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BALANCING EMANCIPATORY LEGAL PLURALISM AND CULTURAL RELATIVISM

BY

BONGA GAZI

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SUPERVISOR: Prof Anthony C. Diala

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DECLARATION

I, Bonga Gazi, declare that this Dissertation which is hereby submitted for the award of Legumes Magister (LLM) in Private Law under the title '**Balancing emancipatory legal pluralism and cultural relativism'** is my own work. It has not been previously submitted for the purpose of an award at this or any other tertiary institution. For all the sources I incorporated in my work, references have been provided, where applicable.

Signed

……

B Gazi

June 2022

Western Cape

South Africa

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ABSTRACT

The concept of legal pluralism receives tremendous attention in sub-Saharan Africa. Notably, this attention arises because of the domineering tendency displayed by transplanted European legal orders now known as state laws. By demanding compliance with bills of rights, which are modelled on universalistic human rights that developed in Europe, state laws are steadily eroding the legitimacy of indigenous African laws. As such, a notable aspect of normative interaction in Africa is a struggle between indigenous laws and state laws. These struggles occur alongside socioeconomic transplants, which have steadily affected the normative behaviour of many Africans. Consequently, an assessment of the status of indigenous African laws is necessary. This study, therefore, explores the innovative idea of emancipatory legal pluralism. Relying on literature review and content analysis of case law, it argues that the interaction of legal orders should be as unrestricted as possible. Unfortunately, this is not the case in South Africa and other African countries. Due to the manner legal orders interact, indigenous African laws are often coerced to imitate universalistic human rights through the interpretation process favoured by judges. The study urges for the harmonisation of state laws and indigenous laws to ensure that indigenous laws do not disappear in South Africa through their relentless subjection to European legal ideas by judges and legislators.

KEYWORDS

African values
Bill of Rights interpretation
Cultural relativism
Customary law
Legal transplants
Indigenous African laws
Legal positivism
South Africa

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CHAPTER ONE

1.1 Introduction and background to the study

Post-colonial African states struggle with preserving their cultural history, which is embodied in their religion, indigenous norms, and customary institutions, while at the same time attempting to function as modern constitutional democracies.[1] Legal pluralism, a result of colonialism, has influenced every aspect of human endeavour in the continent.[2] Legal pluralism is a notion that describes "multiple layers of law, usually with different sources of legitimacy, that exist within a single state or society" or "a situation in which two or more legal systems coexist in the same social field".[3] The dominance of modern constitutional legal orders frequently elicits challenges and conflicts in the interpretation and implementation of the indigenous laws that enjoyed legal monopolies in colonised countries, including South Africa.[4]

These challenges and conflicts, referred to here as struggles, are traceable to socioeconomic transplants, which emerged from Europeans trans-positioning their religion, culture, economy, and legal systems in their colonies. In South Africa, this forceful imposition disregarded the free will of Africans, who were on the receiving end of the European laws and legal orders, thus leading to the existence of legal pluralism.[5] Generally, legal pluralism may be "similar in orientation, coordinated with one another, and mutually supportive or complementary".[6] Furthermore, legal pluralism makes contradictory claims of authority, imposes opposing

1 Pimental "Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique" 2010 *SSRN Electronic Journal*.

2 Ige "Legal Pluralism in Africa: Challenges, Conflicts and Adaptation in a Global Village" 2015 *J. law policy glob*.

3 Diala "Our laws are better than yours: The future of legal pluralism in South Africa" 2019 *Revista General de Derecho Publico Comparado* 1.

4 Roseveare *The rule of law and international development* (2013).

5 Diala and Kangwa "Rethinking the interface between customary law and constitutionalism in sub-Saharan Africa" 2019 *De Jure.*

6 Tamanaha *Legal Pluralism Explained: History, Theory, Consequences* (2021) 1.

standards, and operates through divergent processes which may exist separately or in close proximity.[7]

The generally accepted classification of legal pluralism is "deep" or "weak" legal pluralism. Firstly, 'strong' or 'deep' legal pluralism occurs when normative orders, such as indigenous laws, exist without necessarily depending on state law for the recognition of their validity.[8] According to Rautenbach, deep legal pluralism means that the state does not "incorporate cultural or religious forms of non-state law into state law".[9] Secondly, "weak" legal pluralism arises when the state acknowledges other normative orders within its field of jurisdiction, and in varying degrees, incorporates them into the state legal system.[10] In this context, state laws in South Africa are continuous, and mutations of foreign legal transplants. However, the degree of autonomy between the two generally recognised major legal orders in Africa (state law and indigenous law) is unclear. This ambiguity results from the observance that 'deep' legal pluralism only exists when the state is not obliged to incorporate cultural or religious forms of non-state law into state law.[11]

Incorporation of cultural or religious forms of non-state law into state law is evident in the power given to judges, as observed in terms of the Constitution under section 39(2). This section uses a notorious interpretative phrase "when developing the common law or customary law". Judges having the power to develop indigenous law could be disadvantageous to indigenous law's validity because judges themselves are products of the university curriculum, which could be perceived as a carrier of colonialism. Conversations on this subject trace this perception to the Eurocentric design of the curriculum and its suppression of African world views.[12]

Significantly, the power of judges over indigenous laws is evident in the jurisprudence of South Africa. When judges deal with indigenous laws, they 'develop it' and not necessarily 'interpret

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7 Tamanaha *Legal Pluralism* 1.

8 Diala 2019 *Revista General de Derecho Publico Comparado* 2.

9 Rautenbach "Deep legal pluralism in South Africa: Judicial accommodation of non-state law" 2010 *J. Leg. Plur. Unoff. Law.*

10 Diala 2019 *Revista General de Derecho Publico Comparado* 3.

11 Rautenbach 2010 *J. Leg. Plur. Unoff. Law.*

12 Diala "Curriculum decolonization and revisionist pedagogy of African customary law" 2019 *Potchefstroom Electron. Law J.*

it', as the Bill of Rights (BoR) does not accommodate cultural relativism. Cultural relativism is mainly based on the ideas of the collective, while the BoR advocates for individualistic views, with poor consideration of the origins of culture and its indigenous values.[13] The most common examples of these interpretations, which do not consider indigenous values, but promote individualistic values that resonate with the abandoned 'repugnancy clause', are found in the cases of *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC)[14] and *Shilubana v Nwamitwa* 2007 2 SA 432 (SCA).[15] As state law is the dominant normative order in South Africa's legal pluralism, arguably, it can be viewed as a 'constrainer' and an 'encourager' of normative behaviour in interconnected social fields.[16] The regulation of indigenous African laws by the state legal order is accomplished by combining legislation, judicial decisions, and official policies; as a result, creating the merger of indigenous law and state law, and perpetuating continuities of imposed European law systems.[17]

In conclusion, state regulation of indigenous laws creates adaptive legal pluralism in that Africans are compelled to adapt their indigenous practices to the modern realities of Western human rights, economic systems, and culture generally.[18] The problem with this adaptation is that indigenous laws tend to vanish, as they mostly exist in oral accounts, and cannot keep up with foreign values in order to preserve their authenticity.

1.2 Research problem

As stated above, a struggle exists regarding the co-existence of indigenous law and state law as normative systems with disparate origins. This struggle stems from how indigenous law is often coerced to imitate universalist human rights. This mainly occurs through the interpretation of indigenous law by judges.[19] Often, these norms are interpreted as offensive to

[13] Mokgoro "Ubuntu and the law in South Africa" 1998 *BHRLR* 15.

[14] *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC).

[15] *Shilubana v Nwamitwa* 2007 2 SA 432 (SCA).

[16] Diala *Legal pluralism and social change: Insights from matrimonial property rights in Nigeria* In: Rautenbach ed. *In the shade of an African Baobab: Tom Bennett's Legacy*. (2018).

[17] van Niekerk "State initiatives to incorporate non-state laws into official legal order: A denial of legal pluralism?" 2001 *CILSA* 34.

[18] Diala "Legal Pluralism and the future of indigenous family laws in Africa" 2021 *Int J Law Policy Family*.

[19] Himonga and Bosch "The Application of African Customary Law under the Constitution of South Africa: Problem Solved or Just Beginning" 2002 *S. Afr. Law J.*

human rights values, with a poor appreciation of the variance between their communal, cultural and religious origins and our individualistic, industrial societies.[20]

The problem with the judicial interpretation approach is that the existence of indigenous law is not as independent as expected to be. There is a need to ensure that the state does not unduly incorporate cultural or religious forms of non-state law into state law.[21] Therefore, indigenous law should still be able to hold its legitimacy even when interpreted through the constitutional Bill of Rights.[22]

The legitimacy of indigenous law can be achieved by increased respect for African values, such as *ubuntu*, which is in line with the values in the Constitution.[23] The absence of cultural relativism in the South African Constitution, which represents a diverse society, will be improved by increased judicial remedy to African values. This is because foreign values of colonialism, which are founded on legal positivism, fail to fit in with the culturally relativist rights of African people.

1.3 Aim, objectives and research questions

This study aims to historically review the recognition and development of customary law against the background of legal pluralism, which entails the problem of the role and values of judges in interpreting indigenous laws, culture, and religion. Moreover, it seeks to create harmony between the state and indigenous legal orders to preserve customary law.

The following are the four specific research objectives that are intended to be met in this study.

- Firstly, this study seeks to provide appropriate background for the recognition of indigenous law and its developments through the years against the background of legal pluralism. This background is essential for contextualising the research problem.
- Secondly, the study examines the principles that judges use to interpret indigenous laws, culture, and religion.

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20 Diala and Kangwa 2019 *De Jure* 201.
21 Diala and Kangwa 2019 *De Jure*.
22 Section 39 of the Constitution of the Republic of South Africa, 1996.
23 Mokgoro 1998 *BHRLR* 15.

- Thirdly, the study evaluates the role of judges and legislators when indigenous law is deemed offensive to universalistic human rights values.
- Lastly, the study explores ways to create harmony between the state and indigenous legal orders in South Africa, especially for preserving indigenous laws.

Accordingly, this study aims to answer the following main research question:

To what extent does the idea of emancipatory legal pluralism provide a balance between universalism of human rights and cultural relativism in South Africa?

This question is probed with the following sub-questions:

- How has the interaction of legal orders historically affected the interpretation of indigenous laws in South African courts?
- What principles do South African judges apply to interpret indigenous laws, culture, and religion?
- What role do judges and legislators play in adapting indigenous laws to universalistic human rights values?
- In what ways can indigenous laws be preserved from abolition in South Africa?

1.4 Significance of study

This study explores the idea of emancipatory legal pluralism. This idea is that the co-existence of legal orders should be liberating rather than stifling or oppressive. Its significance lies in its potential for attracting increased respect for indigenous law in the process of its interpretation by judges through the lens of the Roman-Dutch state law.[24] The importance of individualistic rights in a society is important, as minority rights (such as the rights of women and children) tend to be violated when majority cultural rights are considered important, but such protection should not also diminish the importance of indigenous laws.[25]

The use of indigenous values will provide a balance in the protection of constitutional human rights and the cultural rights of individuals who associate themselves with indigenous customs and traditions. This balance would potentially remove the stigma that indigenous customs and

[24] Ollennu "The Influence of English Law on West Africa" 1961 *J. Afr. Law.*

[25] Ewelukwa "Post-Colonialism, Gender, Customary Injustice: Widows in African Societies" 2002 *HRQ.*

laws is incompatible with changing times. Also, it would encourage its development within the fluid social changes of modern life. Ultimately, this study could contribute to ensuring that indigenous laws do not disappear in South Africa through their relentless subjection to European legal ideas by judges and legislators.

1.5 Methodology

This study aims to balance the existence of two conflicting legal orders of state law and indigenous law in South Africa. A qualitative research approach and document analysis research design are appropriate for critical literature review of relevant scholarly articles, case law and statutory documents. It is a rigorous process and provides the context for analysing writings on legal pluralism in Africa. Moreover, judicial decisions will be reviewed in the context of the international and national primary and secondary sources, including the Constitution, legislation, books, journal articles, reports, and internet materials.

1.6 Limitation of the study

The study will focus on the operation of legal pluralism in the African continent and how it has evolved to suppress the soundness of indigenous laws. It will be limited to how legal pluralism could lead to the obliteration of indigenous law in Africa. Indigenous law has consistently been nullified through the universalistic human rights lens instituted by colonial legal uproots. New legislation no longer represents the communal values on which indigenous African laws are founded.

1.7 Chapter outline

The following paragraphs give a short overview of the chapters in this mini-dissertation.

Chapter one: Introduction

Chapter one introduces the study and puts the topic in the appropriate context. Additionally, it presents the background to the research problem. The research problem, aim, objectives and research questions are formulated from the background literature. It also examines the significance and research methodology of the study.

Chapter two: History of the South African legal system

Chapter two explores the historical background of South Africa's legal system. It examines both the common law and statutory legislation relating to indigenous law.

Chapter three: Application and consequences of International Human Rights norms in South Africa

Critically reviews the origins of the International and National human rights values, how these values differ from indigenous law, and how the values influence the interpretation of indigenous law.

Chapter four: The role of the judiciary and legislature in the development of Customary Law

Chapter four explores the role of the judiciary and legislature in the validity of indigenous law ideals and their continuous observance.

Chapter five: The general classification of Customary Law

This chapter addresses the consequences of attitudes towards indigenous values, mainly the exclusion of indigenous values in judicial interpretations and the significance of the BoR for the future of indigenous norms and cultures.

Chapter six: Conclusion and recommendations

The final chapter suggests ways of managing legal pluralism to preserve indigenous laws.

CHAPTER TWO

2.1 Introduction

The South African legal system is frequently referred to as a hybrid legal system because of its mixed legal system. Multiple distinct legal traditions form the hybrid system: a civil law system inherited from the Dutch, a common law system inherited from the British, and a customary law system inherited from indigenous Africans (often termed African Customary Law).[1] The colonial and apartheid struggle the country has undergone influenced the formation of this hybrid legal system. The influence of colonial legal transplant was the "reposition or transfer of rules, principles, legal concepts and transport of laws and legislations across different legal systems,"[2] which led to the establishment of the South African hybrid legal system. Statutory legislation should be specific to the inhabitants for whom the laws are made, and Montesquieu argued that "it is a great coincidence if those of one nation can suit another."[3] When judges interpreted indigenous law into Western legislation, unification (by transplant) and harmonisation (by convention) of legal standards emerged as obvious corrective solutions.

This chapter considers the historical and factual background of legal pluralism and how it has manifested in the marginalisation of indigenous law by the South African Roman-Dutch law and British common law. Moreover, the chapter examines the effects of the varying degrees of restrictions imposed upon indigenous law for it to be compatible with specific Western legal standards.

1 Rautenbach 2010 *J. Leg. Plur. Unoff. Law* 144.
2 Watson *Legal Transplants (*1993) 21.
3 Montesquieu "*The Spirit of the Laws"* 1961 295.

2.2 Legal transplant

Diala and Kangwa mentioned three types of transplants namely: imposed, voluntary and coerced transplants.[4] Imposed legal transplants are when foreign state's laws and judicial systems are forced on another state through colonialism. The product of forcible legal transplant results in the unmindful distinction of the differences in the socio-political settings of the donor and recipient governments. The consequences of the careless distinction result in the disregard of the free will of African people and displaced African legal orders, which articulate with what Siems[5] described as "malicious legal transplants."

Watson[6] classified voluntary legal transplants into three types based on the migration of an entire legal system or a significant portion to a new location or country. The first scenario involves individuals moving to a new territory with no comparable civilisation and imposing their law on the new territory. Second, when a person moves to a new territory and has a comparable civilisation, the law is accepted into the new territory. Finally, when people deliberately embrace a substantial part of another people's system.

The process of coerced transplant occurs when a state uses military or economic force to promote its rules and norms.[7] Morin and Gold[8] describe three types of coercion transplants, with the most prevalent form of imposition being indirect coercion, which occurs when the threat of negative sanctions from another country allows the adoption country to transplant exogenous rules.[9] Direct coercion entails the imposition of foreign legal rules on adoptive countries without their consent, and imperialistic imposition occurs when a country introduces civil and political rights to another country under allied occupation.[10]

4 Diala and Kangwa 2019 *De Jure* 190.

5 Siems "Malicious legal transplants" 2018 *Legal Studies* 105.

6 Watson *Legal Transplants (*1993) 29.

7 Morin and Gold "An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries" 2014 *ISQ* 783.

8 Morin and Gold 2014 *ISQ* 783.

9 Morin and Gold 2014 *ISQ* 783.

10 Morin and Gold 2014 *ISQ* 783.

2.3 Colonial influence on South Africa's legal system

The idea and culture that underpins the modern world's political economy framework are referred to as colonialism.[11] In 1652, Dutch merchants arrived in South Africa and established contact with the Dutch East Indian Company. These merchants infiltrated South Africa and used force to establish their legal system. The common law system was later introduced by the British. Thus, the South African legal system resulted in being hybrid, based on the actions of Europeans, who forcefully imposed their socioeconomic transplants (religion, culture, economy, and legal systems) on their colonies, irrespective of whether the African people welcomed the imposition or not.[12]

This imposition was administered through various historical stages, which was conducted by Europeans preaching Christianity to the individuals of other cultures and brutally taking over nations that resisted their control.[13] A condition of coexistence and interaction of semi-autonomous legal orders in a specific context arose due to this.[14] This coexistence varied from being "similar in orientation, coordinated with one another, and mutually supportive or complementary; they may also make completing claims of authority, impose conflict norms, and operate through contrasting processes; they may exist wholly apart or thoroughly intertwined".[15]

The South African legal system followed the competing claims of authority, imposition of conflict norms, and operation through contrasting processes route, in that South African laws were altered to be continuities and mutations of imposed European laws. This imposition was achieved by allowing normative orders, such as indigenous law, to apply alongside transplanted laws with varying degrees of restrictions. The consequence resulted in indigenous law relying more on Western legal standards criteria to be upheld or applied by the South African courts. These standards stipulated that indigenous law should not be "repugnant to natural justice, equity and good conscience, or incompatible either directly or by necessary implication with any written law for the time being in force in the State".[16]

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11 Diala 2019 *Revista General de Derecho Publico Comparado.*
12 Diala 2019 *Revista General de Derecho Publico Comparado.*
13 Diala 2019 *Revista General de Derecho Publico Comparado.*
14 Fabra-Zamora 'The Conceptual Problems Arising from Legal Pluralism" 2022 *Can. J. Law Soc*.
15 Tamanaha *Legal Pluralism* 1.
16 Diala "The concept of living customary law: A critique" 2017 *J. Leg. Plur. Unoff. Law* 146.

Additionally, the coercive nature of colonialism strengthens the idea that South African laws are continuities and mutations of imposed European laws. This coercion was achieved through the way Europeans constructed their normative orders and what they perceived as 'law', according to their transplanted legal systems, which compromised a rule-based approach to law (mainly known as legal positivism). Accordingly, the rule-based approach created dissonance compared to the foundational background of indigenous laws, considering that indigenous laws emerged from people's adaptations of oral preservation, rather than written texts required by the Western legal standards. Furthermore, the different perceptions owing to the formation of what is perceived to be law has led to the categorisation of indigenous law into official and living customary law.[17]

2.4 Legal pluralism

Generally, legal pluralism accepts that "legal systems derive [their validity] from sources other than the state and exist as independent fields of law":[18]

> As Jorge Luis noted, "legal pluralism is not a theory of law or an explanation of how it functions" but a situation, condition or state of affairs that "alerts observers… that law takes many forms and can exist in parallel regimes".[19]

Scholars have classified legal pluralism in two different ways. The generally accepted classification of legal pluralism is divided into "deep" or "weak" legal pluralism.

Firstly, 'strong' or 'deep' legal pluralism occurs when normative orders such as religious, folk, customary, and indigenous laws exist independently without necessarily depending on (State) laws bequeathed by colonial rule for their validity (in terms of recognition). According to Rautenbach, deep legal pluralism essentially means that the state does not "incorporate cultural or religious forms of non-state law into State law".[20] As a result, normative regimes, such as indigenous law, continue to keep their uniqueness rather than conform to European validity requirements. They must not have been subjected to the 'repugnancy clause' scrutiny, which interprets Indigenous law as being opposed to natural justice, equity, and good conscience or incompatible with any written law currently in force in the State, either directly or by necessary

[17] Diala 2017 *J. Leg. Plur. Unoff. Law* 146.
[18] Diala 2021 *Int J Law Policy Family*.
[19] Cited in Fabra-Zamora 2022 *Can. J. Law Soc*.
[20] Rautenbach 2010 *J. Leg. Plur. Unoff. Law.*

implication.[21] Additionally, it must also not have been affected by socioeconomic changes (religion, culture, economy, and legal systems) to influence its adaptation to new societal norms, which are embodied by the confluence of European imperial interests, which radically altered the social organisation of African communities.

For example, considering the male primogeniture rule, which is an ancient norm that emerged in response to the agrarian nature of pre-colonial society, reference may be made to the case of *Bhe v Khayelitsha*.[22] The court case concerned two separate disputes involving the denial of inheritance rights to daughters and sisters of a deceased black male. Both cases were the subject of public interest and were merged and heard simultaneously. Firstly, in the case of *Bhe v Khayelitsha*, the paternal grandfather of two minor female children challenged their appointment as the representative of their deceased father's estate. In the second case, *Shibi v Sithole*, Shibi, the sister of the diseased, opposed the appointment of the diseased male cousins as representatives for the estate. Additionally, the South African Human Rights Commission and the Women's Legal Trust brought a class-action suit on behalf of all women and children prevented from inheriting.

The court attempted to invalidate specific relevant statutory provisions as unconstitutional (section 23 of the Black Administration Act).[23] The Constitutional Court was faced with the constitutionality and validity of the institution of male primogeniture based on South Africa's (statutory and customary) inheritance laws. The court found that section 23 of the Black Administration Act[24] and its regulations were highly intolerant and in breach of the Constitution's rights to equality and dignity.[25] The court further held that the procedures whereby the estates of black people are treated differently from those of white people are inconsistent with the Constitution. The court decided that the form in which the African customary law rule of male primogeniture is applied to the inheritance of property discriminates unfairly against women and children born out of wedlock. The law rule of male primogeniture was, accordingly, declared to be unconstitutional and invalid.[26]

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21 Diala 2017 *J. Leg. Plur. Unoff. Law* 146.
22 *Bhe v Khayelitsha*
23 Act 38 of 1927.
24 Act 38 of 1927.
25 Sections 9(3) and 10, Constitution of the Republic of South Africa, 1996.
26 Constitution of the Republic of South Africa, 1996.

The abovementioned case law highlights the scrutiny state law possesses for indigenous law's validity in the South African legal system when non-state legal phenomena are incorporated as "law". It also sheds light on the adaptation of indigenous law to the influences or changes of socioeconomic transplants, such as constitutional equality, new (religious/global) notions of fairness, family income patterns, urbanisation, and individualism.[27] However, much light must be shed on the variance between the values of Western legal transplants and the agrarian setting from which indigenous norms originated. Additionally, attention is needed to the classical form in which indigenous norms were developed to serve their traditional communities.

"Weak" legal pluralism arises when the state acknowledges other normative orders within its field of jurisdiction, and in varying degrees, incorporates them into the state legal system.[28] In this context, state laws in South Africa are continuous and mutations of foreign legal transplants. This form of legal pluralism in South Africa is mainly encouraged by the recognition of the BoR in our Constitution, especially the emphasis placed on section 39, which is considered the interpretation clause.

The interpretation clause reads as follows:

- "(1) When interpreting the Bill of Rights, a court, tribunal, or forum-
- *(a)* must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom;[29]
- *(b)* must consider international law; and
- *(c)* may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law, or legislation, to the extent that they are consistent with the Bill."[30]

However, through adequate inspection, the above-outlined section emphasises a poor appreciation of the variance between the values underlying the interaction between state law and different forms of customary, indigenous law, and novel forms of non-state legal phenomena, such as human rights law. Section 39 of the Constitution promotes a Western,

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27 Diala and Kangwa 2019 *De Jure* 198.

28 Woodman "Legal Pluralism and search for justice" 1996 *J. Afr. Law.*

29 Sections 9, 10, 15 of the Constitution of the Republic of South Africa, 1996.

30 Constitution of the Republic of South Africa, 1996.

individualistic, and universalistic legal nature. These preferments occur through the foundational values of human dignity, equality, and freedom, which the BoR promotes.[31] Indeed, these foundational values are often used to interpret norms within the South African legal system. However, their judicial use is neglectful of the variance between indigenous values and their agrarian origins and the industrial setting of the state normative order.[32]

The case of *Daniels v Campbell*[33] illustrates this. In this case, the court needed to consider whether the female applicant is the legal spouse in terms of the Intestate Succession Act[34] and as a survivor, according to the provisions of the Maintenance of Surviving Spouse Act.[35] The applicant's dilemma was that she was married in terms of the Muslim faith, which conferred only certain benefits on 'spouses'. This excluded spouses in a *de facto monogamous* Muslim marriage. The judgment handed down by the Court in both the above-outlined questions was favourable, and both Acts were developed to make provision for the surviving spouse of a *de facto monogamous* Muslim marriage. Although the Court noted that Muslim marriages were not recognised in the South African legal system, it concluded that this exclusion and non-recognition violated the universalist human rights in section 9 of the Constitution.[36] Therefore, it was held that the applicant could inherit. However, the Court restricted the ambit of its judgment to *de facto monogamous* Muslim marriage, in exclusion of polygamous Muslim marriages.

The *Shilubana v Nwamitwa*[37] is another case where universalistic human rights (particularly section 9 of the Constitution) required consideration. In this case, the traditional council passed new resolutions in 1996 and 1997 giving Ms Shilubana the authority to succeed in traditional

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31 Section 7(2) of the Constitution of the Republic of South Africa, 1996.

32 Diala 2019 *Revista General de Derecho Publico Comparado* 17.

33 *Daniels v Campbell* 2004 5 SA 331 (CC),
Justice Sachs who interpreted section 15(3)(a) in the context of the founding constitutional values (human dignity, equality, and freedom) concluded that the section permits the recognition of 'marriages concluded under any tradition or any system of religion, personal or family law'. He further outlined that the: …founding values as given expression in the Bill of Rights now provide the context within which legislation must be construed. The interpretive injunction contained in section 39(2), namely, that when interpreting any legislation courts must promote the spirit, purport, and objects of the Bill of Rights, must be understood in the context of para 55. Additionally, he outlined that the common law and customary law (the state law) must be developed, and legislation interpreted to be consistent with the Bill of Rights and international obligations to reflect the 'change in the legal norms and the values of our [South African] society'."

34 Act 81 of 1987.

35 Act 27 of 1990.

36 Constitution of the Republic of South Africa, 1996.

37 *Shilubana v Nwamitwa* 2007 (2) SA 432 (SCA).

leadership, which was customarily allocated to males only. Furthermore, the Constitutional Court proclaimed the authority of the traditional council to develop customary law following the right to equality (section 9 of the Constitution). As such, the manner undertaken to qualify normative orders to be considered valid in the South African legal system, the degree of autonomy between the two generally recognised classifications of legal pluralism ("strong" and "weak") is unclear.

Thus, conclusions are based on the observation that "deep" legal plurality exists only when the state is not obligated to absorb cultural or religious non-state law (primarily indigenous law) into state law, which is rarely the case.[38] Accordingly, this then probes whether indigenous law still exists and, if so, what differentiates indigenous law from common law.

2.5 What is customary about African Customary Law?

Notably, the definition associated with indigenous African norms has been pre-colonial norms that emerged in an agrarian setting in which community households stayed together for farming and protection. The land was communal and different households had different rights and duties (in terms of maintaining the communal life). However, the historical background of African people is not only limited to the purposes of farming and sustaining a communal life. Some laws kept such communities in line with their developments. Additionally, normative adaptations were in line with the natural pace of social change, which has been described as a "significant change of structured social action or the culture in a given society, community or context."[39]

The introduction of colonial rule radically changed the natural pace of social change maintained by indigenous African norms through socio-economic changes. These changes stifled and undermined the influence of indigenous African norms in terms of their historical background in shaping the evolution of the African legal system. Such oppression restricted South Africa's legal system to be only understood towards the influence of globalisation and colonialism.[40] As a result, African legal reality became inextricably linked to the history they were subjected to. This link is because African states have been subjected to varying degrees of military,

[38] Rautenbach 2010 *J. Leg. Plur. Unoff. Law.*

[39] Servaes "Social Change" 2011 *Oxford Bibliographies Online*.

[40] Allan, "Rethinking African customary law"1988 *Mod. Law Rev.*

political, economic, and cultural globalisation in recent years, which remain invisibly beneath the guise of a democratic state.[41]

Indeed, this is evident in how the South African legal system has continued using the legal system and notions brought forth by colonial rule, even after gaining political independence.[42] As illustrated by Jeffery, globalisation seeks to:

> "replace domestic economic life with an economy that is heavily influenced or controlled from overseas, then … globalisation can also be seen as a surrender of power to the corporations or a means of keeping poorer nations in their place".[43]

As a result, the preservation of European laws to apply alongside South African state laws (such as African customary law) has caused uncertainty, in terms of differentiation between community practices and judicial interpretations of African customary norms. Accordingly, to fully understand this concept, Sanders posed this question: what is 'customary about African customary law?'[44] In explaining it, he identified three categories of customary law:

- The first, being official customary law, is understood by Sanders as the product of colonial policies of interpreting indigenous African law, re-inventing them, and subordinating them to imposed European laws and values. While other scholars define official customary law as the version captured in state codes, court judgments, academic writing, and legislation.
- Sanders' second category (customary academic law) explained this category as that which emerged from scholarly perceptions of discrepancies between an orthodox or official view of customs and customs observed in anthropological studies.[45]
- Lastly, his third category is customary autonomic law, a term that denotes the current practices and norms which a community uses to regulate itself, also known as 'living customary law'.[46]

The above-listed forms of customary law can be elaborated through the existence of dual normative interactions in a social field that generally feed into the norm creation process. That involves typically normative orders in competition with one another as the primary determinant

41 Diala 2021 *Int J Law Policy Family*.
42 Owen "The Foreign Imposition of Domestic Institutions" 2002 *Int. Organ.*
43 Jeffery "What is globalisation?" 2002 *The Guardian.*
44 Sanders "How customary is African customary law" 2017 *CILSA* 407.
45 Sanders 2017 *CILSA* 408.
46 Diala 2019 Revista General de Derecho Publico Comparado 12.

of behaviour.[47] This, therefore, results in individuals who perceive such laws as adapting to state law (common law), in that the socioeconomic changes introduced by Europeans tend to favour women and children (as highlighted in the case of *Bhe v Magistrate Khayelitsha*, concerning the customary law of succession).[48] However, the categorisation of these laws has been critiqued as "unreflective of empirical evidence, unmindful of how the interaction of legal orders influences normative behaviour, and neglectful of the manner customary law emerges in intersecting social fields".[49] This critique centres on the blurred lines between 'official' and 'living' customary law, and the adaptive nature of legal pluralism in postcolonial societies. Accordingly, the answer to Sanders's question of what is 'customary about African customary law?', can be found in the case of *Lewis v Bankole* 1908 1 NLR 81[50] in which Osborne remarked that:

> "In nearly every case (of customary law), I have found that there are general underlying principles not difficult to understand… Indeed, one of the most striking features of West African native custom, to my mind, is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics".

Therefore, this means that African customary law shall remain 'customary law' even though affected by the forceful imposition of socioeconomic changes brought by Europeans through colonialism and globalisation. Additionally, African customary norms' characteristics and foundational values are premised on adaptability, which encourages them not to be stagnant and resistant to change, nor in opposition to evolving to the new values introduced to our traditional communities. However, due to colonialism's influence on the formation of the South African legal system, other normative orders, such as African customary law foundational background, have bare minimum relevance. As a result, African customary law worth is prone to be questionable regarding adaptability to suit the new social change influenced by socioeconomic changes.

2.6 Conclusion

The Europeans' arrival in the African continent disturbed the normative sovereignty of indigenous African laws in their agrarian communities. Accordingly, such disturbance was

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47 Diala 2017 *J. Leg. Plur. Unoff. Law* 157.
48 *Bhe v Khayelitsha*.
49 Diala 2017 *J. Leg. Plur. Unoff. Law* 157.
50 *Lewis v Bankole* 1908 1 NLR 81.

administered through the imposition of non-state legal and socio-economic transplants on African communities, which manifested in creating a hybrid legal system. As a result, conflict of laws problems arose in the coexistence between these legal systems. Indeed, such struggle stems from how indigenous law is often coerced to imitate universalistic human rights, using human rights values, with a poor appreciation of the variance between the communal agrarian origins and our individualistic industrial societies.[51]

In conclusion, understanding the influence of western human rights, socio-economic transplants, and the effects of globalisation on the African continent encourages the concept of emancipatory legal pluralism. This encouragement is essential in balancing the relationship of an emancipating rather than stifling or oppressive legal system between legal pluralism and cultural relativism.

[51] Diala 2021 *Int J Law Policy Family*.

CHAPTER THREE

3.1 Introduction

The enormity of atrocities committed during World War II (1939-1945) shocked the consciousness of Europe, ultimately displaying the vulnerability of the individual who is perpetually a victim of the unlimited and undemocratic exercise of state power. Cognisant of this predicament, the international community established the United Nations in 1945. The United Nations was established to usher in an egalitarian international order to prevent future resorts to war.

It also aspired to advance development and human rights by fostering global cooperation.[1]

Due to the egregious human rights abuses committed during the Second World War, it was agreed upon, internationally, that international human rights standards should be used in addition to national rights protections.[2] As a result, on December 10th, 1945, the Universal Declaration of Human Rights (UDHR) was adopted.

The rationale for the existence of international human rights law can be described in two ways. Firstly, international human rights serve as a beacon-based on an international consensus about what minimum rights all persons should enjoy and towards which states should steer their domestic law, policies, and practices. Secondly, international human rights act as a safety net, providing the possibility of recourse when efforts to obtain a remedy in the national legal system have failed.[3]

Consequently, numerous nations (including South Africa) succumbed to the gravitational pull of the UDHR, unmindful of the historical origin of these human rights and their individualistic

1 Diala 2019 *Revista General de Derecho Publico Comparado*.
2 Strydom *International Law* (2016) 317.
3 Strydom *International Law* 317-318.

nature. They were also unmindful of Europe's violent history of empire, which contradicts the values of the UDHR.[4] Long after the UDHR was adopted, major European nations refused to end their colonisations of African and Asian nations. Unsurprisingly, clashes often occur between traditionalists and change agents over the validity of indigenous African laws.[5] However, universalistic Western legal values always prevail whenever individuals seek recourse for violations of their rights, despite their lack of socio-cultural relativity within the concerned community. An example is South Africa, where terms of indigenous values do not resonate with Western legal values (equality, human dignity, freedom).

The difficulties inherent in the application of universalistic human rights in culturally diverse societies, such as South Africa, are recognised in the Vienna Declaration, which states that:

> "While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".[6]

This chapter highlights the challenges faced by indigenous law regarding the habitual coercion exerted on it to imitate universalistic human rights values in South Africa's Bill of Rights, since conflict often arises between indigenous values and universalistic human rights values. The chapter also explores the background of universalistic human rights and how they differ from indigenous African laws.

3.2 Evolution of South African Law

There is controversy about the existence and protection of human rights in Africa's pre-colonial era. This controversy stems from the era when scholars debated the existence of law in preindustrial African societies.[7] Their arguments emerged from the absence of written documentation before the arrival of colonialists. Indigenous African laws emerged from people's adaptations of oral preservation, in which communities lived together in an intimate, agrarian social setting where members operated with a collective sense of rights and

4 Diala 2019 *Revista General de Derecho Publico Comparado* 6.

5 Himonga and Bosch 2000 *S. Afr. Law J.*

6 Vienna Declaration and Programme of Action, United Nations General Assembly, UN Doc. A/CONF.157/23, 12 July 1993, para. 5.

7 Diala 2021 *Int J Law Policy Family*.

obligations. As a result, the different standards of the creation of laws evoked questions, such as establishing the meaning of law and whether custom qualifies as law.

Hart responded to the question, 'What is law'? And asserted that "few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways." [8] In South Africa, the question of "What is Law?" can be answered from a legal positivist mindset (pure theory of law). The reason is that indigenous African norms possess a processual character which enabled them to embrace Western socioeconomic changes of globalisation to the point of near extinction.[9] The general agreement is that legal positivism encompasses only legitimate sources of law, such as written rules, regulations, and principles that have been expressly enacted, regardless of their morality. Hans Kelsen explains that:

> "Legal theory must be a general theory of positive law, employing the specific jurist method of apprehension, while excluding all admixture of considerations drawn from psychology, sociology, politics or ethics".[10]

Legal positivism demarcates the laws of the physical universe and the ways in which human conduct is regulated. Legal positivists' references to human conduct are that:

> "...it's possible to establish principles of law independent of judgements. The validity of such principles derives not from their moral force but from an objective criterion, such as Bentham's greatest good for the greatest number' of Austin's "command of the sovereign", that is, the prerogative of the law of authority".[11]

Correspondingly, it neglects the values that prompt, inform, and sustain the law through its objective approach. Legal positivism is based on the notion that laws can be separated from religion and morality, and legal validity is wholly dependent on this distinction. Therefore, legal positivism adheres to only three theoretical commitments:

- Firstly, the conventionality thesis asserts that "legal validity can ultimately be explained in terms of a criterion that is authoritative in virtue of social invention ('Basic norm')",
- Secondly, the social fact thesis (also known as the pedigree thesis) asserts that "legal validity is a function of a social thesis, and

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8 Hart *The Concept of Law* (1961).

9 Diala 2021 *Int J Law Policy Family*.

10 Keet *Human Rights Education or Human Rights in Education: A Conceptual Analysis* (D.Ed Thesis, University of Pretoria, 2006).

11 Keet 2006.

- Thirdly, the distinguishing thesis argues that law and morals can be separated from one another.[12]

Legal positivism is sometimes criticised for favouring formalistic, rigid legal notions based on the strict paradigm of the law without appropriately considering moral and social considerations. Indigenous African laws were frequently forced to adopt universalistic human rights norms under the influence of the legal positivism that colonisation brought about. This universalistic approach was achieved through the rise in conflict of laws which resolution was administered using European principles, such as the repugnancy clause.[13] Consequently, such pressure enforced upon indigenous norms to conform to the socioeconomic changes, resulted in the enactment of customary law.[14]

3.3 Influence of universalistic values on cultural relativism in South Africa

The development of the South African Constitution in 1996 reflected a political and legal shift where all law and conduct inconsistent with it, will be considered invalid.[15] All South Africans now have the right to equality,[16] dignity,[17] and freedom[18] due to the Constitution's adoption. Our equality, dignity and freedom were confirmed in *Carmichele v Minister of Safety and Security* 2001 ZACC 22; 2001 4 SA 938 (CC); 2001 10 BCLR 995 (CC) para 54[19], where the Constitutional court stated that "Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system." Albertyn and Davis echoed the statement and assert

> "While we can all agree that the Constitution was designed to enable and support a democratic society, we might disagree on the content and prioritisation of its values thus giving rise to different ideas about the nature of our democracy and the change that is required to attain a more just society."[20]

The incorporation of the BoR in the Constitution stamped the victory of universalism on the apex of South Africa's legislation;[21] as a result, indigenous laws became subjected to European

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12 Finnis "On the Incoherence of Legal Positivism" 2000 *Notre Dame L. Rev.* 1597.

13 Diala 2019 *Revista General de Derecho Publico Comparado.*

14 Diala and Kangwa 2019 *De Jure* 191. Which is formed through adaptation of "indigenous norms to socioeconomic changes" (considering the processual character of indigenous norm.

15 Section 2 of the Constitution of the Republic of South Africa, 1996.

16 Section 9 of the Constitution of the Republic of South Africa, 1996.

17 Section 10 of the Constitution of the Republic of South Africa, 1996.

18 Section 12 and 15 of the Constitution of the Republic of South Africa, 1996.

19 *Carmichele v Minister of Safety and Security* 2001 ZACC 22; 2001 4 SA 938 (CC); 2001 10 BCLR 995 (CC) para 54.

20 Albertyn and Davis "Legal realism, transformation and the legacy of Dugard" 2010 *SAJHR* 201.

21 Section 7(1) of the Constitution of the Republic of South Africa, 1996.

enriched universalistic values.[22] The South African Constitution drew heavily from the Universal Declaration of Human Rights (UDHR) adopted by the United Nations after the Second World War. The Universal Declaration was a statement containing the global agreement about a minimum set of human rights standards.[23] The reference South Africa took in the formation of its Constitution was unexpected because the Universal Declaration is not binding upon any state, although it has acquired great moral force and carries persuasive weight.[24] Additionally, the Constitution of South Africa heavily depends upon the UDHR (in addition to the courts' interpretative disposition towards universalistic values);[25] as a result, causing the stunted development of its indigenous African laws.

The introduction of Chapter Two, the BoR in the Constitution, expanded the number of rights globally recognised and is often referred to as the "cornerstone of democracy".[26] The BoR, which applies uniformly to all laws in South Africa,[27] hindered the growth of indigenous law in South Africa. [2] Section 39(1) of the Constitution establishes the significance of the BoR by stating the following:

> When interpreting the Bill of Rights, a court, tribunal, or forum-*(a)* must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom; *(b)* must consider international law; and *(c)* may consider foreign law.[28]

This provision implies that European laws are better than indigenous laws, even though the latter were in force long before colonisation. Accordingly, the notion of the supremacy of European laws was substantiated by section 233 of the South African Constitution, which provides that: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[29] Furthermore, the importance of the BoR is emphasised in section 8(1) of the Constitution, which provides that: "The BoR applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."[30]

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22 Diala 2019 *Revista General de Derecho Publico Comparado*.

23 Universal Declaration of Human Rights (UDHR) 1948, UN GA Res, 217A (III).

24 Strydom *International Law* 322.

25 "When the UN General Assembly adopted the Universal Declaration in 1948, eight states abstained, among them was the USSR, Saudi Arabia, and (the Union of) South Africa."

26 Section 7(1) of the Constitution of the Republic of South Africa, 1996.

27 Section 8(1) of the Constitution of the Republic of South Africa, 1996.

28 Section 39(1) of the Constitution of the Republic of South Africa, 1996.

29 Constitution of the Republic of South Africa, 1996.

30 Section 8(1) of the Constitution of the Republic of South Africa, 1996.

Consequently, the abovementioned restrictions limit the essence of cultural relativism in the South African legal system, even though sections 30 and 31 of the Constitution provide for the protection of culture.[31] Section 30, states that: "Everyone has the right to use the language and to participate in the cultural life of their choice". Furthermore, section 31(1) of the Constitution that deals with cultural, religious, and linguistic communities proclaims that:

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

Additionally, section 181(1)*(c)* of the Constitution makes provision for the establishment of a "Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities".[32] Section 235 of the Constitution, "acknowledges the right of cultural groups to self-determination".[33] The introduction of these provisions in the Constitution referring to customary law, strengthen the recognition of customary law in consideration to the manner customary law was foreseen before 1996.[34] However, the recognition of these cultures and religions should not contravene any provision of the Bill of Rights,[35] and whenever customary laws conflict with Constitutional or legislative values, the Constitution always prevails. This notion is also highlighted in section 211(3) of the Constitution, which states that: "(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law". South African courts are permitted to take judicial notice of customary law whenever they judge it appropriate. Section 211(3) underlines the secondary treatment that customary law receives. This becomes problematic in that customary law receives inferior treatment, despite its origin within South Africa's legal system, while Roman-Dutch law receives superior treatment, as though it is originally from South Africa.

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[31] Constitution of the Republic of South Africa, 1996.

[32] Constitution of the Republic of South Africa, 1996.

[33] Section 235 provides that: "The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation".

[34] Introduction of the Constitution of the Republic of South Africa, 1996.

[35] Section 36 of the Constitution of the Republic of South Africa, 1996.

The Traditional Leadership and Governance Framework Act[36] supports Section 211 (3) of the Constitution that alludes "the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law". These relevant principles refer to the "…the democratic values of human dignity, equality, and freedom", [37] which must be respected, protected, and promoted by the state as stated in section 7(1) of the Constitution.

Additionally, by ratifying several international and regional human rights instruments, South Africa has demonstrated its commitment to international human rights. These include:

- African Charter on Human and People's Rights, 1981. The African Charter on Human and Peoples' Rights (ACHPR), commonly referred to as the Banjul Charter, is an international instrument regarding the human rights and freedoms of persons in the continent of Africa. It is considered to be the African counterpart of the European Convention on Human Rights.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - 10 December 1984. South Africa signed on 29 January 1993 and ratified on 10 December 1998.
- Hague Convention on the Civil Aspects of International Child Abduction - 25 October 1980. South Africa acceded on 8 July 1997.
- International Covenant on Civil and Political Rights -ICCPR- 16 December 1966. South Africa signed on 3 October 1994 and ratified 10 December1998.
- International Covenant on Economic, Social and Cultural Rights - 16 December 1966. South Africa acceded on 3 October 1994.
- Protocols I and II to the Geneva Conventions of 1949 relating to the Protection of Victims of International and Non-International Armed Conflicts-Geneva, 10 June 1977. South Africa acceded on 21 November 1995.
- Protocol relating to the Status of Refugees - 31 January 1967. South Africa RSA acceded on 12 January 1996.

[36] Act 41 of 2003.
[37] Constitution of the Republic of South Africa, 1996.

- SADC Declaration on Gender and Development for the Prevention and Eradication of Violence against Women and Children. South Africa signed the Declaration on 8 September 1997.
- The African Charter on the Rights and Welfare of the Child (ACRWC), 1990. Also called the Children's Charter, was adopted by the Organisation of African Unity (OAU) in 1990 (in 2001, the OAU legally became the African Union) and entered into force in 1999. South Africa acceded to the African Charter on the Rights and Welfare of the Child on 9 July 1996. Parliament agreed to South Africa's adherence to the Charter but decided that the instrument of accession should be accompanied by a declaration.
- The Convention on Elimination of All Forms of Discrimination against Women, 1979 (CEDAW). South Africa signed the Convention in January 1993 and ratified the Convention on 15 December 1995, without entering any reservations.
- The International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD). CERD was adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 and entered into force on 4 January 1969, South Africa is a party to CERD.
- The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003. The Protocol referred to the Maputo Protocol, is an international Human Rights Instrument established by the African Union and came into effect in 2005.
- The United Nations Convention on the Rights of the Child (commonly abbreviated as the CRC or UNCRC) is an international human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children - 20 November 1989. South Africa signed on 29 January 1993 and Ratified on 16 June 1995. Amendment to article 43 (2) of the Convention on the Rights of the Child - 12 December 1995 was accepted on 5 August 1997.

3.4 Understanding the relevance of founding values

Understanding the relevance of founding values enlisted in the Constitution of the Republic of South Africa is of utmost importance.[38] This is subject to the idea that constitutional values function as a guide for constitutional interpretation.[39]

The South African Constitution states in section 1*(a)* that:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> *(a)* Human dignity, the achievement of equality and the advancement of human rights and freedoms."[40]

Langa, D.C.J., in *Bhe v Khayelitsha,* emphasises the importance of founding values and affirms that these values hold a special place in the South African legal system and notes that:

> "The rights to equality and dignity are of the most valuable of rights in an open and democratic state. They assume special importance in South Africa because of our history of inequality and hurtful discrimination on grounds that include race and gender."[41]

These founding values are given specific application in section 39 of the Constitution, which instructs that the interpretation of the BoR "must promote the values that underlie an open and democratic society based on equality, human dignity and freedom".[42]

3.4.1 Equality

The essence of the idea of substantive equality receives superior attention in South Africa's legal system.[43] This action emanates from the historically disadvantaged background black people have had to overcome, with little or no political, economic, and legal rights, let alone relevance in social institutions.[44] Accordingly, section 9(1) of the Constitution states "that everyone is equal before the law and has the right to equal protection and benefit of the law."[45]

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38 Section 7(1) of the Constitution of South Africa, 1996.

39 *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para. 149.

40 Constitution of the Republic of South Africa, 1996.

41 *Bhe v Khayelitsha* para 71.

42 Grant "Human rights, cultural diversity and customary law in South Africa"2006 *J. Afr. Law* 9.

43 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC); 1997 2 BCLR 153 (CC) para 20 where Mahomed DP stated that:
"There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble, it is declared that there is a ... need to create a new order ... in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".

44 *Bhe v Khayelitsha* para 50.

45 Section 9(1) of the Constitution of the Republic of South Africa, 1996.

Section 9(3), read together with section 9(4), prohibits discriminating against anybody on any basis, including race, gender, sex, pregnancy, marital status, ethnicity, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and place of birth. Discrimination upon these grounds is *prima facie* presumed to be unfair unless established otherwise. The alternative for this decision can be found in section 36 of the Constitution, which states that limitation of the BoR is permitted only:

> "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all the relevant factors, including-
>
> (a) the nature of the right,
>
> (b) the importance of the purpose of the limitation,
>
> (c) the nature and extent of the limitation,
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."[46]

The *Harksen v Lane* test, which was established in *Harksen v Lane No* 1998 1 SA 300 (CC),[47] captures the essence of substantive equality. In this case, the court developed the test for substantive equality against the background of the equality clause, which was captured under section 8 of the Interim Constitution.[48] The first inquiry in each scenario is to determine whether there is a differentiation amongst groups. If there is, the following query is whether there is any rational connection between the differentiation and the government purpose it is designed to achieve. If there is a rational government purpose, section 8(1) is not breached, although it may constitute unfair discrimination. The subsequent inquiry will be to ask if the differentiation is based on the listed grounds to verify that unfair discrimination is present. If based on any of the listed grounds, the discrimination is *prima facie* presumed to be unfair. If it is not based on the listed grounds, the following query would be whether it is based on unlisted grounds. If unlisted grounds are present, the unlisted grounds will be evaluated against the background of the right to human dignity, amongst other things. For instance, if it impairs the person's inherent dignity, discrimination is established. However, the applicant will bear the onus to prove unfairness.

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46 Section 36(1) of the Constitution of the Republic of South Africa, 1996.

47 *Harksen v Lane No* 1998 1 SA 300 (CC).

48 Constitution of Republic of South Africa, Act 200 of 1993.

Despite these initiatives, women and younger male children sometimes find it difficult to achieve equality in South Africa.[49] The last remaining traditionalists, therefore, bring about this obstacle. They tend to preserve their traditions against the violent invasion of Western ideals out of concern that indigenous law will not have a respectable position in an inevitable South African common law. [50] As a result of this conflict, women frequently find themselves torn between an excellent desire for fundamental, radical equality and patriarchal norms.

3.4.2 Human Dignity

The phrase 'human dignity' is frequently used in numerous legal documents, including section 10 of the Constitution, which states: "Everyone has inherent dignity and the right to have their dignity respected and protected."[51] Additionally, the term 'dignity' can also be found in Article 1 of the UDHR; "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[52] As such, in the case of *S v Makwanyane and Another*,[53] the question was whether the death sentence in terms of section 277 (1) (*a)* of the Criminal Procedure Act,[54] conflicted with the provisions of the Constitution of the Republic of South Africa,[55] or not. Although the (*Interim Constitution*,) did not specifically refer to human dignity as a value, the Court underpinned this value in only its second judgment in *S v Williams,*[56] where the Court proclaimed: "[t]he approach followed by the bench seems to indicate an assumption that human dignity is the universal value which is foundational to a constitutional state and its characteristic protection of human rights." As a result, the Court concluded that, in the context of the Constitution, the death penalty was indeed a cruel, inhuman, and degrading punishment.

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[49] Himonga and Bosch 2000 *S. Afr. Law J.*

[50] Diala 2019 *Revista General de Derecho Publico Comparado.*

[51] Constitution of the Republic of South Africa, 1996.
In addition, the second paragraph of the preamble of the United Nations mentions human dignity in efforts to emphasize its main aims: "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."

[52] UDHR 1948, UN GA Res, 217A (III).
Also, the preamble states that: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". Additionally, article 22 and article 23(3) further mention human dignity.

[53] *S v Makwanyane* 3 SA 391 (CC) para 329.

[54] Act 51 of 1977.

[55] Interim Constitution of South Africa, 1993.

[56] 1995 3 SA 632 paras 37 and 38.

Additionally, in both the cases of *S v Mamabolo* 2001 (CCT 44/00) ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC);[57] and *Dawood v Minister of Home Affairs* 2000 (CCT35/99) ZACC 8; 2000 3 SA 936; 2000 8 BCLR 837[58], the importance of human dignity in the South African legal system is demonstrated.

The Republic of South Africa is one sovereign, democratic state built on the values of human dignity. [59] Human Dignity is regarded as a *Grundnorm* in various constitutions, as well as in the Constitution of the Republic of South Africa, 1996. This status and respect come from the fact that the expression 'human dignity' acts as a presupposition for value, as it's the one to whom value makes sense. Moreover, reference to human dignity can be found in many legal instruments. However, many instruments do not provide sufficient clarity on the meaning of human dignity and how it gives rise to the grounds of protection. Referring to the *Harksen v Lane* case, it is evident that shortcomings in the definition of human dignity are prevalent not only in national, but also in international instruments.[60] In the *Harksen v* Lane case, the Court asserted that "[d]ignity [is] a notoriously difficult concept…It needs precision and elaboration."[61] Thus, it is understandable that this ambiguity may result in the inconsistent application of the concept, which can result in inequality in terms of protection and respect.

3.4.3 Freedom of religion, belief, and opinion

Lastly, section 15 of the Constitution is of particular importance to the relevance and development of law, as it embodies a combination of, at least, three freedoms.[62] Firstly, section 15(1) of the Constitution guarantees freedom of conscience, religion, thought, belief, and opinion. The scope of section 15(1) is two-fold: to demand the freedom to practise one's religion without interference from the state and to demand religious equality. Because the right to freedom of religion applies to both individual and communities, does it serve as both a liberty and an equality right?

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57 *S v Mamabolo* 2001 (CCT 44/00) ZACC 17; 2001 (3) SA 409 (CC) para 41,
Where Kriegler J referred to human dignity as one of three "conjoined reciprocal and covalent values which are foundational to this country".

58 *Dawood v Minister of Home Affairs* 2000 (CCT35/99) ZACC 8; 2000 3 SA 936; 2000 8 BCLR 837 para 35.

59 Section 1*(a)* and 10 of the Constitution of the Republic of South Africa, 1996.

60 As the South African legal system is mandated to always consider foreign and international law, reference section 39(1) of the Constitution of the Republic of South Africa, 1996.

61 H*arksen v Lane* 1998 1 SA 300 (CC) para 50.

62 Constitution of the Republic of South Africa of 1996.

Secondly, section 15(2) regulates state involvement in religious observances conducted at state institutions. These observances may be conducted on an equitable basis and are optional. In *Wittmann v Deutscher Schulverien, Pretoria,* 2000 (4) SA 757 (CC), [63] the court had to decide, *inter alia*, whether the freedom of religion clause afforded parents a right to exclude a scholar from attendance at religious instruction classes and observances at school. The court found that section 14(2) of the 1993 Constitution did not apply to the relationship between the parent and the school, as the latter is not a state-aided institution or an organ of the state.

Thirdly, section 15(3) deals with issues that do not stop laws from recognising:

- *(i)* marriages concluded under any tradition, or a system of religious, personal, or family law; or
- *(ii)* systems of personal and family law under any tradition or adhered to by persons professing a particular religion.

Section 15, accordingly, highlights that religion plays a huge role in the development of law. However, it must be kept in mind that execution and enjoyment of such rights must not be "inconsistent with any provision of the BoR."[64] This means that the practice of culture, religion, and customs of any individual choice in South Africa is subjected to the limitation clause.[65] This was brought forth in the case of *Christian Education South Africa v Minister of Education,* 1999 9 BCLR 951 (SE),[66] wherein the applicant challenged the constitutionality of section 10 of the South African Schools Act.[67] Section 10 of Act 84 of 1996 dealt with the 'prohibition of corporal punishment', which provided that:

- (1) No person may administer corporal punishment at a school to a learner.
- (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.

The applicant believed this section violated their right to religious and cultural freedom, which was the free will to exercise punishment upon their children as Christians. The court determined that granting the applicant such a right would be against section 31(2) of the Constitution, thus against the e BoR.[68] The applicant's plea was unsuccessful and was granted

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63 *Wittmann v Deutscher Schulverien, Pretoria* 2000 (4) SA 757 (CC).
64 Section 30 of the Constitution of the Republic of South Africa, 1996.
65 Section 36 of the Constitution of the Republic of South Africa, 1996.
66 *Christian Education South Africa v Minister of Education* 1999 9 BCLR 951 (SE).
67 Act 84 of 1996, which dealt with the prohibition of corporal punishment in schools.
68 *Christian Education.*

leave to appeal to the Constitutional Court, which was also dismissed. Sachs J. held that: "…the interest protected by section 31 is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity."[69] Sachs J. further referred to the supremacy of the Constitution and the BoR and Section 31(2) when he asserted "that the concept of rights of members of the communities that associate based on language, culture, and religion, cannot be used to shield practices which offend the BoR."[70].

The court decision, therefore, meant that the section 10 of the South African Schools Act[71] limited the rights afforded to the parents according to the Constitution, and such limitation can only be exempted upon meeting the requirements of the constitutionality test listed under section 36(1) of the Constitution.[72]

3.5 Conclusion

The influence of the international human rights movement on the South African legal system has evoked many advantages and disadvantages. As such, the international human rights movement has assisted many African nations in gaining political independence[73] through its enactment of the South African Constitution. Additionally, the human rights movement has also been a refuge for many women and younger male children in acquiring property rights.[74] Consequently, the application of European cultural values in the South African Constitution has caused many issues. These issues arise from the superior status acquired by "Western" legal values over indigenous African norms.[75] Notably, this superiority allows indigenous African norms to be forced to imitate universalistic human rights laws and, consequently, lose their validity. In this way, many indigenous laws are transformed into customary laws and lose their native character. In examining this situation, this chapter has outlined how customary law in South Africa is constructed.[76] Its construction is aided by the massive role of South African judges aided by a BoR with founding values that dictate how indigenous laws must be recognised and developed.

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69 *Christian Education* para. 25.

70 *Christian Education* para. 26.

71 Act 84 of 1996.

72 Constitution of the Republic of South Africa, 1996.

73 Diala 2019 *Revista General de Derecho Publico Comparado.*

74 Himonga and Bosch 2000 *S. Afr. Law J.*

75 Section 7(1) of the Constitution of South Africa, 1996.

76 Through application of the provisions in the Constitution, such as section 7(1), section 9, 10, 15 and 39 of the Constitution of the Republic of South African Constitution, 1996.

CHAPTER FOUR

THE ROLE OF THE JUDICIARY AND LEGISLATURE IN THE DEVELOPMENT OF CUSTOMARY LAW

CHAPTER FOUR

4.1 Introduction

The widely accepted feeling that South Africa embodies 'coloniality' in its legal system has not received any serious rebuttal. This feeling stems from the reality that African states are still struggling with their colonial legacies, even after decades of gaining political independence.[1] Indeed, this predicament resulted from the actions of Western Europeans, who forcefully imposed their ways of life and accompanying socioeconomic changes (education, culture, economy, and legal systems) on their colonies, irrespective of whether the African people welcomed the imposition or not.[2] Some of these socioeconomic transplants were imposed during the post-World War II rule of law movement, which "brought pressure on the judicial systems of Asian and African countries to embrace Western models".[3]

Remarkably, even after colonialism, post-apartheid South Africa remains firmly in the grasp of colonialism. The enduring impact of colonialism is encouraged by South Africa inheriting colonial rule's legal systems and curricula. Modiri argues that "the value of legal education should not be indexed by how well it serves the needs and expectations of the legal profession and judiciary, but rather how it contributes to a new jurisprudence suited to the legal, social and political transformation of South Africa".[4] The legacies of colonialism have challenged South African post-apartheid lawyers, legal academics and judges to balance the new social changes brought forth by globalisation, affecting many Africans' normative behaviour. Therefore, demanding a reassessment of the status of indigenous African law,[5] as law can either

1 Diala 2021 *Int J Law Policy Family* 2.
2 Diala 2021 *Int J Law Policy Family*.
3 Diala "A butterfly that thinks itself a bird: The identity of customary courts in Nigeria" 2019 J. *Leg. Plur. Unoff. Law* 1.
4 Modiri "The crises in legal education'' 2014 *Acta med. acad*.
5 Diala 2019 *Revista General de Derecho Publico Comparado.*.

become an instrument of social transformation, social justice, social reconciliation, or it could hinder progress in this regard.[6]

This chapter considers the effects of socioeconomic changes on African people's normative behaviour, in terms of approaching the hybrid legal system of South Africa. Specifically, it examines the role of the judiciary and the legislature in developing customary law, as dictated by the Constitution of the Republic of South Africa, 1996.

4.2 Understanding the effects of socioeconomic changes

Obiora, as previously referred to, explained that law is the product of human needs and aspiration, which emerges in a social context characterised by dynamism: the ability to respond to changing needs and situations.[7] Indigenous African norms are no different from the characteristics outlined by Obiora. This comparison follows from the processual character embodied by indigenous norms, which enabled them to embrace Western socioeconomic changes of globalisation to the point of near extinction.[8] These changes resulted in the loss of (agrarian) livelihoods to individualism, taxation, urbanisation, commercialisation, new religion (Christianity), Western education, and suspicion of colonisers' motives.[9]

Therefore, the implication of globalisation has been deemed not different from the exploitative nature of colonialism since both are driven by economics, who consciously or unconsciously impose cultural standards, which intend to be exploitative in varying degrees.[10] For example, Jeffrey explained that if globalisation seeks to "replace domestic economic life with an economy that is heavily influenced or controlled from overseas, then… globalisation can also be seen as a surrender of power to the corporations, or a means of keeping poorer nations in their place".[11] Indeed, such effects can be demonstrated in South Africa, as it is still struggling with its colonial legacies even after decades of gaining political independence. This is most

6 van Marle "What does changing the world entail? Law, Critique and Legal Education in the time of post-Apartheid" 2012 *SALJ* 211.

7 Obiora "Reconsidering African customary law" 1993 *Leg. Stud. Forum.*

8 Diala 2021 *Int J Law Policy Family*.

9 Diala 2021 *Int J Law Policy Family*.

10 Diala 2019 *Revista General de Derecho Publico Comparado.*

11 Jeffery 2002 *The Guardian*.

evident in the South African legal system, displayed by the massive role the judiciary and legislature play in the development of African customary law.[12]

4.3 Deep legal pluralism versus Bill of Rights

Undoubtedly, the supremacy of the Constitution of the Republic of South Africa is outlined in section 2 which provides that, "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".[13] However, the Constitution's demand for judges to interpret indigenous law following the BoR undermines the realisation of legal pluralism in South Africa.[14] The powers conferred upon judges are outlined in section 165 of the Constitution, which states that:

> "(1) The judiciary authority of the Republic is vested in the courts.
>
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour, or prejudice."

The execution of such duty is emphasised in section 39(2) of the Constitution towards the realisation of judicial engagement, that:

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

This section exists parallel to section 1(1) of the Law of Evidence Amendment Act titled 'Judicial notice of law of the foreign state and indigenous law'. It states that:

> "Any court may take judicial notice of the law of a foreign state and indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice."[15]

"[A]scertained readily and with sufficient certainty" based on indigenous law is not realistic because the latter are pre-colonial norms that emerged in an agrarian setting, and such dissonance in their origin and values will clash with the required criteria of section 1(1) of the Law of Evidence Amendment Act (also known as the repugnancy clause).[16] Indigenous law originates from welfarist communities, while state laws advocate for individualistic modern

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12 Section 39(2) of the South African Constitution, 1996.

13 Constitution of the Republic of South Africa, 1996.

14 Diala 2019 *Revista General de Derecho Publico Comparado.*

15 Act 45 of 1988, which repealed section 54A (1) of the Magistrate's Court Act 32 of 1988 which extended the application of customary law by any court where people from indigenous communities were involved.

16 Act 45 of 1988.

settings.[17] As a result, interpretation regarding these two types of laws tends to be problematic due to the observed confused legal identity South Africans portray concerning the adaptation of socioeconomic changes in their communities.[18] Importantly, customary law depicts the relevant values the community considers,[19] so the community becomes the foundation of its own system of customary law, which is important when developing customary law. In recognition of this crisis, the South African Constitution later provided for a new framework for legislative interpretation which was highlighted in the case of *Nortje v Attorney-General* 1995 2 SA 460 (C) 471 that:

- "... it is no doubt correct to say that the constraints imposed by the traditional rules of interpreting statutes result in too restrictive and 'legalistic' approach to the legislation of this kind and will frustrate both contemporary and future Courts' efforts to accommodate changing social dynamics over the years."[20]

The above-outlined explanation in *Nortje* highlights the new criteria instituted for legislative interpretation, that interpretation must always be in line with the ever-changing societal dynamics (which generally involve new values). The newly proposed interpretation, however, begs the question of who and whose values are to be considered and applied. Moreover, from what viewpoint are these values being assessed?[21] The values instructed to be applied and promoted are those transplanted from Western European origins (BoR). Furthermore, these values are evaluated by judges and legislators whose law teachers treat their subjects as if colonialism and apartheid had not taken place, as if the current dispensation did not call for new concepts of governance, ethics, and legality, and as though the subjects they teach and the research they do is somehow impervious to the imperatives of transformation and social justice.[22]

4.4 The role of traditional leaders

According to section 1 of the Traditional Leadership and Governance Framework Act,[23] Traditional leader means "any person who, in terms of customary law of the traditional

[17] Eweluka 2002 *HRQ*; *Bhe v Khayelitsha* para 109, portrayed the court resist to develop the rule of male primogeniture, due to lack of knowledge considering living customary law.

[18] Berman 'Towards a Jurisprudence of Hybridity' 2010 *ULR*.

[19] *S v Acheson* 1991 2 SA 805 (Nm) 831A-B.

[20] *Nortje v Attorney- General* 1995 2 SA 460 (C) 471.

[21] Rautenbach 2010 *J. Leg. Plur. Unoff. Law.* 153.

[22] Modiri "The crises in legal education'' 2014 *Acta med. acad*.

[23] 41 of 2003.

community concerned, holds a traditional leadership position, and is recognised in terms of this Act." The role traditional leaders play in modern democracy has been argued to be suspicious due to the country's colonial history in which traditional leaders were coerced into becoming the extension of their colonial administrations to turn their people against them.[24] Although, some traditional leaders gave in, others resisted. This is evident in today's continued display of dissonance between traditionalists and change agents, and the questioned legal curriculum still present in South African universities.[25] The recognition of traditional leaders is outlined in section 211 of the Constitution of the Republic of South Africa[26] while section 8 of the Traditional Leadership and Governance Framework Act[27] outlines traditional leadership positions, which are:

(a) Kingship and queenship;

(b) Principal traditional leadership;

(c) Senior traditional leadership, and

(d) Headmanship.

However, the Constitution and other policy documents (such as the Traditional Leadership and Governance Framework Act[28]) tend to be silent about the specific role traditional leaders are deemed to engage in regarding their capacity. For example, section 212 of the Constitution states that:

- "(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law-
- *(a)* national or provincial legislation may provide for the establishment of houses of traditional leaders; and
- *(b)* national legislation may establish a council of traditional leaders."

The lack of obligation favoured upon national legislation to provide for the role of traditional leaders may seem to explain the silence regarding the specific role traditional leaders are deemed to engage in. This reasoning is emphasised by the word "may" outlined in section 212

[24] Koenane "The role and significance of traditional leadership in the governance of modern democratic South Africa" 2018 *Afr. Rev.*

[25] Himonga and Bosch 2000 *S. Afr. Law; Diala 2019 Potchefstroom Electron. Law J.*

[26] Constitution of the Republic of South Africa, 1996.

[27] 41 of 2003.

[28] 41 of 2003, section 19 of the Act states that: "A traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation".

of the Constitution, which is the supreme law of the Republic of South Africa.[29] Indeed, if there is no obligation imposed to be fulfilled, but rather a choice on something, the urgency to implement it will not be taken seriously. Section 212 of the Constitution highlights the inferior status customary law development is subjected to in comparison to the superior status state law is given. Certainly, if national legislation fails to provide for the necessary institutions for traditional leaders, such as:

a) The establishment of houses of traditional leaders, and to
b) Establish a council of traditional leaders,
c) Lastly the specific role traditional leaders are deemed to engage in their capacity.

The litigation for the realisation of rights concerning indigenous law will always be left to the judiciary, which has played a somewhat debatable role in developing customary law. Accordingly, this idea is portrayed by the courts' lack of interaction with customary law, as the courts fail to apply customary law; but merely interpret it. The mere interpretation is demonstrated through the adversarial nature of judicial proceedings, where courts ultimately adopt a version of customary law pleaded by the litigants.[30] Additionally, the Constitution of the Republic of South Africa in section 39(2), imposes a duty on the judiciary to "promote the spirit, purport, and objects of the BoR, unlike section 212 relating to the role of traditional leaders where such obligation is invisible.[31]

The consequences of this poor recognition of traditional leaders in African communities illuminates the normative struggle faced by many Africans, who are generally compelled to adapt their indigenous practices to suit modern realities of western human rights, economic systems, and globalisation, generally.[32] Accordingly, such coercion to adapt affects many Africans, in matters relating to their matrimonial, succession and land issues, which are always deemed to be discriminatory against women and young children.[33]

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[29] Section 2 of the Constitution of the Republic of South Africa, 1996.

[30] Diala 2021 *Int J Law Policy Family*; *Bhe v Khayelitsha* para 109, portrayed the court resist to develop the rule of male primogeniture, due to lack of knowledge considering living customary law.

[31] Constitution of the Republic of South Africa, 1996.

[32] Diala 2021 *Int J Law Policy Family*.

[33] Section 9(4)*(3)* of the Constitution of the Republic of South Africa, 1996; states that "national legislation must be enacted to prevent or prohibit unfair discrimination".

4.5 African customary law of succession

For historical purposes, it is evident through judicial precedent that colonisation has had a considerable impact on the existence and development of indigenous African law.[34] The South African legal system is a mixture of laws characterised as a hybrid legal system. The system is a mixture of Roman-Dutch civilian law, English common law, and indigenous law referred to as customary law.[35] After decades of pretending as though indigenous law did not exist within the South African legal system, its recognition came forth through the development of the Constitution of Republic of South Africa.[36] However, in order for indigenous law to be recognised as valid, a number of prerequisites had to be satisfied.[37] Recognition of prerequisites is evident in the case of *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC),[38] where the Court stated that:

> "The question whether a court, when considering the common law applicable at a time before both the interim Constitution and the Constitution came into force may develop the common law in the light of provisions of the Constitution as provided for by section 39(2) of the Constitution"[39]

The Constitution acknowledges indigenous law as an independent norm source within the South African legal system. However, such recognition is subject to the Constitution and must be interpreted according to the values of the Constitution of the Republic of South Africa.[40] Additionally, indigenous law validity does not only derive from common law, but like common law, it receives similar status of being put through to any legislation, consistent with the Constitution.[41]

Customary law of succession, particularly, has received great judicial scrutiny because of its distinctive patriarchal characteristics, such as the male primogeniture rule, which clashed with particular values of the Constitution.[42] The following is an explanation of the male primogeniture rule, the rule only permits male issues to inherit the property of the deceased

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34 Rautenbach "South African common and Customary law of Intestate Succession: A question of harmonisation, integration or abolition" 2008 *J. comp. law*.

35 Rautenbach 2010 *J. Leg. Plur. Unoff. Law* 144.

36 Constitution of the Republic of South Africa, 1996.

37 Section 30, states that, "no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights". Also, section 39(2) and section 211(3) of the Constitution of the Republic of South Africa, 1996.

38 *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) para. 51.

39 *Alexkor Ltd v Richtersveld Community* para. 38.

40 Section 39(2) of the Constitution of the Republic of South Africa, 1996.

41 Section 9(4)*(3)* of the Constitution of the Republic of South Africa, 1996.

42 Section 9 and section 10 of the Constitution of the Republic of South Africa, 1996.

who dies intestate.[43] This is done on the basis that, upon the death of the deceased, his assets get transferred to his eldest male offspring.[44] Therefore, if the eldest male descendant of the deceased has passed away, leaving no male issue, the next son from his lineage or the eldest male descendant inherits, and so on through males respectively.[45] The rule of male primogeniture meant that only male descendants were allowed to inherit according to the general rules of African customary law.[46] The rules were straightforward: No female child or women were allowed to inherit property or become the family head. This practice is emphasised through the definition of male primogeniture that "his estate devolves", meaning that women were not even regarded at the same standard as their male counterparts to have the capability to own assets to devolve upon their death. Therefore, to keep this rule in practice, females were precluded from being next in line to inherit property purely because of their gender.

However, it is essential to remember that the male primogeniture rule was not entirely designed to discriminate and exclude women. It was done with the understanding that if female children or women are allowed to inherit the deceased assets, the possibility of maintaining the family's lineage and safeguarding the assets of the deceased for future generations will be slim. This reasoning was founded on the common understanding that male heirs had a better foundation in carrying the commitment of maintenance duty, as they would not marry into a different family.[47] Additionally, to further ensure that the practice of male primogeniture rule remained, other measures were used to ensure the provision of a successor, such as the practice of *ukungena* (which means to enter) was considered, among African people. Section 1(1) of the KwaZulu-Natal Codes of Zulu Law[48] defines the *ukungena* custom as:

> "[A] union with a widow undertaken on behalf of her deceased husband by his full or half-brother or other paternal male relative for the purpose (i) in the event of her having no male issue by the deceased

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43 Omotola "Primogeniture and illegitimacy in African customary law: The battle for survival of culture" 2004-2005 *Indiana int. comp. law rev*. 116.

44 *Mgoza v Mgoza* 1967 2 SA 436 (A) at 440D-E; *Matambo v Matambo* 1969 3 SA 717 (A) at 719A-B.

45 *Sonti v Sonti* 1929 NAC (C&O) 23 at 24.

46 Section 23 (1)-(3) of the Black Administration Act 38 of 1927.

47 For example, in *Mthembu v Letsela* 1997 2 SA 936 (T). Le Roux J emphasized that "the devolution of the deceased's property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom he was married by customary law and of the children procreated under that system and belonging to a particular house. … I find it difficult to equate this form of differentiation between men and women with the concept of "unfair discrimination" as used in section 8 of the [1993] Constitution (945-947). He further went on to compare this kind of differentiation between men and women to other methods of differentiation, such as separate toilet facilities.

48 Proclamation R151 of 1987.

husband of raising an heir to inherit the property or property rights attaching to the house of such widow…"

This custom is conducted when a married man dies before he was able to conceive offspring with his spouse. This custom is performed only if the wife is still of a considerable age to reproduce. One of the wife's in-laws (usually the younger brothers of the deceased) will be appointed to enter a relationship with the wife to birth children for the deceased.[49] The *ukungena* custom is performed under the widow's approval, and in most cases, the widow will choose which male shall enter her. She also has the right to terminate the marriage if she regrets her decision.[50] Alternatively, if the deceased had no brothers to perform the *ukungena* custom, the institution of an illegitimate son as successor was considered. This custom was instituted when the deceased had no legitimate male children in his household, but had a successor with a spinster (*dikazi)* outside of his marriage.[51] The appointment of an illegitimate child was considered only if the deceased had paid the necessary damages towards the mother while he was still alive.[52] Additionally, this process could be instituted by the head of the house while he is still alive if he only has female children with his wife, and could follow up by marrying the mother of the illegitimate son, which therefore would legitimize the son and entitle him to the usual rights of succession based on customary law.[53]

The abovementioned efforts were made with the understanding that the successor in customary law not only had the privilege of benefiting from the deceased estate, but also had to undertake the duties which the deceased performed while alive.[54] The duties ranged from:

a) taking the position of the deceased,

b) looking after the family finances,

c) preparation of marriage pre-requisites for both male and female children,[55]

d) maintaining the needs of the widow and her offspring, and

e) responsibility for any violation committed by family members.[56]

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49 Preston-Whyte "Kinship and marriage*"* In Hammond-Tooke, WD Ed. *The bantu-speaking peoples of Southern Africa* (1974) 190.

50 Schapera *Married life in an African tribe* (1939); Section 56(3) of the KwaZulu-Natal Codes of Zulu law.

51 *Dikazi* "is a Xhosa term used to refer to an unmarried woman who has given birth to a child" Stats SA, 2022

52 *Mkanzela v Rona* 1950 1 NAC (S) 219 221.

53 Seymour SM *Bantu law in South Africa* (1970) 262.

54 *Mgoza and Another v Mgoza* 1967 2 SA 436 (AD) 440D-G.

55 Rautenbach et al., "Law of succession and inheritance" In Bekker JC, Labuschagne JMT and Voster LP. Eds. *Introduction to legal pluralism in South Africa part 1 Customary law* (2002) 113.

56 Bekker *Seymour's customary law in Southern Africa* (1989) 297-298.

However, due to the influence of socioeconomic changes, communities started to change, and Africans acquired a remarkable taste for foreign culture, evident in their food, fashion, architecture, and regulatory behaviour.[57] The new changes brought new ways of life as socioeconomic changes advocated for individualism, while pre-colonial communities in which these customs were performed functioned in a remarkable welfarist and conservationist philosophies.[58] As a result, this raised new concerns about the conditions governing the successor under the customary law of succession, such as what occurs if socioeconomic developments impact the successor's normative behaviour and he chooses to forego the obligation of maintenance: Will the dependents be able to compel him, based on his customary duty to support, or will they have a common law claim for maintenance against the estate of the deceased?[59]

Driven by such questions and consideration of the changing communities, influenced by new characteristics, such as individualism, many Africans began to challenge the constitutionality of the male primogeniture rule under the new constitutional grounds provided by the Constitution of the Republic of South Africa, 1996. The manner the Black Administration Act[60] contributed to the transformation of customary law into a "fixed code of law" influenced recent thoughts of communities. The Act neglected the processual character of customary law, which allowed it to develop and evolve as the needs of the indigenous communities changed. As a result, the following cases indicated the modern-day changes to certain branches of customary law (succession).

4.5.1 Bhe v Khayelitsha.

The first case that the Court dealt with concerned Nontupheko Marena Bhe (the third applicant), who cohabited with the deceased, as married couple for twelve years. The couple had two minor children being female, Nonkululeko and Anelisa. Their mother applied on their behalf since they were still minor children. During their marriage, the couple managed to acquire immovable property, with the aid of the state housing subsidy. The deceased,

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57 Diala 2021 *Int J Law Policy Family*.

58 Opoku "Indigenous Economic Institutions and Ecological Knowledge: A Ghanaian Case Study" 1999 *Environmentalist* 217-227.

59 Rautenbach 2008 *J. comp. law*.

60 Act 38 of 1927.

unfortunately, died without leaving a will, but Nontupheko (the third applicant) carried on living with her minor children on the property on which the deceased had intended to erect property. The deceased's father claimed that, in terms of African customary law, he was the rightful intestate succession heir. Therefore, he believed that he was entitled to the property, which he intended to sell, to carry the funeral expenses. Eventually, when the applicants discovered the intentions of deceased's father, they immediately acquired an interdict *pendente lite*, restricting the respondent from selling the property, pending the outcome of their urgent application.

Additionally, the third applicant further went on to apply that the principle of male primogeniture rule was inconsistent with the provisions of the Constitution[61] to enable her daughters to inherit from their father's estate. Therefore, the Court referred to various pieces of legislation, such as the Codes of Zulu Law and the Black Administration Act, which regulate interstate succession amongst black people. Through a brief discussion regarding the various pieces of legislation concerning the customary law of succession, the Court found out that family members could only own property through the family head.

The Court stated that to determine the legitimacy of the applicants' claim, the Court needed to determine whether lobola was paid. The third applicant said lobola was not paid. In contrast the second respondent (the deceased's father) said lobola was paid, making him the grandchildren's guardian and custodian. Reference was made to the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[62] the court found the first two applicants to be legitimate. The court further analysed the constitutionality of the male primogeniture rule through sections 2 and 9 of the Constitution[63] considering precedent from the same or similar matter previously raised in the courts.

As a result, the court deemed that sections 23(10)(a), (c) and (e) of the Black Administration Act is unconstitutional and invalid and that regulation 2(e) of the Regulations of the

[61] Section 9 and 10 of the Constitution of the Republic of South Africa, 1996.
[62] 1984 (3) SA 623 (A).
[63] Constitution of the Republic of South Africa, 1996.

Administration and Distribution of the Estates of Deceased Blacks, published under Government Gazette 10601, dated 6 February 1987, is consequently also invalid.[64]

Additionally, the court declared that section 1(4)(b) of the Intestate Succession Act 81 of 1987 is unconstitutional and invalid, insofar as it excludes from the application of section 1 any estate or part of an estate in respect of which section 23 of the Black Administration Act 38 of 1927 applies.[65] The court ruled that section 1 of the Intestate Succession Act 81 of 1987 governs the division of intestate black estates until the aforementioned flaws are rectified by a competent Legislature.[66] The only reason why the applicants could not inherit from their father's estate was because that they were black and female. This *per se* was discrimination on the grounds of race and gender. It was prima facie unfair and, therefore, offended against the provisions of sections 9(1) and (3) of the Constitution.[67] The court was thus bound to declare such law unconstitutional and invalid.[68]

The court concluded that African females, irrespective of their age or social status, could inherit from the intestate estate of their parents in the same manner that any male person would. This conclusion precludes instances where differentiation on gender lines is necessary for ritual purposes, provided that such differentiation does not prejudice any female descendant.[69]

4.5.2 The Shibi v Sithole case

The case of *Shibi v Sithole* followed a similar standing to that of *Bhe v Khayelitsha*. After being denied the right to inherit her deceased brother's wealth, Ms. Charlotte Shibi (the deceased brother's sister) petitioned the court to declare the male primogeniture rule invalid. Her brother, Daniel Solomon Sithole passed away intestate, without a spouse or children. His only sibling was his sister Charlotte. Applying section 23(10) of the Black Administration Act, a male, in this case, his cousin, was eligible to inherit the deceased's intestate estate. Accordingly, Mantabeni Sithole (first respondent) was made the executor of the deceased intestate estate.

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64 *Bhe v Khayelitsha* 555C/D -D/E.
65 *Bhe v Khayelitsha* 2005 (1) BCLR 1 (CC), at 555E.
66 *Bhe v Khayelitsha* 2005 (1) BCLR 1 (CC), at 555E/F.
67 Constitution of the Republic of South Africa, 1996.
68 *Bhe v Khayelitsha* 2005 (1) BCLR 1 (CC), at 555E – F/G.
69 *Bhe v Khayelitsha* 2005 (1) BCLR 1 (CC), at 55A – B.

However, due to his bad decisions in squandering the estate's capital, he was later taken off from appointment and the next in line was Jerry Sithole (second respondent). The deceased's sister opposed the decision of the magistrate's court to appoint only male cousins as heirs of the estate. Additionally, she sought compensation from the previous respondents together with the Minister for the loss incurred to the estate.

The court followed the reasons alluded to in the case of *Bhe v Khayelitsha* and rejected the magistrate's decision, declaring the applicant as the successor. This afforded her recompense against the previous respondents.

In both the *Bhe v Khayelitsha* and *Shibi v Sithole* cases, leave to appeal to the Constitutional Court was obtained. The appellants opposed the reasons given by Cape High Court and the Pretoria High court, respectively, and sought confirmation of the validity of these obtained decisions. Additionally, the South African Human Rights Commission (SAHRC)[70] and the Women's Legal Centre Trust[71] brought forth an application for direct access to the Constitutional Court to conduct public interest litigation to advocate for the advancement of the rights of women. The cases were heard jointly in the Constitutional Court. The order sought for was to declare section 23 of the Black Administration Act, or sections 23(1), (2) and (6), to be struck down because they were contrary to the provisions of sections 9, 10 and 28 of the Constitution which is the supreme law.[72] After considering various case law and international instruments, to which South Africa is party too, regarding the protection of the rights conferred under sections 9, 10 and 28 of the Constitution., the Court concluded that

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[70] Established under chapter 9 of the Constitution of the Republic of South, 1996 as a state institution strengthening constitutional democracy in the Republic. The functions of South African Human Rights Commission are:

"(1) *(a)* promoting respect for human rights and a culture of human rights,

(b) promoting the protection, development, and attainment of human rights; and

(c) monitoring and assessing the observance of human rights in the Republic.

(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power –

(a) to investigate and to report on the observance of human rights,

(b) to take steps to secure appropriate redress where human rights have been violated,

(c) to carry out research; and

(d) to educate. (Section 184(1) and (2) of the Constitution of the Republic of South Africa, 1996)."

[71] Which is not founded within the state institution, but its primary focus: "is to advance and protect the human right of all women in South Africa, particularly black women who suffer many intersecting forms of disadvantage" (*Bhe v Khayelitsha* para 29).

[72] Constitution of the Republic of South Africa, 1996.

section 23 was unconstitutional. The Court laid down that section 23 and the regulations promulgated thereunder were invalid, regarding its discriminatory provisions which prohibited women, girls, and younger male children from inheriting.[73]

The Court needed to decide whether Section 23 and its rules could withstand the justification inquiry under the terms of Section 36's limitation clause in order to defend its conclusion.[74] Since the modern community has altered due to the adaption of socioeconomic changes, the response to the latter question was negative. Thus, the societal change created dissonance in implementing the rules of male primogeniture. In current communities, heirs to the said intestate estates now reside outside their family households in pursuit of their dreams. Many have relocated to other cities for work-related purposes and established their own families.

Sections 9 and 10 of the Constitution were enacted to ensure that women were treated equally with their male counterparts.[75] Therefore, the Court concluded that section 23 of the Black Administration Act and section 1(4)(b) of the Intestate Succession Act were also invalid and unconstitutional.[76] As a result, it revoked the orders of the Cape High Court in the *Bhe v Khayelitsha* case and the Pretoria High Court in the *Shibi v Sithole* case, therefore, declaring that Nonkululeko and Anelisa Bhe and Charlotte Shibi to be the sole heirs of the respective deceased estates.

However, such decisions created dissonance in the approaches taken to settle the dispute. The decision of the minority, which was delivered by Ngcobo J, differed from that of the majority. Although he agreed with every order taken by the majority, Ngcobo J believed that rather than invalidating the rule of primogeniture, jurists should have developed customary law in line with the rights in the BoR as instructed in section 39(2) of the Constitution.[77] They should not have just adapted a rule central to African customary law as invalid just to meet the requirements of constitutional principles, such as equality and dignity. [78]

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73 *Bhe v Khayelitsha* 2005 (1) BCLR 1 (CC) para 88.
74 Section 36 of the Constitution of the Republic of South Africa, 1996.
75 Section 9 of the Constitution of the Republic of South Africa, 1996.
76 *Bhe v Khayelitsha* para 144.
77 Constitution of the Republic of South Africa, 1996.
78 Van Niekerk "Succession, living indigenous law and Ubuntu in the Constitutional Court" 2005 *Obiter* 486.

The Courts decision to do away with the rule of male primogeniture, instead of developing it in accordance with section 39(2) of the Constitution stamped the ideology that customary law is inferior to state law, in the South African legal system. This issue is always proven whenever individuals seek resources for violations of their rights, Western legal values always prevail, which is exactly what happened in the cases of *Bhe v Khayelitsha, Shibi v Sithole* and *Mthembu v Letsela* 1997 2 SA 936 (T), 1998 2 SA 675 (T), 2000 3 SA 867 (SCA).[79]

4.5.3 Mthembu v Letsela

The *Mthembu v Letsela* case also dealt with the constitutionality of customary law rule of succession, which was based on the primogeniture rule prohibiting mainly women and younger male children.[80] Similar to the majority decision in *Bhe v Khayelitsha*, the Supreme Court refused to grant an application that the Court should develop customary law in line with the Interim Constitution, to ensure no differentiation between men and women. The judge, however, observed as follows:[81] "Any development of the rule will be better left to the Legislature after a full process of investigation and consultation, such as is currently being undertaken by the Law Commission."

4.6 Conclusion

The above discussion highlights the dire position faced by African customary law in finding its equal position in the South African legal system. The colonial imposition of European laws and their accompanying socioeconomic changes brought pressure on African judicial systems to embrace Western models, consequently creating a conflict of laws among traditionalists and change agents.[82] These conflicts of laws are perpetuated through Africans' adaptation to socioeconomic changes in their communities.[83] They created dissonance in how communities view their customs and state officials see them, thus encouraging the increase of legal recourse for violations of their rights. However, changes in indigenous laws are facilitated by judges,

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79 *Mthembu v Letsela* 1997 2 SA 936 (T), 1998 2 SA 675 (T), 2000 3 SA 867 (SCA).

80 *Nwamitwa v Phillia* 2005 (3) SA 536 (T), the Court, however, stated that a Thonga woman could not succeed, as traditional leader as it was not in accordance with the custom of the specific community. Therefore, it was found that such practice was not in conflict with section 36 of the Constitution of the Republic of South Africa, 1996.

81 *Nwamitwa v Phillia* para 40.

82 Diala 2019 J. *Leg. Plur. Unoff. Law* 1.

83 Diala 2021 *Int J Law Policy Family*.

who are also subjects of social change in their communities.[84] This is evident in the lack of engagement regarding the development of indigenous law, which is present in the continued adaptation of customary law pleaded by the litigants.[85] An example, is the case of *Bhe v Khayelitsha,*[86] where a central rule (male primogeniture rule) of African customary law of succession was invalidated instead of being adapted to suit the constitutional principles of equality and dignity.[87] The decisions reached in the abovementioned case law neglected the processual character of indigenous laws—as a result, encouraging their transformation into customary law. This transformation is the subject of the next chapter.

[84] Diala 2019 *Potchefstroom Electron. Law J.*
[85] Constitution of the Republic of South Africa, 1996.
[86] *Bhe v Khayelitsha*; *Mthembu v Letsela*.
[87] van Niekerk 2005 *Obiter* 486.

CHAPTER FIVE

5.1 Introduction

In efforts to understand the general classification of customary law, it must be kept in mind that customary law's encounter with state law created a divergence between the customary law recognised in the courts and the customary law observed by the people.[1] Driven by scholars, the distinction between "living" and "official" customary law has become common.[2] The court in *Alexkor Ltd v Richtersveld Community* [3] stated that:

> "…it is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by it its norms change their patterns of life … In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practiced, and passed on from generation to generation. It is a system of law with its own values and norms. Throughout history, it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution."

The above explanation stated by the court in *Alexkor Ltd v Richtersveld Community*, is fundamental to be kept in mind throughout this entire chapter. Accordingly, this chapter will outline the historical background for the recognised distinction between living and official customary law. Furthermore, it will analyse the privileges held by the judiciary in choosing whether to develop customary law or not, and the effects of such privileges on customary law status.

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1 Diala 2017 *J. Leg. Plur. Unoff. Law* 146.
Lehnert "The role of the courts in the conflict between African customary law and human rights" 2005 S. Afr. J. Hum. Rights 246.

2 Bennett *Customary law in South Africa* (2004) 29.

3 *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) paras 52-54.

5.2 The emergence of customary law's categorisation

The question whether indigenous law remained unchanged after encountering Colonialism has been explored throughout this thesis.[4] Indeed, the pattern of colonial rule and legal transplants disturbed the normative monopoly enjoyed by indigenous law, through the introduction of radical socioeconomic changes.[5] Colonialism disrupted the normative adaptation of indigenous laws whose pace was in tune with the natural pace of social changes in pre-colonial society.[6] As such, people began to adapt their behaviour to the socioeconomic changes brought forth by colonial rule, thereby encouraging the transition of indigenous laws into customary laws.[7] This transition was encouraged by the remarkable acquired taste of foreign culture, which became evident in Africans fashion, food, architecture, and regulatory behaviour.[8] Imbibed with socioeconomic changes, many Africans were easily encouraged with an individualistic human rights mantra and, correspondingly, deemphasised the communitarian values that characterised indigenous law, thereby establishing customary law.[9]

However, the creation of customary law was developed from a legal positivist mindset (pure theory of law), which distrusts oral narratives containing the bulk of indigenous law.[10] Thus, such dissonance between state law and indigenous law resulted in the categorisation of "official" and "living" customary law, in accommodation of transformative constitutionalism.[11] Importantly, Langa DCJ stated that "The problem with development by the courts on a case by case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there may well be different solutions to similar problems."[12]

[4] Section 1(1) of the Law of Evidence Amendment Act 45 of 1988, which correlates with section 39(2) of the Constitution of the Republic of South Africa, 1996; Morse & Woodman *Indigenous law and the state* (1988) 8.

[5] AC Diala and B Kangwa 'Rethinking the interface between customary law and constitutionalism in sub-Saharan Africa' (2019) 52(2) *De Jure* 189.

[6] Diala 2017 *J. Leg. Plur. Unoff. Law* 145.

[7] AC Diala and B Kangwa 'Rethinking the interface between customary law and constitutionalism in sub-Saharan Africa' (2019) 52(2) *De Jure* 190.

[8]Diala 2021 *Int J Law Policy Family* 9.

[9] Diala 2017 *J. Leg. Plur. Unoff. Law* 145.

[10] Diala 2021 *Int J Law Policy Family*.

[11] Klare "Legal culture and transformative constitutionalism" 1998 *South African Journal on Human Rights* 146, 150.

[12] *Bhe v Khayelitsha* para 112.

The above statement explains the struggle experienced by the judiciary and legislature in creating harmonisation to reconcile the imposed European laws with indigenous laws.[13] This difficulty is influenced by the confusing legal identity many Africans found themselves in due to unique perceptions and the different pace adopted to embrace socioeconomic changes. As Diala explained, the legal identity of many Africans can be grouped into three:

> "(a) Firstly, Africans who have fully embraced socioeconomic changes,
>
> (b) Secondly, Africans who are still traditional and/or nationalistic, still practice some indigenous laws, many of which are out of tune with modern conditions, and
>
> (c) Thirdly, Africans who recognise the irrevocable effects of globalisations. Conscious of their altered identity, they promote law reforms to reconcile indigenous law with modern ideas of equality and human dignity."[14]

Notably, the different pace at which people react to normative adaptations of socioeconomic changes demonstrates the categorisation of customary law into "living" and "official" versions.[15] As noted, people become sceptical of the authenticity of official customary law based on the knowledge they have regarding the dynamic nature of living customary law.[16]

5.2.1 Living customary law

Living customary law is defined by scholars as "the law that is observed by communities".[17] The unwritten rule is ingrained in the community's culture and traditions and passed down from one generation to the next.[18] Importantly, living customary law develops as the conditions of the society change.[19] As Hinz noted, the "customary law recorded in the textbooks, codes, or court cases, was not necessarily the customary law practised by the people."[20] Although, the distinction between "official" and "living" customary law is slim, the judiciary perpetuates

[13] *Bhe v Khayelitsha* para 109, where most of the court refused to "develop the rule of male primogeniture on the basis that it did not have sufficient evidence of 'living' customary law to enable it to do so"; Lehnert S. Afr J. Hum. Rights 246.

[14] Diala 2021 *Int J Law Policy Family*.

[15] *Mabena v Letsoalo* 1998 2 SA 1068 (T).

[16] In the case of *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC), Mogoro J stated that "official customary law has degenerated into a vitrified set of norms alienated from its roots in the community".

[17] Lehnert S. Afr J. Hum. Rights 246; *Mabena v Letsoalo*.

[18] Du Plessis *Introduction to Law* (1999) 67.

[19] *Alexkor v Richtersveld Community* 2004 5 SA 460 (CC) paras 52-54.

[20] Hinz and Patemann (Eds.) *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* (2006) 274.

the distinction through the realisation of the prolonged process which will be needed in order to develop customary law.[21] As Lange DCJ said:

"…the problem with development by the courts on a case-to-case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged."[22]

As a result, the living version of customary law is regarded as the version which regulates individuals in their daily lives, therefore, being aligned with the changing conditions.[23] However, though the judiciary acknowledges this predicament, customary law is not given an exception in section 39(2) of the Constitution.[24] For example, in *Mabena v Letsoalo*[25] the appellant (father of the deceased) appealed against the formal inquiry and findings of the magistrate that customary law marriage had existed between his deceased son and the respondent. The respondent and her husband (the deceased) had married following the rules of living customary marriage law. According to the traditional requirements of customary marriage, consent of both family groups, and the couple was required (for representation purposes).

However, driven by socioeconomic changes such as market economy, certain individuals changed the contested custom, to the point where consent required from both families for *lobola* negotiations was substituted, allowing the family head to negotiate for payment of *lobola* upon its receival.[26] In this matter, the fathers of the couple did not give their consent. As a result, the respondent's mother, who is "the family head" because her husband deserted the family, negotiated, and accepted the *lobola* of her daughter. The court held that "there is no reason to hold an independent adult man not entitled to negotiate for the payment of *lobola* in respect of his chosen bride, nor is there any reason to hold that such a man needs the consent of his parents to marry."[27] Additionally, "the rule that a woman who is the head of her family may not negotiate for and receive *lobola* is not repugnant to the customary law of marriage".[28]

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21 *Bhe v Khayelitsha* para 112.

22 *Bhe v Khayelitsha* para 112.

23 *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T).

24 Constitution of the Republic of South Africa, 1996.

25 *Mabena v Letsoalo*.

26 See Bekker JC *Seymour's customary law in southern Africa* (1989) 70.

27 Africanlii.Case: Mabena v Letsoalo 1998 (2) SA 1068 (T) https//Case: Mabena v Letsoalo 1998 (2) SA 1068 (T) |African Legal Information Institute (africanlii.org) (accessed 20 April 2022).

28 Africanlii.Case: Mabena v Letsoalo 1998 (2) SA 1068 (T) https//Case: Mabena v Letsoalo 1998 (2) SA 1068 (T) |African Legal Information Institute (africanlii.org) (accessed 20 April 2022).

5.2.2 Official Customary Law

Official customary law is defined as the version "…contained in legislation and precedents".[29] Sanders defines official customary law as the product of colonial policies of interpreting indigenous African law, re-inventing them, and subordinating them to imposed European laws and values.[30] According to Ndima, "the official version of customary law depends on alien values for validity".[31] Thus, it generally reflects state interests and is part of state law.

South African judges are of the opinion that the Constitution only recognises 'living' customary law, thereby implying that judgments are primarily founded on living customary law.[32] The opinion is based on the idea that living customary law is often deemed discriminatory against women, girls, and young male children.[33] Nonetheless, as Bennet stated,

> "we should not make a clear-cut distinction between official and living law because whenever community practices are recorded for public consumption, fieldwork or judicial inquiry, they begin a process of transformation into the official code."[34]

This process is encouraged by the decision in *Bhe* and *Alexkor v Richtersveld Community*,[35] when the Court mentioned that customary law must adhere to the Constitution and should be treated equally, as a recognised source of law in South Africa. Furthermore, the Court in *Shilubana v Nwamitwa* went further to state that:

> "Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to the Constitution and cannot be accepted."[36]

The above explanations display how courts, generally, justify their marginalisation of the rules of customary law (living customary law). This is because where the rules are repugnant to

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29 Lehnert S. Afr J. Hum. Rights 246.

30 Sanders 2017 *CILSA* 408.

31 Ndima "Judicial Review and Transformation of South African Jurisprudence with Special Reference Customary Law" 2007 *Speculum Juris* 75.

32 Diala 2021 *Int J Law Policy Family*.

33 *Bhe v Khayelitsha*.

34 Bennett "Re-Introducing African Customary Law to the South African Legal System" 2009 *Am. J. Comp.* 21.

35 *Shilubana v Nwamitwa* para 43.

36 *Shilubana v Nwamitwa* para 55.

justice and equity,[37] they must conform to statutory law and the rules of common law.[38] However, as stated in the case of *Alexkor Ltd v Richtersveld Community*,[39] that indigenous laws:

> "…Throughout history, it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution."

Consequently, the distinction created by scholars in categorising 'living' and 'official' customary law becomes hard to accept, based on the notion that indigenous norms possess a processual character which, enables them to adapt to socioeconomic changes.[40] The only seemingly recognisable difference between the two categorised versions of 'living' and 'official' customary law, is that living customary law (usually oracular law) has not undergone the process of being recorded in codes and restatements, or being officially recognised as law.[41]

5.3 Deconstructing the privileges held by the judiciary

In the case of *Bhe v Khayelitsha* and *Shilubana v Nwamitwa*,[42] the privileges possessed by the judiciary is revealed. It came to light how the judiciary holds certain privileges in choosing to deviate from the peremptory obligation imposed by section 39(2) of the Constitution, which essentially deals with the development of customary law.[43] In both of these cases, the Courts deviated from the imposed obligation to develop customary law. For example, in *Bhe v Khayelitsha*, the Court declined to develop the rule of male primogeniture based on its reasoning that it had no sufficient evidence on "living" customary law to enable it to do so.[44] Secondly, in *Shilubana v Nwamitwa*, the Court relied upon section 211(2) of the Constitution as a shield for its obligation to develop customary law.[45] Section 39(2) of the Constitution provides that: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of

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37 Section 1(1) of the Law of Evidence Amendment Act 45 of 1988.

38 *Tshiliza v Ntshongweni* 1908 NHC 10 11; *Tshabalala v Estate Tunzi* 1950 NAC 46 (C) 48.

39 *Alexkor Ltd v Richtersveld Community* paras 52-54.

40 Diala 2021 *Int J Law Policy Family*.

41 Bennett 2009 *Am. J. Comp.* 21.

42 *Bhe v Khayelitsha*; *Shilubana v Nwamitwa*.

43 Constitution of the Republic of South Africa, 1996.

44 *Bhe v Khayelitsha* para 109.

45 Mailula "Abdication of judicial responsibility, cultural self-determination and the development of customary law: Lessons from *Shilubana*" 2008 *SA Public Law* 221.

the Bill of Rights."[46] The institutions outlined in the above section are deemed to be 'independent and impartial', as alluded to in section 165(2) of the Constitution.[47] Therefore, based on section 39(2), customary law development becomes dependent upon these institutions during the adjudicative process, which is typically reliant upon a customary law principle being interpreted.

However, if courts fail to execute their obligation when such an opportunity is presented, customary law development becomes futile. The reason is that the institutions imposed with such obligation do not have a constitutional right to develop customary law separate from their interpretive and adjudicative functions. Additionally, the abovementioned case law shows how the judiciary has quickly dismissed proper investigations into customary law rules and practices[48] based on the reasoning that customary law is dynamic. For example, the Constitutional Court referred to customary law's dynamism in *Alexkor Ltd v Richtersveld.*[49] Furthermore, the courts' decisions to deviate from the obligation imposed in section 39(2) could be seen as a step towards advocating for transformative constitutionalism[50] based on advancement of minority rights.[51]

5.4 Conclusion

The catergorisation of customary law into 'living' and 'official' customary law has received much attention from scholars. Accordingly, official customary law is the version captured in court judgments, legislation, academic writing, and codes. Living customary law is described as the 'practised or lived law' by communities, in contradiction with what outsiders, especially legal experts, consider as their norms.[52] However, the distinction between the two versions has

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46 *Carmichele v Minister of Safety and Security* 22, where the Court held that this section imposes an obligation on courts to consider whether there is a need to develop the common law to bring it into line with the Constitution, and to develop it if so.

47 Section 165 of the Constitution states that, "the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice"; Applied in conjunction with subsection 39(4).

48 Ntlama "Equality misplaced in the development of the customary law of succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC*)" Stellenbosch Law Review* 347-348.

49 *Alexkor Ltd v Richtersveld* 52-54.

50 *S v Makwanyane* para 262.

51 Section 7 of the Constitution of the Republic of South Africa, 1996.

52 Diala 2021 *Int J Law Policy Family*.

been deemed fallacious,[53] mainly due to the rapid socio-economic changes of globalisation, which have caused Africans to adapt their behaviour to changing circumstances.[54]

Living customary law has been deemed favourable by the courts. The reason behind this preference emanates from the limited information the judiciary has on living customary law.[55] However, it must be remembered that although living customary law is preferred by the judiciary, it is still subject to the Constitution.[56] As such, the only recognisable difference between the two is that living customary law (usually oracular law) has not undergone the process of being recorded in codes and restatements or being officially recognised as law.[57]

53 Diala 2021 *Int J Law Policy Family*.
54 Jeffery 2002 *The Guardian*.
55 *Bhe v Khayelitsha* para 109; *Shilubana v Nwamitwa.*
56 Section 39(2) of the Constitution of the Republic of South Africa, 1996.
57 Bennett 2009 *Am. J. Comp.* 21.

CHAPTER SIX

6.1 Introduction

The continued existence of indigenous African norms in South Africa is very dire, especially if measures are not taken to curb the suffocating control of state laws that succeeded European legal systems. The colonial imposition of South Africa's legal system resulted in the formation of a hybrid legal system based on the actions of Europeans, who forcefully imposed their religion, culture, economy, and legal systems on their colonies, irrespective of whether the African people welcomed the imposition or not.[1] To complicate matters even further, South Africa became dependent on its colonial legacies, even after decades of gaining political independence.[2]

The deeply entrenched legacies of colonialism in Africa radically affected the regulatory behaviour of many Africans. As such, indigenous laws were deemed discriminatory against women and children based on the foreign legal standards to which they were subjected.[3] As a result, indigenous laws that survived judicial interpretation were developed and transformed into African customary laws.[4] For example, in *Gumede v President of the Republic of South Africa*,[5] Deputy Chief Justice Moseneke stated that "courts have a constitutional obligation to develop customary law in order to align it with constitutional dictates."

This chapter looks at ways of creating harmony between indigenous and state laws during the interpretation process to ensure that indigenous law thrives rather than being struck down. Additionally, suggestions will be made to show the importance of including indigenous values

1 Diala 2019 *Revista General de Derecho Publico Comparado.*
2 Diala 2021 *Int J Law Policy Family*.
3 Diala 2021 *Int J Law Policy Family*.
4 Section 39(2) of the Constitution of the Republic of South Africa, 1996.
5 *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC) para 166.

in the adjudicative process. Lastly, the management of legal pluralism to preserve indigenous laws is addressed.

6.2 Engaging in proper development of indigenous law

Conscious of the supremacy of the Constitution,[6] and the role it has played in transformative constitutionalism,[7] deviation from this supreme law is impossible. Therefore, harmonisation needs to be created between common law and indigenous law during the interpretation process to ensure better development of indigenous law.[8] As indigenous law is often deemed discriminatory to women, girls, and younger male children, it is replaced with common law. This is evident in the case of *Bhe v Khayelitsha and Shilubana v Nwamitwa*.[9].

The replacement of indigenous law with common law is a temporary solution, which neglects the imitative dialogue between indigenous laws and state laws.[10] This dialogue is encouraged by Africans' normative adaptation to socioeconomic changes. However, this situation should not dismiss the continued dissonance between traditionalists and change agents,[11] as traditional leaders and community members who still observe their ancient practices could hinder the reception of developing laws, given that the new laws will not affect them.[12] To ensure that customary law's development is consistent with the communities in which it is practiced, Moodley mentioned that,

> "we can therefore infer that development by the legislature should involve actual drafting of legislation that is consonant with the culture or customs practiced by traditional communities and the values of the Constitution".[13]

This could be achieved with the increased involvement of traditional leaders and older community members during the adjudicative process. Ensuring that when the judiciary has no sufficient evidence on 'living' customary law to enable it to develop customary law,[14] the traditional leaders could be called to lead expert evidence. The involvement of traditional

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6 Section 2 of the Constitution of the Republic of South Africa, 1996.
7 Klare "Legal culture and transformative constitutionalism" 1998 *S. Afr J. Hum. Rights* 146, 150.
8 Section 39 (2) of the Constitution of the Republic of South Africa, 1996.
9 *Bhe v Khayelitsha*; *Shilubana v Nwamitwa*.
10 Diala 2021 *Int J Law Policy Family*.
11 Diala 2021 *Int J Law Policy Family*.
12 Himonga et al. *Post-Apartheid and Living Law Perspectives* (2015) 98-99.
13 Moodley *The customary law of intestate succession* (LLD-thesis, Unisa 2012).
14 *Bhe v Khayelitsha* para 109.

leaders during the adjudicative process will ensure that the principles laid down in *Shilubana v Nwamitwa*,[15] when developing customary law are always considered, such as:

- "Firstly, the consideration of the traditions of the community concerned,
- Secondly, the importance of respecting the right of communities that observe systems of customary law to develop their law,
- Thirdly, courts must be cognisant of the fact that customary law, like any other law, regulates the lives of people. Therefore, the need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights; and
- Lastly, the development of customary law by courts is distinct from its development by a customary community, the courts when engaged with the adjudication of a customary law matter, must remain mindful of their obligations under section 39(2) of the Constitution to promote the spirit, purport, and objects of the Bill of Rights".[16]

However, the inclusion of traditional leaders in the adjudicative process would seem like an addition to the three legislative making bodies recognised in our Constitution.[17] Therefore, to deviate from this ideology would prolong the process of such inclusion, an imposed obligation could consistently be implemented to admit traditional leaders in matters considering customary law as "*amicus curia*". This mandatory invitation will ensure that traditional leaders are not assigned the power to create legislation independently but are part of the creation process.[18] It will increase the initiative to educate people in their communities about new developments and provide needed expert evidence on living customary law.

6.3 Introduction of relevant indigenous values

The failure to recognise the incongruence between the welfarist origins of indigenous norms and the individualistic modern settings in which human rights values are founded, perpetuates the perceived discriminatory idea of indigenous law against women, girls, and younger male

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15 *Shilubana v Nwamitwa* para 44-49; *Mayelana v Ngwenyama* 2013 (4) SA 415 (CC) para 45.

16 Rautenbach "Oral law in litigation in South Africa: An evidential nightmare?"2017 *Potchefstroom Electron. Law J.* 18.

17 Section 43 of the Constitution of the Republic of South Africa, 1996.

18 Bekker and Boonzaaier "Succession of women to traditional leadership: Is the judgment in *Shilubana v Nwamitwa* based on sound legal principles?" 2009 *CILSA* 460.

children.[19] As a result, whenever individuals seek redress for violations of their rights, Western legal values usually prevail, despite the lack of socio-cultural relativity within a specific nation.[20]

However, through normative adaptation to socio-economic changes, it is essential to note that the values recognised in traditional communities are not so different from those in the Constitution.[21] Therefore, increased development of indigenous law can be achieved by increased respect for African values such as *ubuntu*, which is in line with the values in the Constitution.[22] This notion has been addressed by Ngcobo J, explaining *ubuntu* as "encapsulating communality and the inter-dependence of the members of a community".[23] Although minority rights (such as, the rights of women and children) frequently suffer violations when majority cultural rights are deemed vital, the relevance of individualistic rights in a society is just as important. This protection should not decrease the existence of indigenous law.[24] The Constitutional Court in *S v Makwanyane*,[25] compared the concept of *ubuntu* with the right to human dignity which is one of the cornerstone values of the Constitution.[26] Additionally, the essence of *ubuntu* is placed in the belief that the welfare of the individual is inextricably linked to the welfare of the group or family; that, in turn, is linked to a harmonious relationship with the ancestors and with nature. The welfare of all community members guarantees the equilibrium and welfare of society.[27] Therefore, if such imitative dialogue is evident between state law and indigenous law values, the development of customary law should be encouraged, as the emergence of integrated state law and indigenous law isn't too far-fetched.[28]

6.4 Harmonisation of indigenous law and state law (common law)

The preamble of the Constitution of the Republic of South Africa, states that:

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19 Diala 2021 *Int J Law Policy Family*.

20 Such as South Africa, in terms of indigenous values not resonating with Western legal values (equality, human dignity, freedom).

21 Section 7(1) of the Constitution of the Republic of South Africa, 1996.

22 Mokgoro 1998 *BHRLR* 15.

23 *Bhe v Khayelitsha* para 163.

24 Eweluka 2002 HRQ 427-428.

25 1995 (3) SA 391 (CC) para 308.

26 *Bhe v Khayelitsha* para 224.

27 *Bhe v Khayelitsha* para 163,45.

28 Diala 2021 *Int J Law Policy Family*.

"…South Africa belongs to all who live in it, united in our diversity."

The *Ryland v Edros*[29] case mentioned two critical values which underlie the Constitution, namely, equality and tolerance of diversity, values which include the recognition and accommodation of the plural nature of our society. Therefore, harmonisation between state and indigenous law is important considering our diverse society, as normative monopoly cannot be allowed. Considering the normative adaptations of many Africans to socio-economic changes, law reform should be consistent with the natural evolution of law.[30] This is important to ensure that the development of law has an impact on the people who will be most affected by it.

In *Ryland v Edros,*[31] *Mthembu v Letsela*,[32] and *Nyanisile Bangindawo v The Head of the Nyanda Regional Authority* 1998 2 SA 262 (TK),[33] the courts were not willing to abolish a customary practice just because it is divisive or is being attacked by several interest groups. Accordingly, this was done to ensure that rulings involving constitutional jurisprudence on matters of culture, customary law, and religion are protected.[34] As a result, the establishment of emancipatory pluralism should be advocated, which would ensure equality between state law and indigenous law. This establishment can be guided by the increased interaction between state law and indigenous law, to ensure the integrated existence of legal orders in South Africa after a long period of coexistence. As stated by Ozoemena:

> "Living customary law has powerfully guided the behaviour of a significant portion of the country's population for a long time, and therefore should then be viewed as semi-autonomous, because the ties that bind its observers together are stronger than the ties that bind them to external factors such as state legislation."[35]

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29 *S v Makwanyane* 707 B-C and D-E, 708-J and 709 A-B.

30 Van Niekerk 2005 *Obiter* 474-487.

31 *The Harmonisation of the Common Law and Indigenous Law: Report on Customary Marriages* Project 90 (1998) par 6.1.22 and 6.1.23.

32 *The Harmonisation of the Common Law and Indigenous Law: Report on Customary Marriages* Project 90 (1998) par 6.1.22 and 6.1.23.

33 *Nyanisile Bangindawo v The Head of the Nyanda Regional Authority* 1998 2 SA 262 (TK).

34 Van Niekerk 2005 *Obiter* 474-487.

35 Ozoemena "Legislation as a critical tool in addressing social change in South Africa: Lessons from *Mayelane v Ngwenyama*" 2015 *PER Journal* 997.

6.5 Conclusion

Therefore, in consideration of the abovementioned recommendations regarding creating a balance between emancipatory legal pluralism and cultural relativism. I believe that if the judiciary and legislators work together with traditional leaders as a form of community representation, indigenous law might stand a chance in challenging its eradication, as traditional leaders will provide the needed expert evidence to ensure that when the judiciary has no sufficient evidence on 'living' customary law, aid is provided.[36] Initially, this will increase the development of indigenous laws through the gap filled by traditional leaders to ensure that law reform remains consistent with the natural evolution of law.[37] The importance of this engagement ensures that development of law has an impact on the people who perceive it, to limit the dissonance between traditionalists and change agents.[38]

[36] *Bhe v Khayelitsha* para 109.
[37] Van Niekerk 2005 *Obiter* 474-487.
[38] Diala 2021 *Int J Law Policy Family*.

BIBLIOGRAPHY

ARTICLES AND ACADEMIC WRITING

i. AC Diala and B Kangwa 'Rethinking the interface between customary law and constitutionalism in sub-Saharan Africa' (2019) 52(2) *De Jure* 1-18.
ii. AC Diala, "A butterfly that thinks itself a bird: The identity of customary courts in Nigeria", *Journal of Legal Pluralism and Unofficial Law*, 51, n.3, 2019, p.1.
iii. AC Diala 'Curriculum decolonisation and revisionist pedagogy of African customary law' (2019) 22 *Potchefstroom Electronic Law Journal*.
iv. AC Diala 'Legal Pluralism and the future of indigenous family laws in Africa' 35(1) *International Journal of Law, Policy and the Family* pp. 1-17.
v. AC Diala 'Our laws are better than yours: the future of legal pluralism in South Africa (2019) 26 *Revista General de Derecho Publico Comparado* 1-23.
vi. AC Diala *'The concept of living customary law: A critique'* 2017 Journal of Legal Pluralism and Unofficial Law 146-149.
vii. A.J.G.M. Sanders 'How customary is African Customary law' (1987) 20 *Comparative and International Law Journal of South Africa.*
viii. Allan, "*Rethinking African customary law" Modern Law Review*, 51, 1988, 152-267, at 254-255.
ix. Albertyn and Davis "Legal realism, transformation and the legacy of Dugard" 2010 *SAJHR* 201.
x. Alan Watson, *Legal Transplants,* 2d ed. (University of Georgia Press, 1993) at 21.
xi. A Pimental Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique (2010) SSRN Electronic Journal. DOI 10.2139/ssrn.1668063.
xii. Berman 'Towards a Jurisprudence of Hybridity' 2010 *ULR*.
xiii. Bekker JC and Boonzaaier CC "Succession of women to traditional leadership: Is the judgment in 443 *Shilubana v Nwamitwa* based on sound legal principles?" (2009) *Comparative and International Law Journal of Southern Africa* 460.
xiv. Bekker JC *Seymour's customary law in southern Africa* (1989) 297-298.
xv. Benton and Straumann "Acquiring Empire by Law from Roman Doctrine to Early Modern European Practice" 2010 *Law Hist. Rev.*
xvi. C Himonga and C Bosch, 'The Application of African Customary Law under the Constitution of South Africa: Problem Solved or Just Beginning' (2002) 117 *South African Law Journal* 306-341.
xvii. C Rautenbach 'Deep legal pluralism in South Africa: Judicial accommodation of non-state law' (2010) 42(60) *Journal of Legal Pluralism and Unofficial Law*.
xviii. E Grant, "Human rights, cultural diversity and customary law in South Africa", *Journal of African Law,* 50, n. 1, 2006, pp. 9.

xix. Fabra -Zamora, J.L *'The Conceptual Problems Arising from Legal Pluralism'* 2022 *Canadian Journal of Law and Society/La Revue Canadienne Droit et Société* 1-21.
xx. Finnis, "On the Incoherence of Legal Positivism", 75 Notre Dame L. Rev. 1597 2000.
xxi. GR Woodman 'Legal Pluralism and search for justice' (1996) *Journal of African Law.*
xxii. G Van Niekerk 'State initiatives to incorporate non-state laws into official legal order: a denial of legal pluralism?' (2001) *Comparative and International Law Journal of Southern Africa* 34(3).
xxiii. JM Owen IV, "*The Foreign Imposition of Domestic Institutions"* 2002 *International Organisations* 375-409.
xxiv. JM Kelly, A Short History of Western Legal Theory (Oxford University Press, 1992) 203, L Benton and B. Straumann, 'Acquiring Empire by Law from Roman Doctrine to Early Modern European Practice' (2010) 28 *Law and History Review* 1-78.
xxv. Klare "Legal culture and transformative constitutionalism" 1998 *South African Journal on Human Rights* 146, 150.
xxvi. Kelly *A Short History of Western Legal Theory* (1992) 203.
xxvii. Keet, "Human Rights Education or Human Rights in Education: A Conceptual Analysis", (UP-Dissertation August 2006).
xxviii. Koenane, Mojalefa Lehlohonolo J, "The role and significance of traditional leadership in the governance of modern democratic South Africa" (2018) 10(1) *Africa Review* 58-71.
xxix. Lehnert W "The role of the courts in the conflict between African customary law and human rights" 53 (2005) *South African Journal on Human Rights* 246.
xxx. Mailula D "Abdication of judicial responsibility, cultural self-determination and the development of 433 customary law: Lessons from *Shilubana*" (2008) 23 *SA Publiekreg/Public Law* 221.
xxxi. M. Hinz and H. Patemann (eds.), *The Shade of New Leaves: Governance in Traditional Authority: A Southern Africam Perspective* (2006) 274.
xxxii. Modiri "The crises in legal education'' 2014 *Acta Academica* 1- 23.
xxxiii. Montesquieu "*The Spirit of the Laws"* 1961 295.
xxxiv. Ndima 2007 Speculum Juris 82.
xxxv. NM Ollennu, 'The Influence of English Law on West Africa (1961) Journal of African Law 21-35.
xxxvi. Ntlama N "Equality misplaced in the development of the customary law of succession: Lessons from 430 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC*)" Stellenbosch Law Review* 347-348.
xxxvii. Obiora "Reconsidering African customary law" 1993 *Legal Studies Forum* 217-252.
xxxviii. Ollennu "The Influence of English Law on West Africa" 1961 *J. Afr. Law.*
xxxix. Owen "The Foreign Imposition of Domestic Institutions" 2002 *Int. Organ.*
xl. Ozoemena "Legislation as a critical tool in addressing social change in South Africa: Lessons from *Mayelane v Ngwenyama*" 2015 *PER Journal* 997.
xli. Omotola JA "Primogeniture and illegitimacy in African customary law: The battle for survival of culture" 2004-2005 *Indiana International and Comparative law Review* 116.

xlii. Preston-Whyte E"Kinship and marriage" in Hammond-Tooke WD *The bantu-speaking peoples of southern Africa* (1974) 189-190. London; Boston: Routledge & K. Paul
xliii. PS Berman, 'Towards a Jurisprudence of Hybridity' (2010) *Utah Law Review* 11-30.
xliv. R A Ige Legal Pluralism in Africa: Challenges, Conflicts and Adaptation in a Global Village Journal of Law, Policy and Globalization www.iiste.org ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.34, 2015.
xlv. Rautenbach C, Mojela K, Du Plessis W and Voster LP "Law of succession and inheritance" in Bekker JC, Labuschagne JMT and Voster LP *Introduction to legal pluralism in South Africa part 1 Customary law* (2002) 113.
xlvi. Rautenbach "Oral law in litigation in South Africa: An evidential nightmare?"2017 *Potchefstroom Electron. Law J*. 18.
xlvii. Roseveare, C. (2013). The rule of law and international development. Department for International Development (DFID), London, UK.
xlviii. Schapera | *Married life in an African tribe* (1939).
xlix. Seymour SM *Bantu law in South Africa* (1970) 262.
l. Seth A. Opoku, Indigenous Economic Institutions and Ecological Knowledge: A Ghanaian Case Study (1999) 19 (3) *Environmentalist* 217-227.
li. *The Harmonisation of the Common Law and Indigenous Law: Report on Customary Marriages* Project 90 (1998) par 6.1.22 and 6.1.23.
lii. TW Bennett, 'Re-Introducing African Customary Law to the South African Legal System' (2009) 57 (1) *American Journal of Comparative Law* 1-32, 21.
liii. U Eweluka, 'Post-Colonialism, Gender, Customary Injustice: Widows in African Societies' (2002) 24 (2) *Human Rights Quarterly* 427-428.
liv. Van Marle "What does changing the world entail? Law, Critique and Legal Education in the time of post-Apartheid" 2012 *SALJ* 209-219 211.
lv. Van Niekerk GJ "Succession, living indigenous law and Ubuntu in the Constitutional Court" (2005) *Obiter* 486.
lvi. Yvonne Mokgoro 'Ubuntu and the law in South Africa' (1998) 4 Buffalo Human Rights Law Review 15. BHRLR

BOOKS

i. Bekker JC *Seymour's customary law in southern Africa* (1989).
ii. Bennett TW *Customary law in South Africa* (2004).
iii. BZ Tamanaha *Legal Pluralism Explained: History, Theory, Consequences* (New York: Oxford University Press (2021) 1.
iv. Du Plessis *Introduction to Law* (1999).
v. H L A Hart *The Concept of Law* (1961).
vi. Hennie Strydom *International Law* (2016).
vii. Himonga (et al) *Post-Apartheid and Living Law Perspectives* 2015 Oxford University Press (South Africa).
viii. Morse & Woodman *Indigenous law and the state* (1988).

CASE LAW

i. *Alexkor Ltd and Another v Richtersveld Community and Others* 2004(5) SA 460 (CC).
ii. *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) BCLR 1 (CC).
iii. *Daniels v Campbell* 2004 (5) SA 331 (CC).
iv. *Carmichele v Minister of Safety and Security* 2001 ZACC 22.
v. *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).
vi. *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).
vii. *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC).
viii. *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC).
ix. *Fraser v Children's Court, Pretoria North* 1997 2 BCLR 153 (CC).
x. *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC).
xi. *Harksen v Lane No and Other* 1998 (1) SA 300 (CC).
xii. *Lewis v Bankole* 1908, 1 NLR 81.
xiii. *Mabena v Letsoalo* 1998 2 SA 1068 (T).
xiv. *Matambo v Matambo* 1969 (3) SA 717 (A).
xv. *Mayelana v Ngwenyama* 2013 (4) SA 415 (CC).
xvi. *Mgoza and Another v Mgoza* 1967 (2) SA 436 (A).
xvii. *Mkanzela v Rona* (1950) 1 NAC (S).
xviii. *Mthembu v Letsela* 1997 2 SA 936 (T).
xix. *Mthembu v Letsela* 1998 (2) SA 675 (T).
xx. *Mthembu v Letsela* 2000 (3) SA 867 (T).
xxi. *Nwamitwa v Phillia* 2005 (3) SA 536 (T).
xxii. *Nortje v Attorney- General* 1995 (2) SA 460 (C).
xxiii. *Nyanisile Bangindawo v The Head of the Nyanda Regional Authority* 1998 2 SA 262 (TK).
xxiv. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
xxv. *Ryland v Edros* 1997 2 SA 690 (C).
xxvi. *S v Acheson* 1991 2 SA 805 (Nm) 831A-B.
xxvii. *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC); 2001 5 BCLR 449 (CC).
xxviii. *S v Makwanyance and Another* 1995 3 SA 391 (CC).
xxix. *Shilubana v Mwamitwa* 2007 (2) SA 432 (SCA).
xxx. *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC).
xxxi. *Sonti v Sonti* 1929 NAC (C&O).
xxxii. *S v Williams* 1995 3 SA 632.
xxxiii. *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T).
xxxiv. *Tshabalala v Estate Tunzi* 1950 NAC 46 (C).
xxxv. *Tshiliza v Ntshongweni* 1908 NHC.
xxxvi. *Wittmann v Deutscher Schulverien, Pretoria* 1998 4 SA 423 (T).

INTERNET SOURCES

i. https://africanlii.org/content/case-mabena-v-letsoalo-1998-2-sa-1068-t (accessed 20 April 2022).

ii. Jean-Frédéric Morin, Edward Richard Gold, An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries, *International Studies Quarterly*, Volume 58, Issue 4, December 2014, Pages 781–792, https://doi.org/10.1111/isqu.12176.

iii. J Servaes "Social Change" 2011 available from: https://www.researchgate.net/publication (Accessed 11 December 2021).

iv. Rautenbach, "South African common and Customary law of Intestate Succession: A question of harmonisation, integration or abolition" http://www.ejcl.org/121/art121-20.pdf (accessed on 10/04/2022). J. comp. law 2008.

v. S. Jeffery "What is globalisation?" *The Guardian,* 31 October 2002 https://www.theguardian.com/world/2002/31/globalisation.simonjeffery (last accessed 15 August 2021).

INTERNATIONAL INSTRUMENTS

i. African Charter on Human and People's Rights, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5.

ii. African Charter on the Rights and Welfare of the Child, 1990.

iii. Convention on the Elimination of All Forms of Discrimination against Women, 1979, 1249 UNTS 13.

iv. Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.

v. Convention on the Rights of the Child, 1989, 1577 UNTS 3.

vi. International Covenant on Civil and Political Rights, 999 UNTS 171.

vii. Universal Declaration of Human Rights, 1948, UN GA Res, 217A (III) 1948.

viii. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003.

ix. Vienna Declaration and Programme of Action, United Nations General Assembly, UN Doc. A/CONF.157/23, 12 July 1993.

LEGISLATION

i. Black Administration Act 38 of 1927.

ii. Constitution of the Republic of South Africa of 1996.

iii. Interim Constitution of South Africa, 1993.

iv. Intestate Succession Act 81 of 1987.

v. Law of Evidence Amendment Act 45 of 1988.

vi. KwaZulu-Natal Codes of Zulu Law Proclamation R151 of 1987.

vii. Magistrate's Court Act 32 of 1988.
viii. Maintenance of Surviving Spouse Act 27 of 1990.
ix. South African Schools Act 84 of 1996.
x. Traditional Leadership and Governance Framework Act 41 of 2003.

THESIS

i. Moodley The customary law of intestate succession (2012) LLD thesis Unisa.