage Ordinance. Two forms of indigenous marriages, the modern marriage and the validated marriage, are recognised if they were entered into before 7 October 1971.[273] Once again the protection afforded to indigenous marriages in Hong Kong is limited.

[267] The Recognition of Customary Marriages Act 120 of 1998
[268] s 6 of the Recognition of Customary Marriages Act 120 of 1998
[269] *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC)
[270] Refer to Chapter 2 fn 124
[271] *Ramuhovhi v The President of the Republic of South Africa and Others* 2016 (6) SA 210 (CC)
[272] *Ramuhovhi v The President of the Republic of South Africa and Others* 2016 (6) SA 210 (CC)
[273] Marriage Ordinance – 30/06/1997 Chapter 181

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4.9.2 A Discussion of Legal Measures that Provide for the Restitution of Land to the Indigenous Community

Land Restitution has been at the core of many discussions in a democratic South Africa, with the intention of the Restitution of Land Act to ensure the return land or provide compensation to victims who lost land rights because of racially discriminatory laws or practices. The Restitution of Land Act prescribed the qualifying criteria for a person or community to have the land returned or compensation to be provided as established in Chapter Three.[274]

Legal measures in the form of the Restitution of Land Act were taken to redress the injustices of the past to the indigenous people as well as those people who lost land due to racially discriminatory laws or practices. In addition, case law developed, to define and protect the definition of what constituted a community[275] as well as the definition of indigenous practices.[276]

This not only protected indigenous law and culture but also ensured that indigenous law developed as the law developed, instead of being regarded as a static archaic piece of foreign form of law. The Restitution of Land Act furthered the protection and development of indigenous law while also redressing past discriminatory laws and practices.

Australia has in the preceding decade made inroads into the restitution of land to indigenous people. This commenced with the Mabo case,[277] which declared that Australia was not *terra nullis*. In recognising the indigenous inhabitants of the Australia, it must follow that the rights of the indigenous inhabitants should be recognised as well. This led to the promulgation of the Native Title Act [278] which in turn led to the creation of legal precedent in the matters of the Yorta Yorta Case[279] and the Griffiths and Lorraine Jones case.[280]

The Yorta Yorta Case created a legal precedent, which in effect differentiated between indigenous law before and after the control of Australia by Great Britain. Indigenous law practised after the control of Australia by Great Britain, which differed from the practice of indigenous law before the control of Australian by Great Britain is, a new indigenous legal

[274] Chapter 3, footnote 157
[275] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC)
[276] *Johanna Magdelena Cornelia Prinsloo Others v The Ndebele-Ndzundza and Others* 2005 (6) SA 144 (SCA)
[277] *Mabo v Queensland (No 2)* [1992] HCA 23
[278] *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7
[279] Refer to 4.2.2.1
[280] Refer to 4.2.2.1

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system as the traditions and customs may have been altered to such an extent so as to interrupt the succession of native title. This would result in non-recognition of an indigenous community's indigenous rights and / or interests.

This differs from the South African understanding of indigenous law, which is not static and reflects the changing morals, values and ethics of the indigenous Community and its indigenous law.[281] The change in the societal norms in and values in the South African indigenous law would not negate the recognition of indigenous community rights and / or interests but rather develop the laws to coexist in harmony with each other.

Hong Kong, as discussed above, recognises that indigenous male villagers require assistance in ownership of immovable property and in assisting such qualifying villagers, the Small Housing Policy was passed. Although this is not a form of restitution of land for past discriminatory laws, which would have prejudiced an indigenous person, it is a law which protects an indigenous villager's right to land ownership. This is possibly beneficial to protect indigenous rights, it advanced that it is a discriminatory law as it allows only male indigenous villagers to benefit in terms of this policy. Women in Hong Kong have accepted being viewed as inferior to men and the application of the patriarchal application of the Small Housing Policy.[282]

In light of codification it is important to note the similarity between the codification of South African indigenous law and the codification of Hong Kong law. During the colonisation of South Africa, by Great Britain, the British codified the indigenous language to such an extent that the codified law became static and was implemented by colonial administrators that did not understand the actual indigenous law.[283] In Hong Kong, due to the codification, the indigenous law was not allowed to evolve as the needs of the community changed, while other Chinese cities without a codified indigenous law system evolved their laws to include equal inheritance and recognition between men and women.[284]

Through the codification of indigenous law as applicable in Kwazulu-Natal and Hong Kong, the indigenous law was rendered static and could not develop in accordance with the values of

[281] Refer to Chapter 3
[282] Kwan S 'Hong Kong's women are fighting for housing equality' available at *https://www.aljazeera.com/economy/2019/6/27/hong-kongs-women-are-fighting-for-housing-equality* (accessed 6 February 2020)
[283] Merry S and Stern R 'The Female Inheritance Movement in Hong Kong' (2005) 46 *Current Anthropology* 387 409
[284] Merry S and Stern R 'The Female Inheritance Movement in Hong Kong' (2005) 46 *Current Anthropology* 387 409

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the respective indigenous communities. However this change din South Africa upon South Africa becoming a democratic country in which indigenous law became a recognised law which could develop as was required.[285]

In this regard, South Africa is different from Hong Kong as South Africa recognises indigenous law to be a part of the legal system and it continues to develop the indigenous law to ensure that it is in line with the Constitution of the country as well as the needs of the indigenous community. South Africa recognised women as equal to men in terms of the Constitution and in indigenous law, women may inherit equally with men.[286]

Currently Hong Kong remains locked in the unequal and static nature of the codified indigenous law which maintains the inequality between the application of indigenous and non-indigenous law.

4.10 Chapter Conclusion

Indigenous law practised in South Africa, Australia and Hong Kong have the similarity that during colonisation, indigenous law was given limited or no recognition. Once these countries established their own legal and democratic systems, indigenous law was either given a form of recognition or it remained unrecognised.

Australia and Hong Kong continue with a limited form of recognition towards indigenous law as discussed in this chapter, however, South Africa has recognised indigenous law in terms of marriages and the restitution of land, but also as a valid legal system in terms of the Constitution and has more protective laws than either Australia or Hong Kong.

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[285] Constitution of the Republic of South Africa, 1996
[286] *Bhe v. Magistrate Khayelitsha & Others*. 2005 (1) BCLR 1 (CC); see also Chapter 2 page 22

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CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The preceding chapters examined the concept of indigenous law before discussing the legal measures that protect indigenous culture. Despite the implementation of the various pieces of legislation in South Africa to protect indigenous law, the measure of how successful South Africa has been in the protection of indigenous culture, is established in its protection of indigenous law. This protection was discussed in relation to the protection in similar countries.

Chapter One introduced the topics and outlined the research questions that formed the foundation of the basis of this mini-thesis. The objective of this mini-thesis was therefore to determine whether South Africa has competent legal measures in place to protect indigenous culture and to compare these legal measures to other countries to ascertain the success thereof. In understanding the establishment and implementation of the legal measures to protect indigenous law, the definitions of the terms were at the outset defined to provide the basic understanding of what consisted and contributed to indigenous law. This chapter further outlined the research questions that formed the foundation of the basis of this mini-thesis.

The concepts of 'culture', 'identity', 'globalisation', 'indigenous people, and 'indigenous law were expounded in Chapter Two. Briefly, indigenous for the purposes of this mini-thesis refers to the languages and legal customs of the majority African population as it is naturally existing in South Africa. Identity is an individual's uniqueness,[287] that which differentiates him or her from another person. Culture was defined as the combination of people who share the same beliefs and practices. [288]

An initial understanding of the identified terms was important to shape the understanding of what should consist of indigenous law and to understand the general meaning of the concepts before referring to case law.[289] Legal precedent was discussed to substantiate not only the meanings attributed to the terms, but to provide the legal precedent for the usage and understanding of the terms within the South Africa context. In addition, the Khoisan people

[287] See 2.6 and 2.3
[288] See 2.2
[289] See 2.8

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were briefly discussed and their challenge in not being recognised as indigenous people of South Africa.[290]

Identity, dignity and culture were intrinsically linked in the matter of *MEC for Education: Kwazulu Natal and Others v Navaneethum Pillay and Others*[291] in which Chief Justice Langa held that cultural identity forms an integral part of a person's identity as it is not a personal choice or achievement, rather it originates from a person belonging to a community.

The South African judiciary had to examine and decide on what was recognised as indigenous law and the current limitations thereto before it could properly pronounce on the recognition of indigenous law. In the case of *Bhe and Others v The Magistrate, Khayelitsha and Others*, Deputy Chief Justice Langa held that the codification of indigenous law lead to the stagnation of indigenous law which could not grow or change itself to reflect the changing societal circumstances.[292] The case of *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others* went further to acknowledge that traditional authorities have the power to develop their own law and in so doing, indigenous law regained its ability to be a living law which allowed indigenous law to change and not remain a codified remnant of the past.[293] In *Alexkor Limited and Another v Richtersveld Community and Others*[294] and *Mayelane v Ngwenyama and Others*[295] the Constitutional Court utilised the recognition of indigenous law to rectify a discriminatory act while simultaneously entrenching indigenous law as a living law which changes as required to reflect the circumstances and norms of the indigenous community subject to the Constitution.

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In recognising indigenous law as a valid legal system which had stagnated due to its codification as aplicable and past non-recognition, it became apparent that indigenous law and the application thereof required a level of protection that was required to align indigenous law with the Constitution of South Africa and the needs of changing indigenous communities. The protection was not against globalisation but in the equal application and development of indigenous law under a democratic dispensation.

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[290] See para 2.5
[291] *MEC for Education: Kwazulu Natal and Others v Navaneethum Pillay and Others* 2008(1) SA 474 (CC); see also para 2. 8
[292] *Bhe and Others v The Magistrate, Khayelitsha and Others* 2005 1 SA 580 (CC); see also para 2.8
[293] *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others* 2009 (2) SA 66 (CC); see also para 2.8
[294] *Alexkor Limited and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC); see also para 2.8 and para 3.2
[295] *Mayelane v Ngwenyama and Others* 2013 (4) SA 415 (CC); see para 2.8

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Chapter Three identified and discussed the legal measures in South Africa which protect indigenous law, focussing on marriage and land ownership. The identified measures were the Recognition of Customary Marriages Act 120 of 1998[296] and the Restitution of Land Rights Act 22 of 1996[297].

Marriage and land rights are two important components of culture, but they are also two vital areas of law within South Africa. The Acts mentioned above were promulgated and implemented to protect the rights as practised by the respective indigenous communities. They were also implemented to as means to redress the unlawful discriminatory actions of the past.

In reference to indigenous marriages, the Recognition of Customary Marriages Act sought to recognise those marriages which were concluded in terms of the relevant indigenous law. Prior to South Africa's democracy, wives in polygamous customary marriages were treated unfairly and the marriages had limited recognition. Currently due to the Recognition of Customary Marriages Act 120 of 1998 and its amendments, wives in a customary marriage have equal rights as their husbands and have the full recognition and protection of the law.

Land rights in South Africa remains a sensitive issue. The Restitution of the Land Rights Act 22 of 1996 was promulgated to provide restitution to those communities or persons whose land had been taken away, due to past discriminatory laws.[298] In providing restitution, legal precedent was created, which further developed the recognition and protection of indigenous law and indigenous culture. In so doing, indigenous law was recognised, protected and in certain instances, despite the loss of indigenous ownership, indigenous practices were considered when deciding the applicability of the Restitution of the Land Rights Act.[299] In so doing, the protection of indigenous law within South Africa was entrenched and ongoing. Each legal matter brought unique circumstances, which required a legal intervention and determination that ensured, as the circumstances evolved, so too did the law. This continual development was and remains an integral component of indigenous law, which through the application of legislation and the South African Constitution ensures that indigenous law in South Africa regains its status as a living law.

The recognition of indigenous law and the discussions thereafter between South Africa, Australia and Hong Kong with a focus on the recognition of indigenous marriages and the

[296] See para 3.2
[297] See para 3.2
[298] See para 3.2
[299] See para 3.2

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restitution of land to indigenous communities was discussed in Chapter Four. Despite strides in Australian marital law aboriginal marriages remain unrecognised.[300]

In Hong Kong, the Hong Kong community has embraced Christian marriages and no protection or recognition is afforded to Chinese indigenous marriages and marriages of validation that occur after 7 October 1947.[301]

The restitution of land to indigenous communities has far more recognition than Aboriginal marriages, however, such restitution to Aboriginal communities is dependent on the continuous practice of indigenous law which remains unbroken and unchanged so as not to interrupt the succession of native title prior to colonisation of Australia to date.[302]

Hong Kong only grants restitution of land to indigenous villagers and not communities, however, the villager must be male as no similar form of restitution is provided to females.

South Africa, in contrast, has not only recognised indigenous law as an equal law to the civil law but has promulgated and implemented legislation to protect indigenous law. The Judiciary has further developed legislation, legal precedent and principles to the extent that indigenous law is not only equally recognised but also implemented equally between males and females and develops as the values of the respective indigenous community change.

The above places South Africa in a favourable position in respect to the legal measures which protect indigenous law in South Africa particularly, in respect to indigenous marriage and land rights. However there remains much contention as to the Khoisan community who remain legally unrecognised as an indigenous community in South Africa.

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5.2. Recommendations Pertaining to the Protection of Indigenous Law in South Africa with a Focus on Marriages and Land Ownership

South Africa has an active Legislature and a functioning democracy, which together has established the protection of indigenous law in respect to marriages and land. This, however, is not the sum of all the protection required to protect indigenous law. As the needs of the indigenous communities come to the fore, so too must the requisite constitutional protection as discussed in the preceding chapters.

[300] See para 4.2
[301] See para 4.3
[302] See para 4.4.2

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The ongoing evaluation by the Constitutionally established Chapter 9 institutions and NGO's of indigenous law and the implementation of indigenous law in a South African context is commendable. However, the slow pace of the implementation of the Land Restitution Act[303] and the non-recognition of the Khoisan community as an indigenous people to South Africa remain areas in which South Africa could improve upon.[304]

It is recommended that the land that has already been earmarked for restitution be transferred as soon as possible and the outstanding claims be assessed on an urgent basis. Further, it is recommended that the Khoisan community, after necessary participatory processes, be afforded the status of indigenous people of South Africa.[305]

Indigenous law in South Africa is protected and recognised, however its ongoing development with democratic values must be monitored.

5.3 Chapter Conclusion

The South African Legislature enacted legislation that recognises and protects indigenous law, in addition, Legislature consistently amends its legal measures to its developing indigenous law and culture. South Africa has entrenched the recognition of indigenous law in its Constitution and has created evolving legal precedent that protects the rights and interests of indigenous communities.

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Through its Constitution and Judiciary, South Africa, has substantiated the determination of the South African legal measures to protect indigenous law that is not only adequate but it is constantly evolving as the needs change, thus enabling South Africa to have a living law.

[303] The Restitution of the Land Rights Act 22 of 1996
[304] See para 2.5
[305] See para 2.5

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