



CONFERENCE REPORT

OUTLINE OF PROCEEDINGS

**Customary Law, Culture and Social Justice: Has Transformative
Constitutionalism Advanced Equality and Other Human Rights in
Customary Law**

25 August 2021

Hosted by:

**The Law Trust Chair in Social Justice, Faculty of Law, Stellenbosch
University**



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BACKGROUND

I Purpose

The purpose of the conference is to provide a platform for engaging with developments in social justice and customary law and to assess the impact of transformative constitutionalism on advancing social justice, including gender justice in the implementation of customary law while mainstreaming the Chair's quest for systematising social justice conscious law and policymaking in customary law.

II Key Objectives

With this conference, the Law Trust Chair in Social Justice aimed to:

1. Take stock of customary law and culture reform and its impact on advancing equality and reducing poverty since the Interim Constitution of 1993.
2. Reflect on the equality impact of court jurisprudence on land, succession, marriage, and other dimensions of customary law.
3. Document challenges and good practices.
4. Place holding for the Social Justice Impact Assessment Matrix (SIAM).

III Outcome

The outcome of the conference will be to emerge with a social justice research, teaching, and collaboration agenda to accelerate transformation in the customary law area.

IV Background

This is the second conference hosted by the Law Trust Chair in Social Justice during 2021 and is executed as part of the Chair's mission to promote social justice scholarship, consciousness, and collaboration to accelerate social justice reform in academia and society. Social justice is about the equal enjoyment of all rights and freedoms regardless of human diversity reflected in the just, fair, and equitable distribution of all opportunities, benefits, privileges and burdens in a society or between societies.

V Stakeholders

Everybody with an interest in the transformation of the customary law sphere, including government officials, the judiciary, the legal profession, administrators, academia, traditional leaders, and civil society.

CONFERENCE PROCEEDINGS: OVERVIEW

“It is important that we eschew assuming the repugnancy or delinquency of customary law and treat it as we would treat any other law. This means appreciating its redeeming features, its problem areas and colonial distortions that exacerbated women's vulnerability and other oppressive features of customary law.”

– Prof Thuli Madonsela

This conference is one of the many events organised under the Law Trust Chair in Social Justice's Musa Plan for Social Justice (M-Plan). The Social Justice M-Plan is a type of 'Marshall Plan' and is aimed at accelerating the advancement of social justice, focusing on zero poverty and equalising opportunities in South Africa by 2030, in line with the National Development Plan ("NDP"), Agenda 2063 and the United Nations Sustainable Development Goals ("SDGs").

As emphasised by the programme director and political journalist, Cathy Mohlahlana, this conference aimed to investigate the developments in social justice and customary law. This is particularly important in light of the above-mentioned quote from Prof Madonsela, which highlights the need to shift away from conventional prejudices often associated with customary law and move towards a recognition of the valuable contributions that it has to offer in our plight for social justice. As such, the conference sought to explore various themes. These themes included:

1. The Anatomy of Customary Law: Separating Customary Law from Colonial and Contemporary Distortions
2. Social Justice Dimensions of Land and Other Property Rights Through a Customary Law Lens
3. Good Practices on Transformative Constitutionalism: Advancing Equality under Customary Law
4. Impact Conscious Law Making: Can A Social Justice Assessment Instrument Make a Difference
5. Human Rights Dimensions of Ukuthwala and Other Girls' Rights Finding Spaces to Move the Needle on GBV and Other Gender Challenges in Traditional Communities
6. Equality and Succession / Inheritance Challenges in Traditional Leadership and the Family

7. Gender Equality and Customary Marriages

I Introductory Remarks

Professor Thuli Madonsela - Social Justice Chair (SU) and M-Plan Convenor

“Customary law was bastardised to become a vehicle of oppression”

– Professor Thuli Madonsela

Prof Madonsela started off the conference by highlighting the purpose of the proceedings – to confer on customary law and social justice and to reflect on transformative constitutionalism and whether or not it has advanced equality and human rights. She also alluded to the parallels between South Africa and Kenya, which would emerge throughout the conference proceedings. Furthermore, she equated Ubuntu to social justice and illustrated how crucial Ubuntu is to achieving social justice. Prof Madonsela also provided some powerful questions that would frame the discussions that ensued. These included: have those who live under customary law found their lives becoming more socially just? Is the Constitution as a transformative instrument and blueprint, being used to transform power relations under customary law and between those living under customary law and the rest of society to ensure equality? Are our lives better today in private law? Is the right of everyone when it comes to land better today than it was before? Is governance through the traditional system better today than it was in the past?

II Keynote address and Concluding Observations

Minister Ronald Lamola - Minister for Justice and Correctional Services

“We need to interrogate the status of women across the board.”

– Minister Ronald Lamola

Minister Lamola set the tone for the proceedings by posing the question: has transformative constitutionalism advanced equality and other human rights in customary law? In answering this question, Minister Lamola was confronted with another important question: what is the true status of women in society, particularly a society like ours which is governed by a Constitution, which by all accounts, is the best

in the world? These questions epitomised one of the focal points of the conference, namely the importance of women in the advancement of social justice and our society as a whole. The Minister also reflected on the extent to which transformative constitutionalism has moved the needle on equality and human rights for people living under customary law.

Prof Juanita Pienaar - Vice-Dean Designate, Faculty of Law, Stellenbosch University

Prof Pienaar highlighted that this conference was “absolutely critical” in “unlocking the potential of customary law within a social justice context”. In particular, she highlighted two important points that stood out for her from Minister Lamola’s address. Firstly, the “need to focus on the *true* status of women” in society. Secondly, the responsibility that courts, academics and commentators have to make the Constitution a reality.

III Plenary I: The Anatomy of Customary Law: Separating Customary Law from Colonial and Contemporary Distortions

Inkosi Patekile Holomisa (Keynote speaker) *Traditional Leader and Deputy Minister, Justice and Correctional Services*

Cathy Mohlahlana (Facilitator) *News Anchor*

Panellists:

1. “The Anatomy of Customary Law: Separating Customary Law from Colonial and Contemporary Distortions.”

Prof Anthony C Diala - Department of Private Law, University of the Western Cape; Founding Director, Centre for Legal Integration in Africa, University of the Western Cape

The anatomy of customary law being crucial to the identity of Africans.

2. “Customary Law in Colonial Courts: Should the Separation of Indigenous and Colonial Laws be the Ultimate Goal”

Prof Christa Rautenbach – Faculty of Law, North-West University

*The anatomy of customary law as the survival of an **evolving** customary law and as living law*

The panellists in this session provided insightful reflections on understanding the legal identity of Africans and how this was impacted by numerous facets of colonialism. Our violent history under colonialism and apartheid was placed at the forefront of this discussion and was contrasted to customs seen in African cultures. For example, “traditional communities placed a premium on mutual respect for one another and paramount was the ability to take care and safeguard one another.” Furthermore, insights were given as to how the colonial narrative ignorantly misinterpreted various aspects of customary law. This distortion of African customs was a common thread discussed by the panellists, even in terms of courts struggling to find the content of customary law in light of common law tools being at their disposal.

The need to question our idolisation of the Constitution, as a remnant of colonisation, also entered the discussion given the promotion of constitutionalism regardless of the calls for Africanisation. In light of this, there was a call to retain and integrate the foundational values of indigenous law, in particular Ubuntu, into the constitutional values and spirit.

IV Plenary II: Social Justice Dimensions of Land and Other Property Rights Through a Customary Law Lens

Advocate Tembeka Ngcukaitobi (Keynote speaker) *Senior Counsel, public speaker, author and political activist and member of the South African Law Reform Commission*
Cathy Mohlahlana (Facilitator) *News Anchor*

Panellists:

- 1. “The recognition and protection to customary law rights to fishing: the Constitution, the court case and the policy making process”**

Prof Elmien du Plessis – Faculty of Law, North-West University

Customary law as the interaction between litigation and political processes in policy and legislation making

- 2. “Transformative constitutionalism, customary law and mineral rights: How have courts adjudicated mineral rights related contestation between customary communities and more powerful interests?”**

Prof Jackie Dugard – School of Law, University of the Witwatersrand

Customary law as a disruption of the status quo

This discussion saw a continuation of the idea of the enduring distortions of colonial conquest. Linked to this, reference was also made to customary law as the antidote to European law as opposed to an appendage thereof. More contrasts were drawn between customary law and European law, such as the focus on inclusion in customary law compared to exclusion in European law. This idea of inclusion is central to social justice and is not only indicative of the important role that customary law can play in advancing social justice but also that it is potentially more compatible with the aspirations of social justice.

This plenary also looked at different fault lines of power differentials and the way in which various cases dealing with customary rights show a trend in which there is increasing disruption and complexity when developing customary law.

V Plenary III: Good Practices on Transformative Constitutionalism: Advancing Equality Under Customary Law

Judge Mumbi Ngugi (Keynote speaker) *Judge of the Appeal Court of Kenya*

Dr Mshai Mwangola (Facilitator) *Performance Scholar/Oraturist; Founding Director: The Orature Collective; Chair, Board of Trustees, Uraia Trust; Adjunct Faculty, African Leadership Centre*

Panellists:

1. “Good Practices on Transformative Constitutionalism: Advancing Equality Under Customary Law

Abubakar Zein Abubakar – Co-Founding Director, Orature Collective – KENYA

The importance of customary law and culture in transforming societies

2. “Global or country perspective on how constitutions, post-colonies have dealt with dual legal systems / legal plurality”

Kennedy Kanyali Mwikya – Legal Equality Program Officer, Equality Now, Africa Office

Customary law and legal pluralism

The commonalities between South Africa and Kenya were highlighted during this session. This plenary also illustrated the important link between culture, customary law and social justice as well as the tensions that can arise between culture, customary law and the fundamental rights enacted in the Constitution. In addition, it was noted that culture and customary laws are dynamic. Emphasis was also placed on environmental protection and the creation of harmony. The discussion then shifted to the importance of peace, especially on the African continent. The challenges that legal pluralistic systems face were also raised.

An important point raised in this session was the denial of social justice for women as well as the discrimination against them, particularly when looking at inter alia marriage and divorce. Closely linked to this was the issue of underrepresentation of women in land ownership. Important questions that arose from this discussion were: “how are we to value the financial contribution of women whose contribution is not in monetary terms?” and “how can we ensure women’s participation in cultural development?” Positive movement was also noted in relation to the softening of the power of customary law and how certain customary and cultural practices might actually empower women in a more meaningful sense further down the line. In addition, examples of some of the bold, transformative constitutional moves by the Kenyan courts were shared. Justice Mumbi challenged everyone to interrogate the language we use and the stories we tell which may be used to justify acts (in the name of culture) within a domestic setting that are really not justifiable and that amount to criminal offenses.

VI Plenary IV (Parallel sessions based on 4 themes)

1. Gender Equality and Customary Marriages

Ms Charlene May (Keynote speaker) *Women's Legal Centre* - “Registration and recognition of marriage and the gender burden on women under the Recognition of Customary Marriages Act”

Dr Lize Mills (Facilitator) *Senior Lecturer, Private Law, Stellenbosch University*

Panellists:

1. “Gender Equality and Customary Marriages”

Adv Nthabiseng Sepanya Mogale - Commission for Gender Equality (CGE)
Customary law and lived realities

2. “Separate and unequal: The experiences of exclusion of same-sex couples in the Recognition of Customary Marriages Act”

Ms Mandi Mudarikwa - Women’s Legal Centre

Customary law and the need to focus on intersectionality

3. “The conundrum of aligning *ukuzila* custom with the constitutional values of gender equality for widows in customary marriage”

Sibusiso N Ngubane - LLM candidate, University of the Western Cape

Customary law and the balancing of customs with gender equality

4. “The insurmountable challenge in proving the existence of a customary marriage: *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020)”

Keneilwe Radebe - Lecturer, University of Pretoria

Customary law and the validity of customary marriages

*This session built on Judge Mumbi’s call to think about how law, policy and custom really impacts on the lived realities of people and encouraged everyone to look at how we can develop those laws and policies to ensure that the impact on the lived realities of people is the creation of enabling environments as well as the attainment of substantive equality. Presentations focused on marriage registration, the Recognition of Customary Marriages Act, the regulations and forms that accompany it, and how these legal instruments impact the lived realities of women. In addition, issues relating to same-sex marriages and customary law were discussed. In particular, an issue that emerged was the intersectional nature of marginalisation based on race, gender and sexual orientation. The need for continuous scrutiny particularly in relation to the issue of justice and transformation under a constitutional democracy was emphasised. The custom of *ukuzila* was also interrogated. The conclusion reached was that *ukuzila* is discriminatory and it is unfair based on gender and thus cannot be sustained.*

A key theme was the need to promote diversity that is reflective of the lived realities of all South Africans. In addition, the discussion illustrated the need to balance rights to custom with rights to gender equality. Furthermore, there is a need to question and investigate what culture entails before assuming contradictions between custom and gender equality.

VII Plenary IV (Parallel sessions based on 4 themes)

2. Impact Conscious Law Making: Can a Social Justice Assessment Instrument Make a Difference

Prof Thuli Madonsela (Keynote speaker) *Social Justice Chair, Stellenbosch University and M-Plan Convenor*

Dr Pali Lehohla (Facilitator) *Former Statistician-General and Research Resident Advisor, 22 On Sloane*

Panellists:

1. “Plan A”

Prof Khumbulani Mpofo - Research Chair in Manufacturing and Skills Development, Tshwane University of Technology
Customary law and the importance of understanding the bigger picture

2. “Impact Conscious Law Making: Can a Social Justice Assessment Instrument Make a Difference”

Prof Kanshu Rajaratnam - Director, School of Data Science and Computational Thinking
Customary law and the use of social justice assessment instruments

3. “Update on SCOPRA projects”

Ms Nolwandle Made - Project Officer, Law Trust Chair in Social Justice, Stellenbosch University
The need to view customary law through a social justice lens

This discussion highlighted the seemingly continuous need to justify the existence of customary law in modern democracy and how this very question, along with the imposition of common law without any questions, goes against the principles of social justice. In addition, the potential of a social justice impact assessment along with other tools were assessed in order to understand how these tools can assist in determining the impact of laws on people and to avoid unintentionally exacerbating poverty and inequality. In particular, it was highlighted that while we have many cases that prima facie look like they are moving the needle forward, we are not paying enough attention

to the impact on people, especially vulnerable groups. An update was also provided on the SCORPA project in which some of these tools are being used. Overall, this discussion provided a holistic view on the use of various assessment tools, technology and data given that the panellists came from diverse backgrounds and careers. A key finding was the need to look at the global picture and the importance of remembering that the African family is not a nucleus type of family. Furthermore, these tools and technology can be used for educational purposes, but it is important to think about what the purpose of an assessment instrument is. The implementation of these tools in the social justice context can also benefit from systems thinking.

VIII Plenary IV (Parallel sessions based on 4 themes)

3. Human Rights Dimensions of *Ukuthwala* and Other Girls' Rights Including Finding Spaces to Move the Needle on GBV and Other Gender Challenges in Traditional Communities

Adv Joyce Maluleke (Keynote speaker) *Advocate of the High Court of South Africa*
Ms Karyn Maughan (Facilitator) *Legal Journalist*

Panellists:

1. "Problematizing Policy and Formal Legal Perceptions of *Ukuthwala* and Violence Through Women's Voices"

Dr Nyasha Karimakwenda - Post-Doctoral Research Fellow, Faculty of Law,
University of Cape Town

Ukuthwala and the socio-economic implications on young girls

2. "Customary Law and the Nature of Harmful Practices"

Siziwe Jongizulu - Programme Analyst: Monitoring and Evaluation-Gender
Dynamics, United Nations Population Fund

Customary law and the prevalent nature of harmful practices

3. "The practice of lobola and customary law: Challenges of the current dual legal systems in protecting women from violence arising from harmful cultural practices"

Ms Pretty Mubaiwa - PhD Candidate, Public Law, University of Cape Town and
Canon Collins Education and Legal Aid Trust Scholar

Customary law and understanding forms of violence against women

Delegates were reminded of the significance of August as the month for remembering and recalling the struggles of our women heroines and veterans. This session highlighted that the issue of ukuthwala and the intersections with the Constitution has not received enough attention, especially given how widespread it is, and that we need to question practices like this. There is a need for more empirical research on this issue. The discussion investigated whether violent ukuthwala is a modern phenomenon. The importance of addressing trauma experienced across generations was also highlighted. In addition, it was emphasised that women should be able to vocalise their own stories, which is pivotal to realizing the agency of women. The intersection of the issue of ukuthwala and socio-economic rights was also highlighted.

A key theme that arose from the discussions was that part of undoing violence against women is to understand the different forms of violence that women suffer and why they are exposed to this violence. If history is the prism on which we look at the future, then investing in women in their diversity would guarantee that substantive equality is the future. Panellists also discussed the fact that these discriminatory and abusive practices have their roots in the profound social inequality that causes further damage to women in society. The role of regional and international instruments and bodies was also emphasised.

IX Plenary IV (Parallel sessions based on 4 themes)

4. Equality and Succession/Inheritance Challenges in Traditional Leadership and the Family

Judge TN Ndita (Keynote speaker) *Western Cape High Court, Cape Town*

Dr Jane Diala (Facilitator) *Post-doctoral Fellow, Department of Private Law, Stellenbosch University*

Panellists

1. “Challenges in Traditional Leadership and the Family”

Commissioner Busisiwe Deyi - Commission for Gender Equality

Customary law and the need to understand systems of oppression

2. “An analysis of the impact of the South African Constitution on the recognition of Islamic marriages for purposes of succession law”

Dr Muneer Abduroof - Senior Law Lecturer, University of the Western Cape,
Attorney and Sworn Translator of the High Court and CLR Rights

Commissioner appointed by the President of RSA

Islamic law and polygamy

3. “Equality and Succession”

Ms Lethabo Tloubatla - Marketing Manager, UNISA

The economic, psychological and social impact of the male primogeniture rule

The issue of equality and succession was at the forefront of this discussion. A question that arose in this session was: “what are we truly speaking about when we say women deserve to have equal entitlement to leadership roles or traditional leadership roles?” In particular, Commissioner Deyi highlighted that there is no point in understanding equality in succession as equality to use and mobilise the same systems of oppression that have existed and continue to oppress and marginalise women in rural areas who are predominantly black women. Judge Ndita also shared some real life experiences with the rule of male primogeniture.

Bhe v Khayelitsha Magistrate (“Bhe”)¹ was central to this discussion on equality in succession. The discussion also raised the question of how we ensure that institutions of traditional leadership uphold the constitutional values of equality and human dignity. Furthermore, it highlighted the need for women to understand what equality of treatment under the law means. The impact of the Constitution on Islamic marriages was also discussed. The importance of lived realities was once again highlighted, especially given the fact that the male primogeniture custom is continuing in practice despite the decisions of Bhe and Shilubana v Nwamitwa.² The issue of conflating sex and gender was also raised. Access to rights to equality and dignity was also highlighted as a crucial issue.

¹ 2005 1 SA 580 (CC).

² 2008 9 BCLR 914 (CC).

X Final plenary session

Prof Thuli Madonsela (Facilitator)

A report-back session from each breakaway room was conducted with representatives of each group providing summaries and feedback. This was followed by a closing address by Prof Madonsela.

Key challenges highlighted from the various discussions included:

- The registration of customary marriages and the fact that women find it very difficult to register
- Proof of customary marriages
- The age that we still allow children to get married
- The fact that there is no real equality of spouses
- Issues relating to the practice of *ukuzila*
- The ability of same-sex couples to marry
- The inequality present in the fact that African customary marriages allow men to remarry, while the same is not true for women
- Biases in predictive data needs to be avoided.
- The need to properly understand and clarify what customs entail
- The need to recognise that social inequality and poverty make young women much more vulnerable to forced marriage and forced rape
- The need to address the limiting impact that practices such as *ukuthwala* have on young women
- The need to address and reverse the normalisation of women not belonging to themselves
- The need to address patriarchal practices that still exist, especially in relation to inheritance
- The need to recognise the lived realities that happen regardless of the laws and policies that exist
- The need to address the concern that transformative constitutionalism has not dealt with cultural practices that, despite changes in the law, remain and render women as subhuman beings

Key take-aways from the sessions included:

The need to:

- Have a custom-based approach to culture
- Recognise the differences and diversity between cultures
- Transform customary law so that everybody is recognised in our society
- Assess the impact of law and policies on people and, in particular, vulnerable groups
- Ensure that policies and laws are not developed with a one-size-fits-all approach
- Use assessment tools to educate at a policy level
- Embrace the humanity of everyone and incorporate the spirit of Ubuntu
- Recognise both the advantages and disadvantages of predictive data
- Give a voice and agency to young women who are experiencing harmful practices as well as older women who have experienced these practices
- Have dialogues with communities about these practices
- Explore the right to freedom of testation under Islamic laws to avoid disadvantaging women and to give effect to their rights
- Treat common law and customary law as laws that both need transformative constitutionalism without one of them being regarded as delinquent or repugnant

The way forward

- The conversation should proceed in the form of a reading room that focuses on discussing these developments under customary law and looking at the court cases that have moved the needle in order to consider how that could be translated into law.
- The Green Paper on marriage in the Department of Home Affairs was mentioned as one avenue that is an option for engaging on a possible integrated marriage system, but one which understands and accepts diversity.