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Customary Law, Culture and Social Justice

Has Transformative Constitutionalism Advanced Equality and Other Human Rights in Customary Law?

25 August 2021

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Chapter 1: Introduction

1 Overview

This virtual conference forms part of a series of events organised by the Law Trust Chair in Social Justice in pursuit of social justice. It was the second conference hosted by the Chair in 2021. It was executed as part of its mission to promote social justice scholarship, consciousness, and collaboration to accelerate social justice reform in academia and in society. The purpose of the conference was to provide a platform for engaging with developments in social justice and customary law 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. The conference was conceptualised with the following objectives in mind:

1. Taking stock of customary law and culture reform while impacting on advancing equality and reducing poverty.
2. Reflecting on the equality impact of court jurisprudence on land, succession, marriage and other dimensions of customary law.
3. Documenting challenges and good practices.
4. Place-holding for the Social Justice Impact Assessment Matrix (SIAM).

The main question underpinning this conference was: Has transformative constitutionalism advanced equality and other human rights in customary law? The conference's outcome was to emerge with a social justice research, teaching and collaboration agenda to accelerate transformation in the customary-law area. Participants included government officials, judiciary members, legal professionals, administrators, academics, traditional leaders and civil society. Everybody with interest in the transformation of the customary-law sphere was invited to attend.

2 Summary of discussions

The conference deliberations began with an address by Professor Thuli Madonsela, who highlighted the purpose of the proceedings, that being, 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 spoke of the importance of *ubuntu* in achieving social

justice. She posed various questions throughout her address which prompted delegates to think about issues such as the achievement of social justice for those living under customary law, the role of transformative constitutionalism in these debates, and whether governance through the traditional system was better today than it was in the past.

Minister of Justice and Correctional Services, Ronald Lamola, gave a keynote address. The minister referred to recent court cases, which he explained, showed that while indigenous law was seen through the common-law lens in the past, it must now be seen through the constitutional lens and as an integral part of our law. Like all law, it depends on the Constitution for its ultimate force and validity.

Delegates also discussed topics such as the anatomy of customary law; social justice dimensions of land and other property rights through a customary-law lens; good practices on transformative constitutionalism: advancing equality under customary law; gender equality and customary marriages; impact conscious lawmaking; the human-rights dimensions of *ukuthwala* and other girls' rights; and equality and succession/inheritance challenges in traditional leadership and the family. Key challenges noted included uncertainties about marital status under customary law, enduring harmful traditional practices that trump the inheritance rights of women and girls, and greedy traditional leaders that evict families when the original holder of the permission to occupy passes on. Some speakers, to wit Inkosi Patekile Holomisa, attributed such injustices to colonial distortions of customary law, while others recognised the agency of traditional leaders and the abuse of power and greed that drives such injustices. In addition, the discussion also turned to the prospect of leveraging data-science tools to impact conscious lawmaking and on the work that the Chair is already doing with partners in data science and engineering on this front.

Professor Anthony C Diala highlighted the importance of recognising the impact of colonialism by saying,

> "We have to understand the impact of colonialism and the spiritual and cultural effect it had. This must be part of any discussion on customary law. The attitude of 'my way of life is better than your way of life' should also be considered when we talk about the topic. Some elders exploited this policy for their own benefit, which was a distortion."

He also noted that colonialism "changed everything – we dumped every cultural practice". "We have to talk about returning the spirit of indigenous laws and integrating them into the constitutional values we practise now," he said.

Adv Tembeka Ngcukaitobi shared similar thoughts through examples of how colonial authorities such as Sir Theophilus Shepstone distorted the conception of land rights and other customary-law legal precepts. He decried early judicial tendencies to interpret customary law through the common-law lens and to serve subordination interests. Ngcukaitobi alluded to the recent Ingonyama Trust judgment as an example of true transformative constitutionalism. He affirmed that customary law has the malleability for alignment with social justice and related human-rights dictates of the Constitution.

Gender-based violence (GBV) was a key theme that ran through several of the day's proceedings, most notably in one of the afternoon's parallel discussions around the human rights dimensions of *ukuthwala*". Said legal journalist Karyn Maughan:

> "It is important to consider how limiting this practice is on the lives of children, and how it is tied to the continuing spectre of poverty. Research shows that it is mostly younger girls from poorer, undeveloped communities that are victims of violent coercion by older men when they are forced into a marriage relationship."

Professor Madonsela stated:

> "Consideration needs to be given to restating customary law even if we do not codify it. The uncertainties in customary marriages and land rights that affect ordinary people, particularly women and children, cannot be reconciled with the social justice dictates of our Constitution. In this regard, we will be convening a reading room of those that wish to take the conversation forward."

Chapter 2: Background

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.

Professor Madonsela noted: "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."

The conference sought to explore the following themes:

1. The anatomy of customary law: separating customary law from colonial and contemporary distortions.
2. Social justice dimensions of land and other property rights under customary-law lens.
3. Good practices on transformative constitutionalism: advancing equality under customary law.
4. Gender equality and customary marriages.
5. Impact-conscious lawmaking: can a social justice assessment instrument make a difference.
6. Human-rights dimensions of *ukuthwala* and other girls' rights.
7. Equality and succession/inheritance challenges in traditional leadership and the family.
8. Finding spaces to move the needle on GBV and other gender challenges in traditional communities.

According to equal recognition and respect to the application of customary law and the common law in South Africa, while embracing transformative constitutionalism, was the main topic under discussion at this conference.

Keynote speakers included Professor Inkosi Patekile Holomisa (president of the Congress of Traditional Leaders of South Africa); Advoctate Tembeka Ngcukaitobi (member of the SA Law Reform Commission); Judge Mumbi Ngugi (judge of the Appeal Court of Kenya); Ms Charlene May (Women's Legal Centre); Professor Thuli Madonsela (Social Justice Chair, Stellenbosch University and M-Plan Convenor); Judge TN Ndita (Western Cape High Court, Cape Town); Adv Joyce Maluleke (director-general Department of Women, Youth and Persons with Disabilities); and Professor Juanita Pienaar of Stellenbosch University.

The importance of this conference was encapsulated in a question posed by Minister Lamola when he asked:

> "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? The question, in my view, becomes even more pointed if we concede that in spite of us celebrating 25 years of our Constitution, which is a lodestar towards a new society, the cultural and economic dominance of colonialism still lives deep within our communities. Constructing a new society, finding balance and creating an equitable economic system and redefining cultural norms … require a systemic shift in all aspects of society."

He went further to say,

> "It is at platforms like this [conference] where we need to educate society, and help the lawmakers and the courts with our well-researched papers, to promote social justice by shaping our country with the laws that are in line with the supreme law of the land."

Chapter 3: Opening Remarks

1 Overview

The conference began with Professor Madonsela providing some opening remarks on the conference and its purpose, which was to reflect on the extent to which transformative constitutionalism has moved the needle on equality and human rights for people living under customary law. This was followed by a keynote address delivered by Minister Ronald Lamola, the Minister of Justice and Correctional Services. The morning session ended with Professor Juanita Pienaar, vice-dean incumbent, Faculty of Law at Stellenbosch University, sharing some concluding observations. Minister Lamola's speech marked an excellent beginning to the proceedings and provided food for thought while laying the foundation for the rest of the day and the various panels that followed.

The question-and-answer session that followed focused on various issues including:

- practical matters relating to lobola;
- issues with the interpretation of customary law;
- how the courts and individuals within the legal diaspora can overcome the legal conservatism towards customary laws and traditions; and
- the problem with equating customary law with the Constitution instead of aligning customary law with the Constitution.

2 Opening remarks – Professor Thuli Madonsela

We gather today 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. We do so because we are prisoners of hope. We are here together because we believe that all we have done since the dawn of democracy must have meant something for social justice and the advancement of human rights for those living under customary law. As prisoners of hope, we are not the first ones. Charlotte Maxeke, whose 150th anniversary we are celebrating this year, was a prisoner of hope as well. She believed that everything she thought about justice would one day be true. She also believed that justice was the same as *ubuntu*, embracing the humanity of everyone and ensuring that all public goods in a group or community accrue to every member of that group. That is not different from what John Rawls eventually termed as social justice in his epic book, *The Theory of Justice*. It is similar to the

thoughts that inspired African intellectuals such as Pixley ka Isaka Seme to engage with the world as the world was putting together the document that became a precursor to the Universal Declaration of Human Rights. That document was the United Nations Charter of 1945. They came with their demands, a document that they called African demands, which had basic requirements for embracing the humanity of Africans. From that document, you can see the roots of what eventually became our globally acclaimed Constitution of the Republic of South Africa, 1996 ("the Constitution"). This globally acclaimed Constitution states that:

> "We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."[1]

These declarations in our Constitution signify that public goods, as we understand them, should accrue to everyone, whether that person lives under customary law or elsewhere. The above quote is from the South African Constitution. However, participating in the dialogue are colleagues from Kenya and there are major parallels between the South African Constitution and that of Kenya. These modern constitutions place social justice at the centre of human intercourse.

At the Social Justice Chair, we regard social justice as the most equitable and fair distribution of all opportunities, resources, privileges and benefits in a society or group and between societies. This is ultimately about embracing the humanity of every person to this equal enjoyment of all rights and freedoms by all members of a community and between communities.

[1] Preamble of the Constitution of the Republic of South Africa, 1996.

In *S v Makwanyane* ("*Makwanyane*"),[2] Madala J eloquently clarifies the link between social justice and the African value of *ubuntu*, and also underscores the transformative ethos of the Constitution. He says the following:

> "The Constitution, in its post-amble, declares '… there is a need for understanding but not vengeance, and for reparation but not for retaliation, a need for *ubuntu* but not victimisation.' The concept '*ubuntu*' appears for the first time in the post-amble, but it is a concept that permeates the Constitution generally and more particularly Chapter Three, which embodies the entrenched fundamental human rights. The concept carries in it the ideas of humaneness, social justice and fairness".[3]

Justice Madala said this in relation to the preamble contained in the 1993 interim Constitution.[4] However, the Constitutional Court in subsequent cases, has again endorsed the idea that *ubuntu* is a foundational principle of our Constitution that threads together the right to equality and the right to human dignity. Therefore, when we look at *ubuntu* as the same as social justice, we have to ask ourselves – have those who live under customary law found their lives becoming more and 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? Equality, according to Moseneke J and Chaskalson J in *Minister of Finance v Van Heerden* ("V*an Heerden*"),[5] means the equal enjoyment of all rights and freedoms. However, section 9(2) of the Constitution already provides for this.[6]

We also have to remember what Professor Kader Asmal said – that most but not all apartheid legislation has been repealed in 1994. The effects of apartheid will remain for some time still and even longer if an elected democratic government does not take appropriate remedial action. His understanding, of course, was that all aspects of society had been touched by apartheid and colonialism and that those unjust laws of the past had created systemic and structural, unequal power relations between black and white people, between women and men, between children and older persons, and between many other groups in society. In other words, we were a society where social injustice was legalised. That is why Justice Ismail

[2] *S v Makwanyane* 1995 (6) BCLR 665.
[3] Para 237.
[4] Constitution of the Republic of South Africa Act 200 of 1993.
[5] *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC).
[6] Para 28.

Mohamed always reminded us not to confuse law and justice because all of these things were done under the law. Customary law was used as a legal system and bastardised in the process to become a vehicle of oppression. Therefore, as victims of hope, we know that the law can be used as a vehicle or as an instrument of oppression, but we also know that it can be used as an instrument of justice, as an instrument of transforming society to ensure that there is social justice. It was in this regard that our Constitution was adopted.

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? I do not want to pre-empt what the data shows, because we have amazing speakers who will give us their assessment of our progress. I am certain that we will agree that both in Kenya and South Africa, today is better than yesterday, but I suspect that they will also tell us that things could be better if we had thought better and done better.

To conclude, everything we are doing in the conference proceedings we are doing under the Social Justice Chair at Stellenbosch University. It is part of the vision of the University of Stellenbosch. It is the only university I know, and possibly the only institution I know, that has a restitution statement[7] that not only acknowledges the injustices of the past, but also acknowledges the impact of those injustices in the present. This is similar to the judiciary's approach in the constitutional cases of *Makwanyane* and *Van Heerden* mentioned earlier.

Our vision here at Stellenbosch University and at the Social Justice Chair is to become a globally respected social justice research and training hub. Our purpose is to promote social justice consciousness, scholarship and collaboration to systematise socio-economic inclusive decision-making in society. Our mission is to become a platform that promotes social justice scholarship, consciousness and collaboration to accelerate social justice reform in academia and society.

This conference is part of many things that we have been doing, starting with a summit that was held in 2019. At that summit government and numerous other role players committed themselves to accelerate the pace of transformation to advance social justice. As you saw in the Constitution's preamble, there is a promise to everyone in society that we are adopting this Constitution to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. This means that no one should be left behind and we have an opportunity to leverage the United Nation's Sustainable Development

[7] Stellenbosch University "Strategic Documents" available at http://www.sun.ac.za/english/about-us/strategic-documents#Restitution.

Goals (SDGs)[8] in doing this. In our own vision as a Social Justice Chair, supported by Stellenbosch University, we believe that the focus should be on advancing equality and ending poverty by 2030. This is also in line with the South African government's National Development Plan. Naturally, those under customary law cannot be left behind.

We hear every day about statistics relating to unemployment that has ballooned and is leaning towards 40% if we speak about official unemployment. If we include the Not in Education, Employment, or Training ("NEETs"), we are looking at a youth unemployment rate of 72%, poverty at 55.5% before COVID-19, and in some provinces at 72%, with among those classified by law as African, about 64.2%. Customary law can either mitigate those inequalities or exacerbate those inequalities and I am curious to hear from colleagues whether lawmakers have interpreted customary law and the courts in a manner that transforms social relations to advance social justice and in so doing, liberates everyone's human potential so that we can grow as a country. We can grow as a people. This is in line with *ubuntu* because in *ubuntu*, I am because we are, your pain is my pain, my wealth is your wealth. If I let you suffer, I am condemning myself. If I improve your quality of life, I am assuring my own future. I do hope that this is going to be the basis of our discussion today.

Thank you again to the Minister of Justice, the judges, and all of you for coming here to confer with us. We do believe that when there is a light somewhere, it is stronger than darkness, but when many lights are united, you must agree, that light becomes formidable against injustice. The Ethiopians have a saying – when spider webs combine, they can tie up a lion. And here we are. The lion before us is inequality, poverty and disrespect for human rights, including the rights of women that are undermined on a daily basis by GBV, poverty, inequality and exclusion from the economy.

3 Keynote address – Minister Ronald Lamola

In this month of August, we continue to celebrate women and commemorate the 150 Years of Charlotte Mannya Maxeke, a courageous leader and women's rights activist. I am thankful to the Chair of Social Justice Trust for inviting me to interrogate this critical question: has transformative constitutionalism advanced equality and other human rights in customary law? In my attempt to pursue this question to its logical conclusion, I was confronted with another

[8] UN General Assembly, Transforming our World: the 2030 Agenda for Sustainable Development, 21 October 2015, UN Doc A/RES/70/1, available at: https://www.refworld.org/docid/57b6e3e44.html [accessed 24 March 2022].

question, and that is: what is the true status of women in society, particularly a society like ours which is governed by a constitution that by all accounts, is the best in the world? The question, in my view, becomes even more pointed if we concede that despite us celebrating 25 years of our Constitution, which is a lodestar towards a new society, the cultural and economic dominance of colonialism still live deep within our communities. Constructing a new society, finding balance, creating an equitable economic system and redefining cultural norms which are confined to the household all require a systemic shift in all aspects of society. We can only advance as a society if we consistently probe the true status of women broadly in our communities, in our private spaces, in our churches, in the workspace and in our economy.

As a result of sacrifices by many of our people, South Africa has become a democratic system where the Constitution is the supreme law of the land. The preamble of our Constitution further emphasises the healing of the injustices of our past and unity in diversity. The late Chief Justice Pius Langa wrote:

> "The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves, and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."[9]

The theme of this conference is integral to building a solid and coherent state. The coming into effect of the interim, and later the 1996 Constitution became a watershed moment in the history of South Africa. The supremacy of the Constitution demanded transformation in many areas of the existing laws, including customary law. Different role- players significantly contributed to shaping and transforming our customary law and cultural practices to be in conformity with our Constitution. Academics, researchers, the judiciary, traditional leaders and many others have been very instrumental in aligning the customary law with the Constitution, particularly the rights contained in the Bill of Rights. The jurisprudence has been

[9] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2000 (10) BCLR 1079 (CC) para 21.

broadened in this regard, by *inter alia Shilubana v Nwamitwa* ("*Shilubana*")[10] and *Bhe v Khayelitsha Magistrate* ("*Bhe*").[11] These two cases were instrumental in doing away with the principle of male primogeniture that unconstitutionally suppressed females in various community sectors. For instance, in *Bhe*, the Constitutional Court addressed patriarchy squarely when it said:

> "The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family."[12]

In the *Shilubana* case, the Court referred to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[13] in seeking to explain what equality truly entails:

> "South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality … The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one 'in which there is equality between men and women and people of all races'."[14]

Alexkor Ltd v Richtersveld Community ("*Alexkor*")[15] also laid out fundamental principles which addressed customary land rights, and in the following year (2004), the *Bhe* case addressed the customary succession and the inheritance rights of woman and children. Importantly, the two cases taught us that customary law is subject to the Constitution. It evolves and develops to meet the changing needs of the community.

Customary law is a living law, and this is important for a community that is willing to transform. *Alexkor* in particular reminds us of the intersection between customary law and the land question in particular. The Court held that customary law vividly illustrates the political

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[10] *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC).
[11] *Bhe v Khayelitsha Magistrate* 2005 (1) BCLR 1 (CC).
[12] Para 78.
[13] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC).
[14] *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) para 69 citing *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) paras 73-74.
[15] *Alexkor Ltd and Another v Richtersveld Community* 2003 (12) BCLR 1301 (CC).

and conceptual difficulties which are inherent in the public-private divide. An interesting aspect of this case is that it centred on the importance of customary law. The nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law which governed its land rights. The *Alexkor* judgment goes on further to highlight that while indigenous law was seen through the common-law lens in the past, it must now be seen as an integral part of our law. Like all law, it depends on the Constitution's ultimate force and validity. Its validity must now be determined by reference not to common law, but to the Constitution.

The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. The distortion of customary law did not arise only from the imposition of statutory customary law under colonialism and apartheid. It also arose from the failure to recognise the nature of customary law and its dynamism in the face of changing circumstances. In relation to the land question and customary law, we see an important transformation in our law that we must sustain. This transformation, in effect, is a movement away from state ownership to recognising communal ownership in terms of customary law. The transformation project therefore requires a fundamental reassessment. These exercises demand the attention and participation of all of us.

This conference is taking place at a very important phase of our democracy, where we are working on addressing the imbalances of the past, including the issue of land ownership. As South Africans, we know very well the crimes committed against women and vulnerable groups in our societies. Some of these violations were perpetrated and motivated by some of the customary practices. It is concerning that some areas in our country are still abducting females, and more particularly children, in the name of the *ukuthwala* practice. Women are still suppressed and forced into marriages in the name of *ukungena* practice. It is in platforms like this one where we need to educate society and help the lawmakers and the courts with our well-researched papers, to promote social justice by shaping our country with the laws that are in line with the supreme law of the land. We need to interrogate the status of women across the board. Customary law can exist within the prescripts of the Constitution.

Section 211 of the Constitution states that customary law is protected, but the rules of customary law must be in line with the principles in the Bill of Rights. The Bill of Rights protects the right to culture as well as the right to equality, non-discrimination and dignity.

Transformation is important in building and shaping the South Africa for which many sacrificed their lives. We must all commit to stand against anything that may diminish the gains we have made as a constitutional democracy.

4 Concluding remarks – Professor Juanita Pienaar

Listening to the Minister of Justice's address, I have found the following especially striking. First, we need to focus on the true status of women (and persons generally, including children) in society, which brings us to the actual place and role of the Constitution and the Bill of Rights in society. It cannot be a theoretical construct only; it cannot be paper law only. It has to and must be part of our daily lives. Second, the minister's reference to the role of courts, academics, commentators etc. resonated specifically: we all have to take responsibility to make the Constitution a reality. We cannot be complacent. We must be vigilant and meticulous in dealing with the Bill of Rights and the Constitution.

At Stellenbosch University, we believe customary law has an important role to play – not only as a building brick in a law programme where we educate and train the next generation of lawyers, jurists and commentators, but also in real life, where it has the potential and the capacity to change lives. Customary law has been part of the LLB programme since 1997, offered at the first-year level. After grappling with programme renewal these past years, we have concluded the process, and we are rolling out our new LLB programme in 2022, at first-year level, and phasing it in accordingly. Part and parcel of our new programme is Foundations of Law, a new module for all law students dealing with, *inter alia*, different legal traditions. While we may have focused more on civil-law and common-law traditions in the past, we have specifically now incorporated African legal traditions. The underlying idea is that all of our law students, not only LLB students, will be exposed to the broad spectrum of legal traditions right from the outset. African customary law will now move up to the second year, with more credits, and will be offered on par with, for example, Constitutional Law and Property Law.

Customary law is important, but it is also complex: it operates within various contexts, spheres and dimensions. Often past customs are called on to deal with present needs and demands, which can be challenging. It also operates alongside national law, often with a different approach and different underlying values. At an overarching level is the Constitution, impacting on all law, including customary law.

Customary law is also contentious: much of today's proceedings will highlight some of these concerns and challenges and unpack them in more detail in the successive panels. It is contentious, but it is part of our history and more importantly, it is part of our future. This leads to the following question: where is social justice located within this complexity, of which customary law forms part, also having regard to other challenges we continue to face in our country – poverty, which impacts disproportionally on women; socioeconomic realities, exacerbated by COVID-19; the continued land question; and unfortunately, prevailing gender inequality and GBV? It is in this light that today's proceedings are absolutely critical: unlocking the potential of customary law within a social justice context.

5 Discussion

One of the questions that arose after the opening session related to customary marriage. A delegate asked:

> "I had lobola paid for me, however, it was not paid in full. I broke up with this man and he got married last year. Do we need to get legally divorced? I would hate to have him come back in my life and claim we are still married. How do I handle this?"

Professor Madonsela responded to this question and stated that the colleague is not married under customary law, but she is correct in saying that somebody can come back and say she is married. This question tied in nicely with the paper delivered by Professor Madonsela wherein she provides anecdotes about what we thought we were doing and what has happened, what we celebrated and what the reality is. In her paper she touches on *Moseneke v Master of the High Court* ("*Moseneke*")[16] and why she thinks the judgment is wrong. She also deals with the recognition of the Customary Marriages Act 120 of 1998 ("Customary Marriages Act"), which she was part of, and why we were wrong in not being clear about when a customary marriage is concluded.

Professor Madonsela shared a story about the time when her daughter was preparing to get married and said: "They started with the customary celebration and the lawyer that was supposed to help them with their antenuptial contract was saying, no, she cannot do that. They have to go and dissolve the customary-law marriage first."

[16] *Moseneke v Master of the High Court* 2001 (2) BCLR 103.

Professor Madonsela noted that part of the problem was that the people who interpreted customary law never studied it because during colonialism and apartheid, it was a system that was viewed with suspicion, it was denigrated and nobody really took it seriously. It was treated as a delinquent system. "There were even repugnant clauses that were included in the settlement between the English and the locals when the Union of South Africa was formed." The question posed spoke to another question: was it not time that we finally codified customary law? "There are just far too many issues. The romantic ideal we heard at the beginning of this session – that if we codified it it would fossilise – is not working because people's lives are impacted negatively by too much fluidity."

Another question was posed in relation to the legislation in the Marriage Act 25 of 1961 ("Marriage Act") governing Islamic marriages and its consequences. Minister Lamola responded by stating that the Department of Home Affairs had issued a policy that will govern all marriages in the country with an intention to enact a statute that would improve Islamic marriages and all marriages that we have in society.

> "The period for public comment has closed, and the process will be moving towards the development of that statute. It will enable us to resolve some of these teething challenges related to not only Islamic marriages, but all other marriages where we continuously have challenges in this regard. The minister noted that they do encounter some of these difficulties, particularly when the processes of divorce come into the space in terms of properties, their distribution, and how it should be governed in terms of the dissolution of marriages and so forth."

The attitude that has been taken in most cases is to stand in line with the previously decided cases concerning marriages that are dissolved, where they are governed by religious activities, Islamic activity, or any type of governance that the parties believed in at the time of the existence of the marriage. However, the whole solution will come from the process that Home Affairs is currently leading, which the Department of Justice is also participating in, and the minister noted that he hoped the author of the question also participated in that process.

The minister then turned to a question posed by Professor Madonsela, who asked whether it was not time to codify customary law. He stated that his department did not think it was time and that they were not yet convinced that this should be done because of the different aspects of customary law and practices present in our society. Another reason was

codification's impact in terms of which system to use and so forth. However, the minister noted that it is a debate that can be continued. With maturity maybe that stage can be reached, but at this stage the view is that it cannot be done.

The next question related to how the courts and/or individuals within the legal diaspora could overcome the legal conservatism towards customary laws and traditions, mainly relating to women and other issues. Professor Madonsela responded and said that the conservatism around customary law would end when everyone thought about the impact on everyone. She drew on the minister's thoughts about the humanity of women and the need to embrace the humanity of women. She held: "At the Social Justice Chair, we talk about embracing the humanity of everyone. In *Makwanyane*, Justice Madala equates *ubuntu* with social justice and, again, we talk about social justice being about embracing everyone. What does that mean to decision-makers? It means every time you make a decision, you have to ask yourself, how will it impact on everyone? You must disaggregate the people who will be impacted by your decision and then see whether it will reduce the existing inequalities."

According to Professor Madonsela, this would mean that when judges make decisions, they think about whether their judgment will enhance equality between women and men or equality between different age groups or equality between those governed by customary law and those governed by common law and other laws. She noted that this has been happening in the Constitutional Court, especially when looking at the cases cited by Minister Lamola, which are indicative of an attempt in that direction.

Professor Madonsela also noted the mistake in simply equating customary law with the Constitution instead of aligning it with the Constitution. The delinquent part in the transformation process has been the "lazy" thing of simply superimposing common law on customary law. This is clear in *Moseneke* where widows were not allowed to inherit when they should have been allowed to inherit. Simply taking the common law and superimposing it on customary law is not transformative constitutionalism entirely. It is half transformative because it does not consider the *ubuntu* framework of customary law where the family is not nuclear.

> "For example, right now a lot of women take every penny they have to pay for their first child to go to university or play a sport, for example, soccer. The question is, why do they do that? The answer is because in Zulu we say *ukuzala ukuzelula*. That is part of *ubuntu*, *ukuzala ukuzelula*, which means the child who is ahead must then use their hand to pull

those up. That is part of customary law but by just one fell swoop, *Moseneke* turned the African family into a nuclear family."

Professor Madonsela further said she was one of those who celebrated this judgment because she knew no better having been brought up in a system where customary law was seen as a delinquent legal system. However, when Lesley Manyathela died, in the name of the law and in the name of justice, the mother was kicked out of the house. The mother suddenly had no income because the law said the only person it sees is the son of Lesley Manyathela. That was when Professor Madonsela realised: what have we done? "By being lazy and not looking into customary law and looking at what can be taken that is good in customary law based on *ubuntu* and bringing it into the common law, we had been unjust and ruthless. Going forward, we will have to think about what is good about customary law based on *ubuntu* and preserve it."

Professor Madonsela also shared a story about being involved in a process called Project 90 in the South African Law Reform Commission before the Constitution,

"Part of the debate was that if we talk about harmonisation of customary law with common law, are we simply talking about killing customary law and replacing it with common law, or are we talking about finding some good in customary law and preserving it if it is about a better way of being human?"

Minister Lamola added to this and said that from the perspective of customary law, it is an evolving law which obviously is dynamic and dependent on the evolving situation in society. As confirmed by the cases mentioned earlier, he said, it reflects that the courts when interpreting customary law have done so in progressive way. "For example, when you look at the *Shilubana* case and the *Bhe* case and so forth, most of the decisions have moved a very long way in dealing with patriarchal situations, far better than any other institution in society could have done it."

The minister said that even from the context of the executive and government, there has been an attempt to evolve with the times, to respond to these evolving situations in society.

"An example relating to inheritance in a polygamous marriage is where all the spouses can now inherit equally, irrespective of the type of marriage regime that governed that kind of a marriage. This shows that there is a movement toward the progressive realisation of

these rights, but we can still do more in evolving of customary law. Particularly with regard to us not waiting for courts to give some kind of directive and interpretation."

There are still teething challenges in society that relates to some of the practices, which the minister believes could be addressed through legislation and other legal tools. Minister Lamola noted:

"We do not have to wait for the courts to interpret and tell us that this is unconstitutional and then only we deal with it. I think that also goes to the role that we have of constitutional development as the state that should not only be left to the Constitutional Court. The state should continue to develop the Constitution to respond to this changing situation in society and to comply with the Bill of Rights."

Chapter 4 Plenary 1: The Anatomy of Customary Law: Separating Customary Law from Colonial and Contemporary Distortions

1 Overview

This discussion centred on unpacking the anatomy of customary law with a keynote address by Chief Inkosi Patekile Holomisa. This was followed by presentations given by Professor Anthony Diala and Professor Christa Rautenbach. Chief Holomisa started the conversation with a very practical observation on traditional attire compared to Western attire. He also highlighted the urgency of the proceedings in light of the current times by referring to the murder of University of Fort Hare LLB student, Nosicelo Mtebeni, at the hands of her boyfriend. Chief Holomisa then turned to an exposition of the extent of the damage caused by colonialism and apartheid policies on indigenous South African communities, and shared some observations from his experience as a traditional leader.

Professor Diala's discussion probed the legal identity of Africans and reflected on how we need to understand the impact of colonialism to answer this question. He looked at two motifs to understand colonialism and the colonial experience:

1. The economic motive; and
2. The reaction of Africans to colonialism. He then delved into the three categories of laws on the continent, namely indigenous law, statutory law and customary law.

Overall, he emphasised the need to pause, take stock and capture the spirit of indigenous laws.

Professor Rautenbach asked the question: should the separation of indigenous and colonial laws be the ultimate goal? She also spoke about the difference between changes in customary law through case law and legislation, as opposed to changes on the ground. In addition, she highlighted the possibility of integrating customary law and common law. On this note, she illustrated how customary law and common law are not equal, despite what the Constitution guarantees. She ended with the question: what should we prefer, living law or official law?

A fruitful discussion ensued with various questions arising including:

- When is a traditional wedding or customary law marriage really concluded?

- What was the colonial influence on customary law and why do these distortions, or harmful practices that have been distorted, mainly affect women?
- How did African countries come to accept colonial laws as superior governing frameworks for African societies?
- Can indigenous law adapt to modern South African society, including the ability to embrace a more empowered position of women today?
- What would a project on substantive gender equality look like in the context of customary law?

2 Keynote Address – Inkosi Patekile Holomisa

First of all, I thought when people attended a church conference, especially leadership, they dress accordingly. We would see some collars in the necks of the priests or the imams and so on. Now I see that I am the only one who has dressed accordingly and dressed for the occasion. That could say something, because we are talking here about customary law and what colonialism and other invasions did to our way of life and that, therefore, even when we want to talk about our own way of life, the dress code is that of the very same people who descended on our shores and did what they did to us. That is said lightly, but I think it is something we need to ponder on.

Nonetheless, it is a privilege for me to have been asked to partake in this pertinent and much-needed discourse under the umbrella of customary law, culture and social justice. I want to preface by advancing that to the extent that we assist with transformative constitutionalism, advancing equality and other human rights in customary law, we are deeply saddened and disgusted by the brutal and horrific murder of University of Fort Hare LLB student, Nosicelo Mtebeni, at the hands of her boyfriend who, having professed his love for her, was supposed to be a protector and defender. May her soul rest in peace.

Unfortunately, she is one of so many who have fallen victim to the ways of men in our country. This, for me, places into context the importance, relevance and urgency of the discussions we are having today in order to make decisive inroads into the psyche and appreciation of the anatomy of customary law, with my topic focusing on separating customary law from colonial and contemporary distortions.

Unfortunately, I am going to disappoint the participants in this conference because there are so many issues that you would want to raise that have fallen victim to the onslaught of colonialism. Time constraints will limit this discussion but nonetheless, I am sure with the

hour given to this particular session, time will allow me to elaborate more on some of the issues that people are interested in.

There is a paucity of literature that would do justice in depicting the extent of the damage caused by the impact of colonialism and apartheid policies on indigenous South African communities. In my view, this is an area of research, relatively speaking, that is virgin territory. It is also an area of our discourse that is susceptible to misconceptions, misinterpretations and obvious distortions.

The notion of structural violence is invariably embedded in our violent political history in which race, class, gender and sexuality were normatively constructed. This is courtesy of discriminatory laws that have manifested in institutionalised violence along racial lines over centuries. The migrant labour system we know, the forced removal of people from their ancestral lands with the attendant destruction of the family structures, are just some of the cases in point.

The apartheid machinery birthed and nurtured an animalistic and violent behaviour that culminated in the GBV phenomenon of our time. As a nation living in a democratic South Africa, it is our civic duty to reverse this scourge. Allow me to highlight a few observations drawn from my experience as a traditional leader. Traditional communities in years gone by placed a premium on mutual respect for one another and paramount was the ability to take care and safeguard one another. Again, the idiom that says "it takes a village to raise an African child" embraces and validates the notion of a non-violent people exposed to foreign tendencies. The government of the day, ruled by the majority of our people, is premised upon an open, democratic, non-racial, non-sexist and just society and in this regard, I understand and embrace the wisdom of the human rights leader, Mahatma Gandhi, who famously said the true measure of any society can be found in how it treats its most vulnerable members.

I am more familiar with the values entrenched yet distorted and abused in African cultures and traditions and ordained by the dictates of the cultural values of my father's people to interpret jurisprudentially and administratively how these cultures and traditions are to be implemented. Our culture is about nurturing, as well as the defence and protection of the weak and the vulnerable. We do not have notions of, for instance, women being perpetual minors. Deliberately or out of ignorance, the colonial invaders, whose legacy will continue to endure, decreed that according to African laws and culture, women were minors. Yet no man of reason regards himself to be superior, as to be a dictator in his own homestead.

In this regard, for instance, a homestead is referred to as the homestead of Mr X – it is never referred to as Mr X's place. Even when we apply for pieces of land as men for residential and cultivation purposes, we do so because we have a family that we have to provide for. You cannot entitle someone under custom to a piece of land for residential purposes when they do not even have a family. What will they use that land for if they do not have a wife and will not have children? They must continue to live in their father's and mother's homestead because land is too valuable to be given to anyone who has no consideration of the value of the piece of land because he does not really have anything to do with it. It belongs to the community as a collective so that every individual in the territory has a piece of land that he can lay claim to as a member of a family.

These days where men abuse and exploit women, babies and children, we need to ask: what does it mean to be a man? Being a man means to be none of the things that today's society is complaining about. To be a man is to be a provider to the family. It is to be the guardian and protector to all who fall within your family. It is to be not a monster to be feared as it ravages its daughters and the vulnerable. To be a man is to respect and love your family.

One other area of focus and perpetual distortion is the phenomenon of lobola. The provision of lobola does not mean the family of the prospective bridegroom is buying the woman as you would when, for instance, you buy a sheep or a car. She is not your property to deal with as you please. She remains a human being with the same rights as any other person, male or female. She is of flesh and blood as the man, and when she is not in the mood, she must not be forced. Importantly, she is not a servant or a slave. She deserves respect.

Lobola is meant to form familial bonds between the two families. The cattle are normally contributed by the man's fathers and uncles. In doing this, they lay claim to the pride, making it clear that they are interested in her well-being as a new family member. The man may not abuse her by beating her up, denying her food and shelter or generally failing to provide for her wellbeing and that of the children.

Lobola is meant to be a form of safeguard in times of hardship and want, as the woman can resort to her maiden home for support. The cattle deposited at her home are there to support her in times of need. This support is available for her, especially when she can no longer continue to live with her husband or in-laws. The objective here is to create men who will be of value to their families, communities and the nation at large. The men are therefore meant to be humble, respectful and productive members of society.

At this point I wish to emphasise that no custom has ever been conceived with the sole purpose of the exploitation and abuse of the vulnerable, least of all women. Any distortion is a negation of the original intent. I have in mind here, *inter alia*, the law of inheritance. The heir moves into the shoes of the father, not as the owner of his assets, but as the custodian who holds the responsibility of ensuring the sustainability of the homestead and the family – to build and grow the family, to feed the family and to protect its members from the many forms of life. Importantly, the economic and social status of the widow must remain unchanged. There is no basis or justification for her to be deprived of the amenities and benefits to which she was entitled while her husband lived. The heir to the family estate is required to provide the support that the father was required to provide to all who depended on him while he lived. He is required to keep the homestead and all its possessions in good order and even improve on their quality and quantity. He must conduct rites of passage for his brothers and sisters, he must provide lobola for the brothers who cannot do it by themselves, and he must marry off his sisters.

If the deceased leaves no sons and only daughters, the uncle or male cousin in line has to take over the responsibilities of the deceased. Again, this does not mean that he is the owner of the estate. It continues to belong to the deceased and his family members. To do otherwise is to destroy the purpose and intent of the practice of the law of succession. Today, such a responsibility of taking up the management of a deceased estate in the absence of a male heir is limited only to matters of the performance of cultural rituals and assisting the widow and her daughters. Even the homestead and livestock registration is done in the name of the widow to ensure the security of tenure and the lawful ownership of movable property. This indicates therefore what has been said before, that customary law and practices are dynamic. They do not remain in one place and instead move with the times. Other customary practices that are oppressive to women are of foreign origin. They are not our own. For instance, the requirement that widows wear black clothes for a year to mourn their departed husbands is not our own. The practice of widows wearing black clothes was copied from Europeans when they settled in our lands, even though they would only wear them on the day of the funeral. Of course, it is our custom that the widow has to observe a period of mourning for her departed husband and that the wearing of clothes must be clothes of modest colours, displaying no style of glamour in her appearance.

Apropos the customary practice of *ukuthwala* I need to report that the Congress of Traditional Leaders of South Africa took a decision a long time ago to ban that practice. It is

no longer necessary for a marriage relationship to be initiated through *ukuthwala*. Historically, ukuthwala was a legitimate way of expediting the initiation of the marriage by avoiding the drawn-out processes involving several steps and people in negotiations. The practice has since been abused and distorted by a variety of people who have interests that are different to those of the women concerned. Men take advantage of young girls from poor families. They offer goats, sheep and chickens, in exchange for the girl's hand in marriage, pretending to be providing the lobola that we earlier spoke about. In such cases, the prospective couple do not even know each other, let alone love each other. Young girls are not even mature enough to be considered women. Such men are criminals who commit the crime of rape and should be treated accordingly. The same goes for relatives who collude in such acts of criminality. They are human traffickers who must be treated as such.

In conclusion, this topic, as alluded to, is a rich area of opportunity for further research and interrogation in order to validate and entrench the life lived by rural communities and to militate against the widespread distortions in the public domain. Due to time constraints, I will only briefly touch on land, governance by traditional leaders and polygamy. On the question of land, as I said earlier, tribal land belongs to the tribe as a collective. It is land that was acquired in most instances through wars with neighbouring or other communities. That land was then, as I say, occupied by the community and it has to be used for the benefit of the community. When we talk about the allocation of land to people who need it, first of all, it must be established by the leadership of the community as to what purpose the particular piece of land is required. In most cases, as I said, you need the land as a man because you want to provide shelter for your family and to cultivate food for them. You would then apply for this piece of land to the traditional leader and his counsellors. Thereafter you have to prove that you have a wife or are about to have a wife. Once you have that wife, the land belongs to you and your wife, as well as your children and your offspring after that. It is not a question of it just belonging to the husband alone.

If the colonisers had understood our way of life when they came here and in relation to registering land, they would have registered the land in both the husband's and the wife's name, because it is theirs jointly. That is why when you take another wife in a polygamous arrangement, you provide the same piece of land for her because you are going to have your own children together with your wife, so they must have that kind of security.

On the question of polygamy, as mentioned, you do not easily take up more than one wife as a man unless you are able to provide for them, because each one provides a homestead

for yourself, your wives and your children. They need to be properly provided for. You are not to take the property of one household and use it for another household when you are not in a position to ensure that the one from which you are taking the property, like the lobola cattle, is not going to be impoverished. You may not impoverish the existing wife by taking on another wife when you are not in a position to provide for both of them.

On the question of governance and whether the institution of traditional leadership is making the lives of the people under the traditional leadership better now than it was in the past or vice versa, I would say that given the opportunity and the necessary recognition, a lot of good would have come to the people living in rural areas. This is the result of the fact that they would have the advantage of having simultaneously elected leadership and traditional leadership.

Traditional leadership has its own attributes of uniting the people, for instance, mobilising them. The traditional leaders mobilised communities to build a school and clinics during the apartheid years. As we know, elected leadership is divisive because there are political parties and politicians who compete and divide families and communities. If we had to come up with a formula that allows these two systems of governance to coexist, the people living in rural areas would be better off than those who live in the urban areas under poor conditions.

3 Presentation – Professor Anthony C Diala

When we speak of the anatomy of customary law, we are essentially asking ourselves one question: what is the legal identity of Africans? To understand this question, we need to understand colonialism's impact on Africans. Sometimes we underestimate this impact. We forget the spiritual aspects of colonialism. We forget the economic aspects, the philosophical aspects and the cultural aspects. In other words, everything that has to do with our lives in one way or the other can be attributed to colonialism. First, I want us to understand two motifs for colonialism and the colonial experience in Africa. The first motif is the economic motive. Many of us may be aware that the Europeans, specifically the Western Europeans who came to Africa, did not come here to admire the place. They came to take over. They came to take over the resources, and for you to take over the resources of a nation, you need some sort of superiority attitude and belief that your own way of life is more superior to the way of life of the people that you are taking over.

Sometimes we miss this very important aspect of colonialism, that mental attitude that my way of life is better than your way of life, therefore I have the right to impose on you not just

my own laws, but also my religion, my food, my fashion, my economics and my systems of life. We need to understand that when we speak about the anatomy of customary law and the so-called distortions of customary law, these two things must be kept in mind.

The next thing we have to keep in mind is the reaction of Africans to what happened in their lives. In other words, the reaction of Africans to colonialism. Unless we go back to history books, we will not be able to understand this because we were not there. However, if you read historical works, you will be able to understand how the initial Africans who met the Europeans received them. They received them with fear, suspicion and curiosity.

We will not have enough time to go into what happened in this encounter, but let me simply point out that there were some Africans who saw colonialism as an opportunity to enhance powers that they did not have. That is why I like what Deputy Minister Holomisa said about our attitude, our way of life in our dressing, and the things that colonialism did to our people.

Some African elders took the opportunity to assert powers they did not have prior to colonialism. There were people who exploited the new land policies to make changes in the customs of African peoples. That is where that so-called distortion of African customs comes from.

What then are we saying about the anatomy of customary law? We are saying that colonialism should be perceived as a historical marker, a sort of line in the sand for the categories of laws we have on the continent. Based on fieldwork in western and eastern Africa, I have identified three of these categories of laws on the continent. Apart from religious laws, which I will not mention, the first category is indigenous laws. The second category is statutory laws, also known as state laws. The last category is customary laws. Now, are you surprised to hear that I am using indigenous laws and I am also using customary laws? Let me explain why these are three different categories. Indigenous laws are the practices and norms that our forefathers and ancestors practised prior to colonialism, as well as the norms and practices that survived the colonial contact. In other words, wherever you find a practice, norm or custom that remains in the form it was before colonial authorities came, then that is indigenous law. The clearest example is known as the male primogeniture rule. For those who do not know, the male primogeniture rule is the rule that the eldest male child will inherit. In the interest of time, I will summarise why the eldest male child was the only person to inherit. It was because of the agricultural nature of society, the need for defence for an individual to intercede between the spiritual and the material worlds and to stand as a representative of

the ancestors. Therefore, that person inherited the property, not for his own benefit, but for the benefit of the entire family, as the deputy minister rightly pointed out. That is the value that underpinned the male primogeniture rule. It is an indigenous practice. However, now whenever you find communities saying, no, that practice is no longer suited to our modern conditions and, therefore, we want all the children to inherit irrespective of whether they are male or female, that is customary law. It is no longer indigenous law. I will tell you why it is customary law. Suppose you then find another community that says, no, we shall give it to all the male children, but not the females, there is not enough wealth, or for whatever reason, their justification is based on. That is customary law, it is no longer indigenous law. Therefore, customary law is a mixture of indigenous practices and the influence of colonialism.

Today we have the influence of colonialism. The most prominent influence is the Constitution. Everybody worships the Constitution. We are all idolaters, if I may use that very strong and controversial term. All of us worship the God known as the Constitution. Many people sometimes do not realise that this Constitution is unknown to customary law or unknown to indigenous law. Our forefathers and ancestors did not know what the Constitution is, but today we accept the Constitution as the law of our legal lives. This is why I speak about the anatomy of customary law being integral and crucial to the identity of Africans.

Sometimes the most difficult things for people to see are the things staring them right in the face. That is the reality that Africans are facing today. We speak of decolonisation and Africanisation, yet we promote constitutionalism. You have to ask yourself this question: why did our forefathers, the early political liberators, retain the systems left behind by colonialism? Not just in South Africa, but elsewhere in the continent. Why did they not throw them away and start de novo or afresh? In other words, start with what their ancestors were using before the Europeans came. The answer is simple: because it was impossible to discard. Colonialism, simply put in computer language, is the most sophisticated software ever devised on earth. It has self-replicating systems in place. It cloned and reproduced those Western systems in such a way that Africans themselves will be maintaining those systems left behind by the Europeans. Basically, in the words of *Animal Farm*, we become the Europeans, but in a different scheme.

We apply those systems, we subject customs to values in the Bill of Rights, values in the Constitution, a Constitution that is a stranger so to speak. However, we worship the Constitution, we use it and we fail to appreciate that we are changing our lives in response to the systems put in place by colonialism. From the way we eat, the way we speak, the clothes

we put on, the way we think, to the laws that we use, the economic systems we have in place, the land practices, every aspect of our lives have changed and will even change more. Unless we pause, take stock and try to capture the spirit because most indigenous practices, to be frank, are finished. They are gone. They cannot come back. We have changed so many of them we barely even know them. The only thing left is their spirit.

Unless we retain the spirit of indigenous laws, things like ubuntu, the welfare of the family, the attendant duty to take care of the family by the eldest male child or whoever inherits, unless we can retain these spirits – what I call the foundational values of indigenous laws (i.e. use them, integrate them into the constitutional values and constitutional spirit and so-called Roman-Dutch law) – we will end up losing indigenous laws completely. That is what happened in Europe. When the Romans captured and colonised the almighty British, they imposed their laws on them. When the Scandinavians came there, they also imposed their laws on the British and eventually, the British imposed their own English legal system on us. We are going to lose indigenous laws entirely unless we preserve their spirit by integrating them with the so-called Roman-Dutch law. Therefore, we have a new identity of customary law and it is left for us to open our eyes and see what that new identity is and to be able to plot the future of the legal order in South Africa and beyond.

4 Presentation – Professor Christa Rautenbach

Customary law in colonial courts: Should the separation of indigenous and colonial laws be the ultimate goal?

To sit around the table with Inkosi Holomisa for a second time after more than 25 years is indeed a privilege. Inkosi might not remember, but I was a young academic who was part of the traditional authorities research team that argued the case of traditional leaders in the Constitutional Court in the certification case in the 1990s. Inkosi attended the court proceedings in his traditional attire, like today, which made a huge impact on us all. While the outcome of the case did not go our way, what stuck to me is the statement by the court that the text of the new Constitution guaranteed – "the survival of an evolving customary law" and that it could not be faulted for "leaving the complicated, varied and ever-evolving aspects or specifics of how customary law should be developed and interpreted for future evolution, legislative deliberation and judicial interpretation".

I think we have all seen this over the last two decades, that customary law could not escape the winds of change. It has indeed evolved in many respects, despite some resistance by more

conservative groups and individuals. However, most of the changes have been through case law and legislation, and we have no easy way of knowing if those changes have filtered through to the traditional communities.

Mohamed J, in a speech that he gave many years ago, believed that the influence between common law and customary law worked both ways. He foresaw that both these legal systems would eventually develop into a more integrated system and said that "southern Africa will be poorer without the sound discipline, effectiveness and historical experience of Roman-Dutch law and will also be poorer without the spiritualising, humanistic and bonding values of customary law".[17]

We are all aware of the success stories of the value of *ubuntu* which has seeped into the legal arena to carve out an undisputed place in the legal literature. However, the co-existence of indigenous and colonial laws – and I deliberately use this word "colonial" to link up with the theme of this panel – have challenges when it comes to the application of customary law in the mainstream courts. I will focus on three points that might be controversial.

My first point is that customary law and common law cannot be treated equally in the courts because they are not the same. Despite what the Constitution promises and what the court says, common law and customary law are not equal in all respects. The fact that customary law shares the podium with common law does not mean that it applies automatically in any given case. In contrast to common law, which is the general law of South Africa, customary law applies only when it is applicable.

Despite its equal status, customary law is not a law of general application. It is a personal legal system that applies only to people living under a system of customary law. The qualification "when it is applicable" does mean that in a given circumstance, the court will have to decide whether customary law is applicable or not. This has to be done following the choice of legal rules, which are extremely vague at this moment.

In 1994, the South African Law Reform Commission pointed out that the courts need to know when they must apply rules from customary or common law, because notwithstanding the recognition of customary law as part of the general law of the land, the circumstances in which it is to be applied are still unclear. This is still the situation. What happens in the courts? In some cases, for example, *Maisela v Kgolane*,[18] the court held that the litigant who wishes to

[17] I Mahomed 'The Future of Roman-Dutch Law in Southern Africa, particularly in Lesotho' (1985) 1 *Lesotho Law Journal* 357-361.
[18] *Maisela v Kgolane* 2000 2 SA 370 (T).

have an action determined in terms of customary law must first prove that customary law is applicable, and if it cannot be proven, the common law will apply.

My second point is that the courts struggle to find the content of customary law with the common-law tools at their disposal. The judiciary takes judicial notice of the common law which can be found in written sources, such as the Constitution, legislation, precedents and reliable textbooks. Litigants are therefore generally not allowed to lead evidence to clarify common-law rules. Customary law, on the other hand, except for its official version, is essentially an oral law observed by traditional communities and that is why it is referred to as living law. The fact that living customary law resorts in the community and is therefore flexible, has challenged the reasoning of the judiciary on several occasions and its approach to this problem has not been consistent, particularly the question of whether a court should take judicial notice of living customary law as a question of law or a question of fact.

The Law of Evidence Amendment Act 45 of 1988, which is still in operation, but has been severely criticised for being a remnant of apartheid legislation, allows judicial notice if customary law can be ascertained readily at a sufficient clarity. Official customary law provides a readily accessible source, and the judicial officer can take judicial notice of it. But what happens in the case of living customary law which is not readily accessible? Earlier court decisions, for example, *Hlophe v Mahlalela*,[19] held that a litigant relying on customary law, which is not readily accessible, must prove it by deducing expert evidence to establish it as a fact. In other words, facts must be placed before the court from which the court then deduces the customary legal rules. However, in *MM v MN*,[20] the majority held that the determination of customary law is a question of law. According to *Mayelane v Ngwenyama*,[21] "a court is obliged to satisfy itself, as a matter of law, on the content of customary law, and its task in this regard may be more onerous where the customary-law rule at stake is a matter of controversy. With the constitutional recognition of customary law, this has become a responsibility of the courts. It is incumbent on our courts to take steps to satisfy themselves as to the content of customary law and, where necessary, to evaluate local custom to ascertain the content of the relevant legal rule".[22]

Although the court regards customary law as a matter of fact, its words to "evaluate local custom in order to ascertain the content of the relevant legal rule"[23] casts some doubt on the

[19] *Hlophe v Mahlalela* 1998 (1) SA 449 (T).
[20] *MM v MN* [2010] ZAGPPHC 24.
[21] *Mayelane v Ngwenyama 2013* (8) BCLR 918 (CC).
[22] Mayelane v Ngwenyama 2013 (8) BCLR 918 (CC) para 48.
[23] Mayelane v Ngwenyama 2013 (8) BCLR 918 (CC) para 48.

contention. Surely this practice cannot mean anything other than to require factual evidence from which the court can deduce a rule of customary law, which makes it a determination of fact. Therefore, it is a play of words.

In this instance I have to agree with a dissenting judgment of Zondo J who said that customs and usages traditionally observed by any group of people are a question of fact and not of law and the rules of evidence cannot be bent to accommodate customary law otherwise.[24] It is not fair to expect the courts to bend the rules of evidence to accommodate customary law at all costs, especially at the expense of legal certainty. They are creatures of law that operate within the parameters of common law and, therefore, the rules of evidence should be applied differently when customary law is applicable, and legislative guidance should be provided in this regard.

The third and last point I would like to make is the fact that we are quick to assume that colonial courts are ill-fitted to deal with customary-law disputes. In contrast, if we look at the high number of cases where people take their customary law disputes to court, it is actually a confirmation of the fact that members of traditional communities are embracing the power of colonial courts to settle their disputes. The judgment inevitably becomes the origins of customary-law rules that are discovered by the court or developed by the court. Is this then piecemeal recording of customary law which transforms this living law into official law? We are then back at the original question, what should we prefer – living law or official law? I do not know the answer, but I do know that we cannot continue keeping the common and customary law separated at all costs. Cross-pollination has already taken place and will continue to happen. Take the *Bhe* case, for example, where the rule of male primogeniture has been replaced by a statute that contains both typical common law and customary-law norms, such as the extension of the meaning of wife and descendant to cater for extended families in customary law.

I have used the *"potjiekos"* metaphor before to argue that by putting all the different laws in one big pot, letting it simmer and infusing all the ingredients with all the different flavours, we might eventually have a wonderful, integrated *"potjiekos"* mix distinctly South African to be enjoyed by all. My argument I think is more in favour of having this pollination between the legal systems continue spontaneously than forcing them apart.

[24] Mayelane v Ngwenyama 2013 (8) BCLR 918 (CC) para 126.

5 Discussion

A fruitful discussion ensued after the presentations. The first question focused on the point made by Chief Holomisa when he stated that the aspects of custom that are oppressive are of foreign origin. The question was then whether or not violence against women is a feature of all societies, both in the past and today? In addition, when speaking about custom, do we speak to customary ideals which differ from the fact that there are inequalities in families, including violence? Furthermore, where do we draw that distinction when looking at customary laws and what the original intention was compared to the interpretation and implementation that we have in the context of South African society today? This question is important because what people and government say versus what is practised seems to be two separate worlds. Where is the disconnect and is there a way of changing that?

Chief Holomisa responded and agreed that violence against women is a feature of all societies. He went on to say that we have the animal in us when speaking about the survival of the fittest and the elimination of the weak. He held the following: "Unfortunately, women are not the fittest in terms of their physical abilities and therefore it is easy when looking for a person to take advantage of, to direct energies at women and children. Nonetheless, I do not believe that any man, father or brother would deliberately participate in the formulation of practices or laws that are meant to denigrate and undermine women. That is why some of the teachings that are given to the boys who are being turned into men through the initiation ceremonies must be protective of women and children and should not take advantage of the vulnerable. Even during wars, although there will always be exceptions, women were spared from the killings that took place. The killing was directed at the male opponents who were engaged in war. Unfortunately, and this would be distasteful to some, together with the cattle and other animals, women were taken over, captured by the winning army and spared their lives because they were known to be responsible for the perpetuation and the growth of the nation itself. In such situations, violence tended to be directed at women because, in any event, even if they were spared, they were taken into a livelihood they never had a choice in. For example, they were forced into marriages and so on, even in those times. However, in times of peace, in the absence of war, when there is normality, these practices are meant to protect the women. Hence, the land you have that has been given to you as a man is given to you because you have a wife to provide a livelihood and shelter. Therefore, the idea is to protect everybody, to ensure that everybody is fine."

In terms of the disconnect between the presentation and what happens in practice, Chief

Holomisa shared the following observation: "People live their lives. They are born in a particular lifestyle. If they are born and grow up in an environment where customary practices are followed, then they follow them. However, they are not in a position to follow them in the same way as they used to before there were influences from outside, influences that became stronger than the previous ways of life. These difficulties arise when there are problems with interpretation. For instance, Africans will want to have two weddings. They will want a traditional African wedding, and then they will want a white wedding due to, for example, religious beliefs. It is only when there are these types of problems that difficulties arise because, in essence, if you are married in terms of your culture, that marriage is legal, provided all the necessary requirements and conditions have been met. This speaks to the question: when is a traditional wedding or customary-law marriage really concluded? It is difficult to say, because one might have provided lobola which was accepted and therefore, we are married. Yet somebody else will say, no, presentation of the lobola cattle was a way of initiating a marriage relationship, and certain rituals still had to be performed. For example, you have to be handed over formally to your in-laws as a woman before you can be considered as truly married.

"The provision of lobola can be seen as an engagement. The true consummation of the union or conclusion is when the pen is put to paper and you are legally married. That is when a certain animal is slaughtered that introduces you into the family who then receive you and presents you to the ancestors. I cannot point to a particular time when we left our way of life and in fact we have not. But our own original way of life is overweighed by the received way of life."

Professor Diala also commented on the colonial influence on customary law and why these distortions, or harmful practices that have been distorted (such as ukuthwala, genital mutilation, witch killings, succession and inheritance), mainly affect and women and their rights with the result that men benefit from said infringements. His response was that we have a "gender war" that is ongoing. He highlighted: "For millennials who are active on social media, you would know that there's a gender war going on. As a personal example from our family chat, one of my sisters said something about the other gender – of course referring to men – and then she ended up saying that we fear the other gender. I responded, 'We fear you too, thank you'. You can imagine that it is banter between siblings, but it gives you an idea of this sharp binary between genders that came with colonialism. I say it came with colonialism because I am not denying that there was gender violence in the past, prior to colonialism, but

we underestimate the impact of the radical socioeconomic changes and the disruption in the social settings of Africans caused by colonialism. Before colonial rule, Africans lived close together in a very communitarian sense. Property was produced jointly, rights and obligations were grouped based on the interest of the clan or the interest of the extended family, which was the primary, overriding concern, as was the welfare of the family. In that type of setting, there was no sharp gender binary. It was a complementary relationship between the genders and between males and females. The women knew what they had to do. The men knew what they had to do – defend the family and hunt. We did not have all those sharp claims of property rights. There were really no individual property rights in that type of setting. The only matrimonial property that women had were the things that were given to them when they entered a new family as brides. When entering a family, they went with their personal items of adornment. That was their personal property. Maybe there were kitchen utensils.

"Divorce was rare because of all the external influence and the family was heavily involved both in marriage negotiation and in the stability of the marriage. In the few cases of divorce, the woman left with her personal items. That formed the customary law – that women have no matrimonial property – and in the strict sense there was no concept of matrimonial property in those days because there was no individual property, everything was communal. However, we now have situations in which people started leaving the family and going to the cities to work, so the concept of a strong, united group production or family production of wealth was lost. Now we have individual production of wealth with women earning income individually and contributing to family property, and yet when the marriage breaks down, some people will claim that according to our customs women have no matrimonial property and therefore they cannot go with anything.

> "As such, this gender issue that we have today is the result of colonialism and, of course, violence. As we know, issues relating to money and emotions breed violence. Nobody just wakes up in the morning and without provocation hits or assaults their partner. There are things that build up. These are little things that we often ignore when we speak about domestic violence."

Chief Holomisa also commented on the nature in which these issues are skewed against women. He held that it is clear that this is a difficult question and noted: "The way our customary-law practices have been followed by those who want to take advantage of them

results in disadvantaging women. Nobody bothered to sit down and interrogate each and every one of these practices that have evolved into something like a law. As such, when the Constitution itself was formulated, there was a lot of hostility towards the customary law, as well as the practitioners or the implementers of customary law, that is, traditional leaders. They were seen as the people who are perpetuating gender discrimination and oppression against women. Those of us who were there or our representatives defended the position without getting the opportunity to explain why exactly we were saying these things. This would have been an opportunity to promote the positive aspects of the customary law practices that people were complaining about when formulating policies and laws in the Constitution.

"As somebody asked – can this be reversed now? I think all is not lost because a number of people are beginning to question why it is that we accept as a fait accompli that colonial laws are superior and better than ours? It is because in a way they have been explained, both by apartheid legislators and current legislators, why it is that we move in a certain way. But when it comes to customary law, there is a lot of uncertainty and confusion and a person will interpret it from their own perspective, informed by their own life experience. This is how, when these matters come before our traditional court where I preside, I interpret them so that there is justice and equity in the manner in which people are treated, so that that original intent comes out and so that we can move with the times. For instance, the question of male primogeniture. The father is the leader of the homestead and, therefore, when he passes, somebody must take up that leadership role that the father played.

In the same way, as the mother is a leader – when she has a daughter-in-law married to her son, she (the daughter-in-law) has to take over those responsibilities when she (the mother) is gone as the leader of the house. The leader, as it happens, has to be a male. One of the simplistic reasons is that the male is expected to remain in his original home while the woman, the daughter, is expected to go and be part of another family after marriage into that family. Therefore, someone has to perform the rituals that the leader of the homestead has to perform and will have to be the heir in terms of that particular culture. As mentioned, there are rituals and social and political issues that must be dealt with. There are court cases that have to be attended to by males at that time. Of course, now they are attended to by women as well.

"In conclusion, it is a matter that requires cool heads and people to sit down. Maybe the

chair that Professor Madonsela occupies must take this matter up. I remember that she was part of the South African Law Commission that is responsible for formulating laws that are debated and passed in Parliament. She has to take up this responsibility and ensure a proper discussion by the decision-makers, uninfluenced by political considerations and others but influenced purely by the need for justice, to be accorded to everyone including the vulnerable, the weak and the poor."

Professor Rautenbach also provided some input on the matters raised and stated:

"We have a romantic view of customary law, how customary law was and how we have distorted it to being what it is now. However, we should remember that modernity always has an influence on laws. Maybe the input this time was colonial laws that came from the West. But if colonial laws did not influence the views of customary law or develop customary law, other influences might probably have developed. Those influences might even have come from the inside. As Inkosi Holomisa said, they conquered other land by means of wars and obtained other land. As such, it was not all happy, traditional communities living in South Africa. They were conquering each other. It was definitely not peace and quiet in South Africa. It might have gone in another direction. I think that colonial laws are being made out as the bad guy in this story, but it definitely had positive influences as well that we sometimes do not acknowledge."

A further question raised was: At what point and why did African countries recognise, accept and adopt colonial laws as superior governing frameworks for African societies and placed such above customary law and practices, and is there any consideration to integrate African laws more and reverse the status quo? A further question related to Professor Rautenbach's idea of spontaneously infusing the two laws instead of pulling them apart, and what exactly was meant by the *"potjiekos"* example provided. What would an infusion of these two particular laws really look like?
Professor Diala responded and said:

"Colonialism must be understood as a holistic process. We cannot isolate the various components. There was a spiritual angle and churches were established. There was a philosophical angle where schools were established. It had an economic angle, systems of

trade, new systems of commerce and work were established. There was the political angle where systems of administration were changed. There was the military angle where force was used to conquer communities. There was also the deceptive angle where communities were deceived into signing away so many portions of their lands. As such, the way colonialism was undertaken made it impossible for African states to go back to what they had before, before colonialism. Just to give you an example, Tanzania tried to go back by starting with making Swahili the national language and making it the language of parliament and legislation. That did not work out very well. I think, generally, African states struggle to go back to their indigenous practices after colonialism because the way colonising was undertaken made it impossible for them to go back. As mentioned, it is like a self-sustaining system that brings people who will propagate the ideas of colonialism, who will also raise others in the classrooms and teach them the same new philosophies that they have learnt, and so it continues. As such, we really cannot go back to the past, unfortunately."

Chief Holomisa commented on the question relating to how African countries came to accept colonial laws as superior governing frameworks for African societies and held the following: "It is a question of them having been defeated and brainwashed. As Diala says, they were made to feel that the way of life of the coloniser is better, that the coloniser's form of religion is superior to his own, that the manner of dress is different and better and if he masters the coloniser's language, then he is better than his fellow countrymen and women. Therefore, they became jealous of the power as well as the lifestyle that the colonisers were leading, and as they are fighting for freedom to liberate themselves and their own people, they are also looking at the seat of power that is occupied by that man who has been oppressing their people for so long. The result was that when they negotiated freedom at the end of the war between the coloniser and then their people, the framework that was dominant was that of the coloniser and, therefore, he assumed that this is the way things should go. This led to people living in the countryside in most of the African countries basically having no government. They continue to live under the guidance of their traditional leaders because the newly elected leaders leave the countryside and take up residence and offices in the towns that were occupied and used by the colonisers in order to make sure that they remain dominant. It is only when the election time comes that the politicians will flood the rural areas, paying homage and tributes to traditional leaders, telling them how important they are, how important it is that their people must vote for their political parties and, therefore, that they

recognise them.

> "The manipulation that occurred in colonial times has survived to the extent that now we do not even realise that this is all manipulation. This is not what we had been fighting for, to replace the oppressor with some of our own. Hence, we continue to experience more poverty and under-development in the rural areas. The people who live in the periphery of the urban areas are flooding into those spaces looking for a better life in the cities, because we continue to neglect the systems of governance and the way of life present in the countryside.
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> As to whether or not the African laws therefore can be integrated and the status quo reversed, I still believe as long as there are people who feel that there is justice in the African way of life, even in these times, then the integration could occur. Of course, it would be extremely difficult to say that we can go back to the original way of life. That is no longer possible and, in fact, it is not really desirable in a number of respects because everyone wants the lifestyle obtained in the urban areas – but not everybody wants it at the expense of their cultural ways."

Professor Rautenbach agreed with Chief Holomisa that when the Western powers came to southern Africa, they did not find a homogenous, unified state, but what they found were traditional communities spread all over the country with their own traditional authorities. She said: "It was easier for them to come in from a point of power because they were unified, and they came with their laws and started applying those laws. However, we should remember that, if we compare our laws now, what I refer to as the common law, this common law is made up of many Western laws, Roman-Dutch law, English law and legislation. It is a law common to South Africa. That law has developed and adapted to South African needs. If you compare the law that we have now with where it originally came from, it is totally different. That also changed over the years. If you look at our legal literature from a few years ago, the fight was between Roman-Dutch law and English law. Roman-Dutch law initially came, and then English influences came and there were similar struggles saying we should keep Roman-Dutch law pure. These debates and struggles are continuously ongoing during the development of law.

> "While the panel deals with the topic of separating customary law from colonial distortions, when I say we should diffuse or infuse the two legal systems, what I mean is that if we focus less on the separation and more on the infusion or the diffusion of the two laws, we might eventually have something typically South African. It is a natural development of law. Where the fight was initially between English and Roman-Dutch law, the fight is now between customary law and common law. My argument is that perhaps we should focus less on keeping them apart and more on letting this natural infusion of the two laws continue, to see if we cannot obtain something that is not legal pluralism anymore, but allows for diversity."

A further question directed at Professor Diala related to the naming of the legal system and whether it is indigenous law or customary law. The colleague who asked the questioned noted that from their undergraduate studies, they are taught that laws are developed or created from customs and as such a custom practice becomes law. Therefore, is it not mischaracterisation of indigenous laws to refer to it as customary law because these are customs that eventually became law?

Professor Madonsela also posed a few questions. The first was for Chief Holomisa and asked whether he concedes Professor Diala's point that the distortion of customary law was aided and abetted by traditional leaders, men who wanted to be colonially given power that they never had? In this regard, would he accept that distorted succession law has been abused to the detriment of women and non-firstborn children? Second, are customary-law principles at times not resonant and dynamic and therefore, in modern times it can be argued that there is no place for a male protector? If we were to take the example that Professor Diala provided of agricultural systems, there are not that many women, at least not the majority of them, who would be in agriculture and making a living in agriculture.

The next question she asked was also for Professor Diala and related to whether indigenous law has ever been homogeneous.

> "South Africa, for example, was not a country until 1910. A related point is that sub-Saharan Africans did not fear strangers as *ubuntu* saw strangers in terms of the interconnectedness of humanity and does it make sense to assume all indigenous laws were the same? Is the point not unintentionally romanticising pre-colonial power relations?"

Professor Madonsela then posed another question directed at Professor Rautenbach, noting that she liked the melting-pot idea and that it has room for mainstreaming *ubuntu*, but is it common law?

Another question was posed by a delegate relating to whether indigenous law can adapt to modern South African society, including the ability to embrace a more empowered position of women today. In the delegate's opinion, no law can remain static. Society changes and progresses, hopefully to get better, and all law must adapt with it in order to serve the people in the present day. The next question asked what would a project on substantive gender equality look like in the context of customary law? Patriarchy is inherent in customary and religious personal laws. How do we transform the power relations based on gender that emanates inherently from personal laws?

Professor Rautenbach began with her response and concluding thoughts. She reiterated that when speaking about common law, she means that it is a law common to South Africa and it refers to those Western norms that we have in the legal system. She usually distinguishes between common law and customary law in her literature, and when referring to customary law, she refers to all the different laws of the communities and also those that are unified, which is the official laws.

She also provided a short comment on gender equality, such as patriarchy, and on the question of what can be done to advance gender equality, especially in customary law. Her response was:

> "Common law is also based on custom and some of it has been codified by means of legislation. However, when looking at the common law, those Roman-Dutch law rules and those English influences were also custom. That is why it was so easy in post-apartheid South Africa for those laws to adapt to the new South Africa – because of the fact that not the whole legal system of South Africa was codified. As such, it would be possible for customary law to also adapt and the impetus to do that is the Constitution that provides us with all of those values and rights. Patriarchy is present in the common law as well. It was only around 1988 when the powers of husbands were taken away from the property of women in a marriage. If the common law was able to develop and get rid of those inequalities, it would also be possible for customary law to do it as well. I know that many traditional communities have started with this drive to rid gender inequality from their communities."

Chief Holomisa dealt with the question that asked whether it is not the case that traditional leaders and other men abetted and aided the assault on customary law by colonialism in order to get powers that they did not have. He stated:

> "It is possible that this is the case because the traditional leader is as strong as the community that he leads. If the community or the tribe has been defeated, the traditional leader is equally defeated. Even in the tribal laws, a community that was conquered by another would be taken under the wing of another, more powerful traditional leader. That traditional leader would be allowed limited autonomy to preside over his community, but under jurisdiction of that conquering traditional leader. Therefore, he would be forced to, in certain respects, do things in the manner that is required by the one that conquered his people. As such, it is possible that the colonisers could have in a number of instances in Africa used the traditional system in order to achieve its ends. We know that South Africa was balkanised by the apartheid regime in order to ensure that we are not united as African people. Hence, we had numerous homeland territories. It is thus possible that there could have been powers that they did not have before which were given to them, not for purposes of advancing the interests of the people but to advance the interests of the colonising power or conquering power.
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> However, we also have to consider that some traditional leaders resisted colonialism and apartheid and some of the first inhabitants of Robben Island were traditional leaders themselves – kings and princes of our land. A number of them even died there on Robben Island but not much has been said about that. Others were exiled on St Helena and other places because they were resisting the colonial project. Others decided therefore to be like the reed in a river. When a flood comes, the water comes over them, they bend down, and then when the rains have stopped, they come up again. You find that the big trees would be uprooted and taken by the floods and that would be the end of it. A number of them had to survive therefore for the benefit of their own thrones and also for the benefit of the people."

The other question relates to the need for male protectors of women. I do not think we want to throw the baby out with the bathwater because we continue to need the support of our

family members in terms of the attributes that they have. Therefore, men currently continue to have better opportunities than women in spite of the fact that we are in a democratic South Africa. However, customary practices evolve. For instance, I spoke about a man being the person who wants to go and apply for a piece of land to the traditional leader because he has to have a wife and children, but the reality is that there are women who set up their own homesteads. Not in flats or apartments in town, but in the countryside. They go to the traditional leader, naturally with a brother or uncle, because they have a family of their own, unmarried as they are, but they have children that they have to look after. They have to take their rituals. Once that piece of land has been obtained and the homestead has been established, the involvement of male members of the family, of the brothers and uncles is necessary. Additionally, these women will, like anyone who has a homestead, have their own livestock and other property and cars. You need someone therefore who will now and again have a look as to whether everything is in order in the homestead of so and so. Therefore, it is still necessary in my view that there should be that kind of security that is provided by males because it will be other males who take advantage of women who live by themselves.

> "This leads to the question of *mafungwashe* – that is, the first-born girl in a family, who has a role to play. Indeed, the aunts and sisters to the father have a role to play, especially when it comes to the settlement and mediation of disputes between family members. Everybody will look up to the *mafungwashe* to resolve issues. Even if she is living in her own homestead, having been married to other people naturally, she is required to come. Certain rituals would also have to be done by the *mafungwashe*. In essence, the person who continues to lead is the one who is expected to be permanently in that particular homestead.
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> Succession is seen as distorted against daughter succession laws but as mentioned, as long as the person who has been designated the heir understands that the inheritance that is at his disposal is not property that belongs to him, there will not be a problem. If people do not recognise that, including family members and community, and instead they believe that the person now is in charge and therefore owns that property, that is where issues arise. He is merely the custodian of the property that belongs to the real owner of that particular family and homestead."

Professor Diala also provided some clarity on the questions. He noted:

> "African legal philosophy is communitarian and this is because of the close-knit social settings in which customs emerged. It is important not to conflate indigenous laws with customary law. On the contrary, indigenous laws are those pre-colonial norms that people still observe in their ancient forms, and customary laws are the adaptations of indigenous customs to socioeconomic changes. Socioeconomic changes include all those broad philosophical, educational, religious, economic and political changes that came with colonialism. Colonialism is actually the flagship of globalisation. This leads to Professor Madonsela's question about homogeneity in indigenous laws. No, indigenous laws are not homogeneous because of the reality of cultural pluralism. It differs from community to community."

In terms of the question about Africans not fearing strangers he held the following:

> "I do not think that is correct. We have to really think and be realistic about the settings in which Africans encountered early Europeans. These are people of a different skin colour, speaking different languages. It can be equated to if we were to have aliens come from Mars or some other planet now. This is the same way that they would have received them. They do not know these people. The political union known as South Africa was only formed in 1910, but contact with Europe is far earlier. European infiltration or landing on southern Africa dates back to about 500 years prior to 1910 in the thirteenth century. We have to understand the context in which the initial Africans met the Europeans. For example, the Europeans came with superior weapons. We are not romanticising pre-colonial relations. We are explaining it as it were for them, because that was the setting in which they found themselves. There were also violent disruptions in those settings. Like the deputy minister explained, there was even military conquer of communities, forcing traditional leaders to plead their loyalty to the new sheriffs in town."

In relation to Ka Seme's speech, which is an emancipatory speech. Civilisation existed in Africa way back, especially in the Egyptian period, the Great Ruins of Zimbabwe, etc. There were civilisations that existed on the continent. The key thing is that by the eighteenth century when colonialism started rapidly accelerating, two things happened. Most African kingdoms

and civilisations disintegrated. The second thing that happened, is that Europe had developed sophisticated weapons, especially the magazine gun and the machine gun. As such, technology played a key role in the conquer of African societies.

> "Finally, can we replace constitutional values within the foundational values of indigenous laws so the spirit of indigenous laws can basically be captured? Yes. That is the focus of the Centre for Legal Integration in Africa at the University of the Western Cape. We are looking forward to a future in which we can integrate customary laws with the so-called Roman-Dutch law. The first place to start is by replacing the values in the Bill of Rights with the foundational values of indigenous laws, starting with the judiciary. When a judge wants to decide on something, instead of the judge saying that they will look at the Western concept of equality, they should, for example, look at *ubuntu*, which is an African philosophy. Or look at the welfare of the family, which is an African philosophy, or the involvement of extended family marriage, which is an African value. In doing this, we take these indigenous values and foundational values of indigenous law and replace the values in the Bill of Rights. That is one way to start. Ultimately South Africa will have a common law of South Africa which is made up of integrated indigenous laws and the so-called Roman-Dutch law. We then have a South African common law in the same way as we have an English common law. However, this is not something that will happen overnight."

Chapter 5 Plenary 2: Social Justice Dimensions of Land and Other Property Rights Through a Customary-Law Lens

1 Overview

A keynote address was provided by Adv Tembeka Ngcukaitobi, followed by presentations by Professor Elmien du Plessis and Professor Jackie Dugard. Adv Ngcukaitobi focused on colonial laws and their implications for, and ultimate distortion of, customary law. He then moved to the Ingonyama Trust Land issue and the continuation of conquest. Customary Law in Colonial Courts: Should the Separation of Indigenous and Colonial Laws be the Ultimate Goal?

Professor Du Plessis focused on the interaction between litigation and political processes in policy and legislation-making and whether the two speak to each other. In looking at this, she highlighted the distortion of customary rights post-Constitution. She did this by examining the development of fishing policies and questioned whether it really recognises and protects customary fishing rights within the Constitution's framework.

Professor Dugard's discussion delved into using transformative constitutionalism as a yardstick to measure the extent to which the constitutional order is being used to disrupt or maintain *status quo* power. In particular, she examined how the courts have adjudicated mineral rights contestations across a range of increasingly more complex fault lines in the customary-law realm. Overall, she highlighted that when called upon to adjudicate between status quo and less status quo interests, the courts have been able to do so transformatively, disrupting the status quo in the interest of protecting traditional community interests in the realm of mineral rights contestation.

The discussion included questions such as: What is the distinction between the colonial notion of trusteeship as employed by the Ingonyama Trust, and its features, and the Communal Property Association Act 28 of 1996 ("CPA") born out of a constitutional dispensation insofar as it relates to communal ownership? Is land allocated to families regarded as owned by them or how would one most accurately conceptualise that status as contrasted with unallocated land? Why is it so common that Black people are often required to explain why they need their stolen land back?

2 Keynote Address – Advocate Tembeka Ngcukaitobi

I must start with the 1846-1847 Report of the Natal Locations Commission. Its purpose was to create "native locations" in Natal, to formalise white settlements. One of its chief members was Theophillus Shepstone, the prime theorist of "Zulu customary law". The report did much more than it had announced. Its enduring outcome was to subordinate customary law to colonial laws: "The natives' own laws are superseded; the restraints which they furnished are removed. The government of their own chiefs is at an end."

The commission's proposed system allowed colonial officials to recognise, "without violating the stern requirements of justice", "the usages and customs of native law". Thus, natives could use their own system, provided it was subject to European laws. This would be cemented in the Native Administration Act, 1875 which absorbed Africans under the formal system of colonial justice. However, it was the Code of Zulu Law of 1878 which had a lasting legacy. This code relegated the status of African chiefs. A chief responsible for a section of an African community was a "minor deputy of the Supreme Chief and a judicial officer, and holds such offices during the pleasure of the Supreme Chief". The Supreme Chief could appoint and dismiss chiefs. The code aligned the functions of chiefs with the needs of the Natal colonial administration. Their role was to ensure the "good conduct of his tribe, the prompt supply of men for purposes of defence, or to suppress disorder or rebellion, or as labourers for public works, or for the general needs of the colony". The labour and defence needs of the colony were paramount. The Supreme Chief wielded power to appoint and dismiss chiefs, and compel Africans to provide military service and labour. New chiefdoms could be formed, existing ones destroyed, and others combined.

While chiefs were generally reduced in status in relation to the administration, in some respects the scope of their powers increased especially in relation to their control over land and women. Land could only be allocated by a government-appointed chief. No exception was made for family fields. Women were firmly placed under the control of men, as perpetual minors: "The family head is the owner of all family property in his family home. He has charge, custody and control of the property attaching to the houses of his several wives and may in his discretion use the same for his personal wants and necessities, or for general family purposes or for the entertainment of visitors." By virtue of section 22 of the code the "inmates" of a family home – including women and children "irrespective of sex or age shall in respect of all family matters be under the control of and owe obedience to the family head".

The code was presented as reflective of custom. Yet, before 1891, women were allowed to be independent of their husbands in cases such as labour contracts, and girls were allowed to marry persons of their choice as provided by the law regulating marriage among Africans. As far as property was concerned, it was a definite fallacy that women had no property in Zulu society. A father could give property to his daughter and that became her property. There [were] instances where a husband also bequeaths cattle and other property to his childless wife.

Zulu king Cetshwayo ka Mpande gave evidence at a commission in 1883 that women, married or not, could acquire and hold property independently of their husbands. The changes to the law introduced by the code altered the emerging economic phenomenon of the 1880s and 1890s of independence among women who had taken up employment as migrant labourers in the nascent white settler economy. With this changing economic climate, women asserted their independence and challenged the authority of men, at times resisting domestication. The new law, conferring the status of "kraal head" to men granting authority to inflict corporal punishment, constrained any possibility of independent economic and social activity for women. In sum, while chiefly power increased in certain respects, for the most part it was drastically reduced. Now, they could no longer administer land according to the wishes of the communities, but only under the direction of colonial magistrates.

Shepstone's vast changes to Zulu law came to be accepted as "Zulu customary law". The Natal Code of Zulu law was no longer seen as an externally imposed system of law, but as legitimate Zulu customary law. The last half of the 19th century can rightly be regarded as having laid the seeds of this distortion. A central attribute of the distortion was in aligning chiefly interests with control over land. The Native Administration Act 38 of 1927 proclaimed that it was intended to be "for the better control and management of native affairs". Its opening section provided that "Governor-General shall be the supreme chief of all natives exercising all such powers as may be vested either by custom or by law in a paramount chief, and that he may appoint officers under him to administer native affairs".

By so doing, the government not only elevated the governor-general above customary law institutions, processes and practices, but rendered him the ultimate source of legal and political authority over Africans. Included in the powers of the governor-general was the power to remove any tribe or portion thereof, or any native "from any place to any other place within the country on any conditions he may determine". Individuals failing to obey

instructions of the governor-general were guilty of an offence and were liable upon conviction to imprisonment or a fine. The distortions over the control of land extended to its ownership.

The colonial state rendered fragile any hold over land by Africans. Their courts followed suit. The Transvaal Supreme Court ruled in 1902 that: "When [Africans] were governed by their own customs and laws the notion of separate ownership in land or of the alienation of land by a chief or anyone else was foreign to their ideas." Judges in the British colonies widely held this idea. Chief Justice Rayner in the Report on Land Tenure in West Africa stated in 1898:

> "The next fact, which it is important to bear in mind in order to understand the native land law, is that the notion of individual ownership is quite foreign to native ideas … My experience in Lagos leads me to the conclusion that except where land has been bought by the present owner there are very few natives who are individual owners of land."

On 26 July 1918, the Judicial Committee of the United Kingdom's Privy Council published its ruling, *In Re: Southern Rhodesia*[25], endorsing the British crown's claim over the entire land territory of Southern Rhodesia. The British South Africa Company ("BSAC") of Cecil John Rhodes invaded the territory using a combination of trickery and violence. A puppet government was set up, which had ruled in the country for 30 years. When the white settler population of Southern Rhodesia agitated for self-rule, it seized all lands and declared that they belonged to the company, and the indigenous people had no rights over the land. At the Privy Council, arguments raised on behalf of the natives of Southern Rhodesia, were summarily dismissed:

> "Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them."

The back story to the claims were concessions over land and minerals purported to have been signed between Rhodes and Lobengula, king of the Ndebeles, the indigenous tribe of

[25] In Re: Southern Rhodesia [1919] A.C. 211.

Southern Rhodesia in 1888. While the nature of the agreement – in reality a mark of "X" by the Ndebele king – was dubious from the outset, its existence was not in dispute. However. Lobengula had been duped into believing that only a few whites would survey Ndebele land, and strictly under the laws of the Ndebeles. Upon realising that the paper he "signed" was a land and minerals concession – the so-called Rudd concession – Lobengula balked, relying on the sovereignty of the Ndebele nation as against the British crown. In legal terms, reasoned the court, Lobengula's agreement had been overridden by war, in 1893, between the British and the Ndebeles. The effect of war was that the land was neither Lobengula's nor the BSAC's: the land belonged to the British crown. Lord Sumner explained his reasoning: "Whoever now owns the unalienated lands, the natives do not." Hence all land was the property of the Crown, with its minerals assigned to the BSAC of Cecil John Rhodes.

The final judicial act of empire was in *Sobhuza v Alister M Miller*[26] where it was held that "the notion of individual ownership is foreign to native ideas. Land belongs to the community and to the individual. The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is sovereign".

The distortion was now complete. The "customary" rules were firmly established. Women had no rights to land. Africans had no ownership rights over the land. The Code of Zulu Law which emanated from colonial authorities was made the "Law for Blacks in Natal". Shepstone's vision had come full circle. The foundation had been laid for the stripping of land rights of African communities in the name of African customary law. Once the courts accepted these distortions, they became common sense. The apartheid state embraced these distortions. They were central to the establishment of the Bantustan regimes, separate development and dispossession.

The post-democratic state has fared no better. Take for instance, the KwaZulu Ingonyama Trust Act 3KZ of 1994, which acquired such prominence in the prelude to the 1994 elections. It was a continuation of decades of colonial imposition of chiefly authority from above. Its key tenets are a modern version of "Zulu law" which Shepstone had in mind in the late nineteenth century: the stripping of land rights of individuals and family, the concentration of power with chiefs, and the dilution of customary norms, replacing them with distorted Western ideas, based on indirect governmental rule. Prominent among these features is the idea of "trusteeship". The trust land vests in the Ingonyama, the King, as trustee on behalf of members

[26] *Sobhuza v Alister M Miller* No. 158 of 1924.

of communities. The powers of the trust are vast. It administers the land for the benefit, material welfare and social wellbeing of the members of the tribes and communities as contemplated in the KwaZulu Amakhosi and Iziphakanyiswa Act 10 of 1990. It may deal with the land in accordance with Zulu indigenous law. The king may not encumber, pledge, lease, alienate or otherwise dispose of any of the said land or any interest or real right in the land, unless he has obtained the prior written consent of the traditional authority or community authority concerned. There is no requirement that the individuals affected by the decisions should consent or be consulted. It is sufficient to consult with traditional authorities. Land-reform programmes of the government are also subject to consultation with Ingonyama.

It was inevitable that there would be clashes. One area of contestation is between occupiers of land and the trust. Another feature of black holding over land was the permission to occupy ("PTO"). This was the primary form of residential tenure for persons living in the rural areas of the former homelands or self-governing territories, on land which had not been surveyed. The PTO right was a recognised statutory form of tenure on unsurveyed land in the designated black rural areas under the Black Areas Land Regulations.[27] These regulations authorised the Black Affairs Commissioner to issue written PTO allotments for residential or arable use. The PTO was recorded in an allotment register, and afforded exclusive and perpetual occupancy and use rights to the holders. The PTO was not private title but it was a strong right – a formalisation of land holding for Africans who had no title to land. PTOs remain operational, despite their apartheid origins. The irony, of course, is that without them, there would be no tenure for Africans in former bantustans.

Finally, a recent judgment of the KwaZulu-Natal High Court promised to change this. This was a case brought by women who resided in Ingonyama Trust land. They asserted that they had been stripped of their rights to equality because the land is effectively "owned" by the chiefs; their rights are subjected to the men of the village, including their sons; and they are unable to hold land in their own names. The judgment creates new opportunities and avenues for progressive change in customary law under the Constitution. Let me highlight three of the court's findings:

"As the nominal owner of trust-held land, the Ingonyama does not have exclusive rights to own, control and regulate trust-held land, nor does it have an unfettered right to deal with such land. It is common cause that the trust and the board in the execution of their functions and exercise of their powers in terms of the Trust Act, must act within the parameters of

[27] Proclamation 188 of 1969.

such Act, indigenous law, any other applicable law and the Constitution. Therefore, the trust and the board may exercise no power and perform no function beyond that conferred upon them by law."[28]

The key to this passage is that conduct of an organ of state can be tested against the content of customary law. This is a fundamental transformation of customary law, from its colonial and apartheid origins. Customary law thus can constrain the exercise of governmental powers:

"The concept that land under Zulu customary law is 'indivisible and inalienable' means that an owner of a particular portion of land cannot take his or her portion and secede from the rest of that particular tribe or community of which he or she is a member, and that the land cannot become a subject of a private sale, as with freehold. It does not follow that an owner or allottee cannot exercise the incidents of ownership in respect of the allotted portion of land to the exclusion of all other members of the community, save the members of his or her family. He or she can transfer land to any other person who is willing and prepared to reside in, become party of the community in which the land is situated, and to owe allegiance to the inkosi of that area concerned."[29]

The statement is important as it shows custom no longer as an appendage of European law, but its antidote. While the common law focuses on exclusion, customary law focuses on inclusion. While the common law is for the individual, customary law is for the community and thus holding land is linked to community formation.

> "Under customary law, each member of each class or community is entitled to an allotment through procedures under customary law. Once a portion of land has been allocated to a particular individual as residential or arable land, it is automatically taken out of the realm of communal ownership. It is demarcated and has fixed boundaries. The ownership thereof descends from generation to generation of such particular individual owner or family. However, unallotted and common land is communally owned by all members of a particular community, under the administration of an *induna* and *inkosi* (headman and senior traditional leader). However, both communally and individually owned land is defended by all members of the community concerned against attack or interference by outsiders. It is

[28] *Council for the Advancement of the South African Constitution v The Ingonyama Trust* 2021 (8) BCLR 866 (KZP) para 95.
[29] Para 98.

only unallocated land which requires prior written consent of a traditional or community authority for it to be encumbered, pledged, leased or alienated by the trustee."[30]

The final anti-colonial act is to show that Africans, too, had ownership. Before a stand is allotted, it is communal. But after allotment, the family acquires rights over the allotted stands. Here, they can exercise rights – at the level of *umuzi* (extended homestead). They are protected from external interference. The larger point is that customary law contains substantive protections.

Customary law has been fundamentally transformed. Yet there are instances where there is a clamour for the return to unbridled chiefly powers. When the Constitutional Court struck down the Communal Land Rights Act 11 of 2004 in 2010, the status quo ante returned. No post-Constitution law addresses the status of communal areas. Yet, if we took seriously the injunction in the Constitution to provide for more, rather than less tenure, it will be clear that a wholesale state-sanctioned forcible taking of communal land contradicts the Constitution. By its nature, an expropriation weakens and destroys the rights of ownership, access and occupation over the targeted land. No cogent reason exists why tenure over communal land should be subjected to further erosion, given the history. Nor is there a reason to repeat and perpetuate the distortions of custom. The constitutional order calls for greater, not fewer rights of communities over land. Saying so, however, may not answer how those rights are to exist. Accommodation is the ultimate telos of custom. We have the right to occupy the same land, but we must accommodate each other. Accommodation of varied, sometimes conflictual, often inconsistent interests – husbands accommodate wives, children, their siblings, the living accommodate the dead. These rights to the same land overlap, intersect and collide in a number of dazzling ways. This is not a binary choice between modernity and custom. It is a recognition that there is no necessary separation between the two. Customary law is not to be found in ossified codes or random pronouncements by traditional leaders. It is a living law, reflective of the changes in real people's lives. Chiefly power, then, invariably always appears as custom. But when the customary veneer is peeled off, the distortion is revealed. This is the urgent task of the Constitution.

3 Presentation – Professor Elmien du Plessis

[30] Para 136.

The recognition and protection of customary-law rights to fishing: The Constitution, the court case and the policymaking process

My paper focuses on the interaction between litigation and political processes in policy and legislation-making and whether the two speak to one another. In a sense it looks at the distortion of customary rights post-Constitution. It does so by looking at how fishing policy was developed over the past decades and asking if it really recognises and protects customary fishing rights within the Constitution's framework. Fish is therefore the resource that I focus on rather than land and probably more governance than property rights. However, I am not going to go into detail on the constitutional framework. I will only highlight section 39(3) of the Constitution which recognises customary law as a source of law and then section 211(3) which states that courts must apply customary law when law is applicable, but more importantly, subject to the Constitution and legislation that specifically deal with customary law. That legislation that specifically deals with customary law is what I focus on. That was the subject of the inquiry in the *Gongqose v Minister of Agriculture, Forestry, Gongqose and S 2018* ("*Gongqose*") case,[31] of which the keynote speaker was the counsel. This case dealt with communities who had enjoyed customary law rights of access to marine resources in the Dwesa-Cwebe reserve for over three centuries. During apartheid the communities were relocated to the land just outside what is now the reserve, where they still reside today. They were thus excluded from a significant part of the ancestral land and were no longer able to exercise their customary rights in the marine-protected area. After the advent of the Constitution, under the Marine Living Resources Act 18 of 1998 ("MLRA"), the minister of environmental affairs and tourism declared the reserve a strict no-take zone. This prohibited even members of the community from access to the marine resources and furthermore it made it an offence for anyone to fish or attempt to fish in a protected area without permission of the minister.

Parallel to this, the community also instituted a claim to have the land returned in terms of the Restitution of Land Rights Act 22 of 1994, and a settlement agreement was signed between the community and the then minister of land affairs in terms of which the land would be restored to the claimants. This agreement, however, excluded the marine-protected area but it did allow for the community to have access to sea and forest resources based on the principle of sustainable utilisation as permitted by law. The agreement allowed for the

[31] *Gongqose v Minister of Agriculture, Forestry, Gongqose and S* 2018 (5) SA 104 (SCA).

community to participate in the management of the nature and forest reserves and the community was made beneficiaries of ecotourism. However, despite this agreement, the ministerial declaration of the reserve as a marine-protected area meant that some of the activities have now become criminalised. It is because of this that the applicants in this case were criminally charged in terms of the Act for attempting to fish, entering a wildlife reserve without a permit, carrying weapons and killing wildlife animals in contravention of the Act.

The appellants pleaded not-guilty to the charges, but admitted to contravening the Act. Their plea explanation stated that they were a community and that the community was governed by, and is still governed by, customary law. This system of law regulates, according to them, the use of marine resources, and in terms of the system of the community they had the right to use the marine resource. According to them, when they were arrested, they were exercising their customary rights. Alternatively, they argued, if the Act prevented them from exercising their customary law rights, then it is inconsistent with the Constitution and invalid.

This case went through the Magistrate's Court and the High Court and eventually ended up in the Supreme Court of Appeal. The Supreme Court of Appeal found that customary law rights to fish were proved sufficiently. They were satisfied that the people did show that there is a customary right to fish. However, what is more important, the court found that only clear and justified extinguishment of customary rights is permissible, which did not happen in this case. Since the customary-law rights survived the decree, the customary right to fish was not extinguished and the community validly exercised rights in terms of it. That means that they did not contravene the Act and that the issue of whether the fishing was lawful or not is simply not applicable.

The focus here is on legislation that specifically deals with customary law. That is the focus of asking if legislation replaces or amends customary law. Luckily, co-counsel for the community, Michael Bishop, wrote an article on the case setting out a six-step analysis to determine whether legislation replaces customary-law rights or not and he focuses specifically on this case. I will just mention these steps as I think it is important to understand how such an inquiry should work. The steps are as follows:

The first question that you should ask is, is the access to the resource a cultural practice or customary-law right? If it is a right, then you ask if legislation specifically deal with customary law. If not, the legislation does not replace customary-law rights and they continue to exist alongside the legislation. However, if legislation does specifically deal with customary law, we ask the question, does it extinguish or alter the customary right? If it does not extinguish the

right, then actions exercised under it are not unlawful, although it can still be regulated. The other inquiries will look at whether the regulation of the customary right limit other rights in the Bill of Rights? The next step will then be, if the legislation extinguishes, alters or limits the exercise of a customary-law right, is that limitation in line with section 36 of the Constitution? If it is not justifiable, then it is unconstitutional. If there is a limitation on customary rights, it must be asked whether customary law should be developed in line with section 39 of the Constitution? It goes on to say that if what is being infringed is not a right but a practice, then it can be limited by any law in line with the protections afforded by the Constitution, most notably, section 36.

The interesting question is then: how does this influence policy and legislation? In other words, if the minister now reads this court case, how should she go about making legislation that deals with customary law explicitly, if it is needed? First, the requirement is that legislation must deal with customary law expressly or by necessary implication. In other words, the legislature and the executive must inform themselves of the existence of these rights and what they entail – here we can think of living customary law – and they must expressly deal with that. Moreover, if these rights are protected by section 30, 31 and 39 of the Constitution, it may only be regulated and thus permitted in line with section 36. If these rights are balanced with something like section 24, which is an environmental right, it must be scientifically justified and the interference with customary rights must be as little as possible.

What happened is that there was an amendment to the legislation that inserted a new structure that recognises small-scale fishing and also recognises customary fishing rights. This refers to the MLRA that deals with customary-law rights to fish specifically and it means that it may regulate these rights. However, it does not mean that it may do so automatically or that it has extinguished those pre-existing rights. The Act and any action taken in terms of that Act must regulate customary law expressly and also proportionately.

This has two major possible implications. First, customary fishing rights continue to exist and can be lawfully exercised, unless or until the minister grants rights and issues permits to a small-scale fishing community. This is only necessary if she believes that the self-regulation of the customary right is not enough to meet the principles of the Act. Or, Second, the Act should be interpreted as recognising the pre-existing customary rights while also requiring the recognition of the minister in the form of a permit before they can exercise the right. This means that the minister does not have a discretion on whether the rights must be recognised or not. She must recognise them, but she can regulate them. However, this is not how the

minister and the department understands it. Parallel to the court case, a framework for the recognition and protection of small-scale fishers was developed, with customary fishing law falling into that category. However, it is important to remember that not all small-scale fishers fish in terms of customary rights. The amalgamation of the two therefore seems strange, and it cannot be said that this deals specifically with customary rights. Yet the department argues that the amendment provided sufficient recognition entitling the state to regulate the rights and, in fact, means that customary-law rights are now extinguished. Members of the community have again been arrested last year for contravening the legislation. Furthermore, the department also does not regard themselves as bound to the Supreme Court of Appeal judgment because it dealt, according to them, with different legislation that is now repealed and dealt with the setting aside of a criminal conviction and not the management of fishing resources.

For me, the voices of the people were litigated into the public realm, only to be legislated out with regulation of fishing resources and we are poorer for it. What would have been a better solution, a wholesome solution, was to take customary law seriously with the minister appointing an advisory committee on customary fishing rights to establish the existence of these rights of the communities living alongside the coast in order to understand them.

To establish a customary right to fish will require that the community must practise and abide by a general system of customary law that goes beyond the practice of fishing. Within the system, fishing must be a right that belongs to members of that community to the exclusion of non-members. Furthermore, the person wanting to claim that right must show that they are a member of that community and have such a right as a member of the community.

The bottom line is that the court made it clear that in the absence of legislation dealing specifically with customary rights, those rights are not extinguished. "Dealing specifically" means that the department cannot regulate these rights without engaging with the community and getting experts in to help with the rights inquiry. Anything short of this means that they are acting in contravention of the Constitution and that the recognition in Section 39(3) remains a promise on paper waiting for the next court case to be fulfilled.

4 Presentation – Professor Jackie Dugard

Transformative constitutionalism, customary law and mineral rights: how have courts adjudicated mineral rights-related contestation between customary communities and more powerful interests?

In my research, I want to briefly respond to an invitation by Heinz Klug who recently invited scholars to use transformative constitutionalism as a yardstick to measure the extent to which the constitutional order is being used to disrupt or maintain status quo power. Similarly, Zanele Sibanda has suggested that the standard by which to measure transformative constitutionalism should relate to whether judicial remedies advance disruptive redistribution and reparation to address South Africa's sustained and deepening inequalities. Neither Klug nor Sibanda delineate the fault lines of power or relative power and most people probably think classically in terms of racial power in South Africa. However, I want to argue that to be truly transformative, it would be necessary to include all axes of relative power, whether economic, socio-political, racial, gender, sexuality, etc. With this in mind, I have embarked on a project of looking at particular fault lines of contestation and how the courts, as proxies of transformative constitutionalism, have responded to contestation between more powerful and less powerful groups along a range of axes. I have looked specifically at how the courts have adjudicated mineral rights contestations across a range of increasingly more complex fault lines in the customary-law realm. I have looked at mineral rights because minerals obviously remain at the centre of South Africa's mineral energy complex, and also because minerals as embedded in the land speak to the core of one of the most contested issues in post-apartheid South Africa – that being property, land distribution and access.

My question really has been: how have the courts fared when adjudicating between quite complex power dynamics to develop the customary law to protect communities from more powerful interests and of various different types? What I have seen in the customary-law realm is that it is quite complicated and complex when looking at the power differentials. In many of the spaces examined, you have to go beyond a more simple racial transformation lens because in many of the instances the power dimensions and power dynamics are not primarily around racial dynamics. There are different types of power differentials at play.

I have looked at three cases which focus on three different fault lines of power differentials. The first is where you have traditional communities with their traditional leader against a mining company. In the case of *Bengwenyama Minerals v Genorah Resources*[32] it is made even

[32] *Bengwenyama Minerals v Genorah Resources* 2011 (3) BCLR 229 (CC).

more complex, possibly by the fact that Genorah Resources is a black-owned mining company. In this case, the traditional community, having received a land claim, wrote to the department to signal its interest in prospecting on the land. It is quite obvious from the case and the papers that there were some dubious dealings with the department and the department simply did nothing about that, and instead allocated the prospecting rights to Genorah Resources. However, the Constitutional Court ruled in the community's favour, holding that the Minerals and Petroleum Resources Development Act 28 of 2002 ("MPRDA") makes provision for a community to obtain a preferential right to prospect on community land. That was a really important case, which established that communities, in terms of developing customary law in the mineral rights context, would have a preference claim in terms of prospecting rights by a company.

The second case I want to look at is where a traditional community actually comes up against its traditional leadership in the context of a mineral rights claim. This occurred in B*akgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority*,[33] which is a 2015 case from the Constitutional Court. Here the court had to decide between the interests of a traditional community that wanted to establish a communal property association through which to apply for prospecting rights. They came up against the establishment of a trust to be controlled by the tribal authority, as represented by the traditional leader, Kgosi Pilane. In this case, again, the courts ruled in favour of the traditional community and specifically said that we need to transform customary law in line with the Constitution and extend the fruits of democracy to traditional communities still subject to customary law. That is an even more complicated fault line case where a traditional community came up against its own traditional leadership in terms of interpretation of which rights would prevail. What I am trying to highlight is these increasingly disruptive and complex cases that certainly fall into the definition that Zanele Sibanda and Heinz Klug have posed as being transformative adjudication, which has developed customary law in a progressive and, it may be argued, disruptive way against the established interests, however you configure the established interest.

The final case I want to discuss is arguably the most disruptive and revolutionary case, and that is *Baleni v Minister of Mineral Resources* ("*Baleni*").[34] This is a 2018 North Gauteng High Court case. Of course, as a High Court case it could still be appealed, but the government has, although having signalled its intention to appeal, run out of time. Although technically they

[33] *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* 2015 (10) BCLR 1139 (CC).
[34] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP).

could still attempt to appeal. In this case, what you have is a traditional community versus mining companies, which include an Australian mining company and the South African subsidiary being its Black Economic Empowerment (BEE) local partner, the chief and the government. In essence, it is a traditional community versus all of those established interests, and all of those established interests want to mine titanium on the community's land. The community does not want titanium mining, it would like to continue its customary and pastoral way of life and is very concerned about how titanium mining might destroy that. In this case, the North Gauteng High Court stressed the Interim Protection of Informal Rights Act 31 of 1996 ("IPIRA"), and the protection of communal land rights interests, including the peremptory right to consent to any action that might deprive their land rights. In other words, what this case does is it establishes that customary or traditional communities have the right to veto mining development on their land. This indeed gives customary or traditional communities an enhanced right over the common-law rights or the rights in the MPRDA for common-law property owners who would only have the right to be consulted prior to any application for prospecting or mining on mineral rights. In contrast, we now understand from the *Baleni* case that customary or traditional communities actually have the right of veto. This is an extraordinarily powerful judgment and quite certainly incredibly transformative in terms of the court adjudicating on the side of disempowered interest versus the very substantial status quo and more powerful interests. In conclusion, I would say that, when called upon to adjudicate between status quo and less status quo interests, the courts have been able to do so transformatively, disrupting the status quo in the interest of protecting traditional community interests in the realm of mineral rights contestation.

5 Discussion

The discussion began with a question for Adv Ngcukaitobi asking how he would distinguish between the colonial notion of trusteeship as employed by the Ingonyama Trust, and its features highlighted in his presentation, versus the CPA born out of a constitutional dispensation insofar as it relates to communal ownership?

Adv Ngcukaitobi responded by noting: "The colonial trusteeship was a form imposed in order to explain tenure in a context in which ownership was denied by law and as such, they imposed trusteeship. Initially, blacks could not even be trustees. The trustees would be a colonially appointed magistrate or a colonially appointed man of the cloth. Most of these were members of the churches – colonial missionaries. Much later the use of missionaries also

declined in scope and importance and the native-affairs commissioner was granted the trusteeship. When the native commissioner system collapsed, current government stepped in. The reason for the introduction of trusteeship is because in a place like the Transvaal, a law was passed by Kruger, which specifically prohibited native people or Africans from ownership of land. That was its purpose and that was its function. Yet, if you compare, there is no comparison to the CPA. It is not a trusteeship by any stretch of the imagination. It is ownership. The title is registered in the name of the association. The association owns it. The individual members have subdivided rights of occupation on the land that is owned by the CPA. Those rights include rights not to be evicted from the land. Whereas in a trusteeship system, you actually had no rights not to be evicted from the land. As such, the two are substantially different.

"That, of course, does not mean there are no problems with the CPA model. The CPA model simply does not work. That is because there are weak communal property associations. There are often competing and overlapping claims over the land. There is often very little income that is derived from the use of the land, such that in 2013, the government published its annual report on CPAs and actually recommended that the CPA model be scrapped altogether. This is not surprising. If you lost land in 1913 with a population of nine-million people, you got land back in 2013 with a population of 58-million, the numbers have grown substantially and therefore the demand for the land has also increased – but it is still the same piece of ground, it is still the same number of hectares. It is no surprise that there is such a question over the CPAs and that there is even a thought about totally abandoning the CPA model."

Another question related to whether land allocated to families can be regarded as owned by them or how would one most accurately conceptualise that status as contrasted with unallocated land? Professor du Plessis responded by saying that she does not want to look at the customary law through the lens of common law, but just for the sake of answering the question, she stated: "It is seen as a strong property right that is very difficult to interfere with or to lose. The attorney that worked on this fishing case, when speaking to people, asked, 'Do you have rules relating to what happens if somebody tries to take your fishing rights?' Their response was, 'Who would want to take my fishing rights?' They cannot fathom that once you have been allocated this resource and set it up within the community, that you will actually be deprived of it if all the other customary laws are functioning optimally. To conclude, it is quite a strong protection, as far as I understand it, and that is also an argument that they

tried to make – to say that it should at least be recorded to some extent to ensure that there is a record of it, although it is not registered in terms of the Deeds Registry Act 47 of 1937."

The next question was: "Is it so common and unjust that black people are often required to explain why they need their stolen land back and in some instances told that they, black people, are not farmers, therefore they need not claim the stolen land back?" The delegate clarified by saying: "In most cases the land debate goes on and on, but I do find that there is often this question that black people are not farmers, so why do they have to be given back the land? As an example, before lockdown we would go as a group to do road running in different parts of the country. You find vast pieces of land, for example in the Magaliesberg area, where young, white males often play football and they have massive spaces where they entertain themselves with bikes and all sorts of things. Next to it, there is a little piece of land with shacks on top of each other for people to live on. It is absolutely absurd that you find people questioning black people and asking what they need to use the land for? We also want to have big tracts of land to play on, to plant, to eat, to do whatever we like, just like those white, young males. In conclusion, we do not just need land as black people to farm and work. We need land for entertainment, for our children to play, just like white people are doing right now."

Professor Dugard responded by saying that she agreed and that part of the problem is that there is a bit of a schizophrenic discourse and also legal framework around land reform generally. She held: "The process of restitution is technically and legally closed. That process was never meant to be about whether or not you are a farmer or whether you can use the land productively. That was supposed to be about reparation, but that process is closed. What we have now are land reform programmes where previous ministers have told beneficiaries that they have to 'use it or lose it'. There is a bit of schizophrenia in the process of land reform, some of it being about reparation with that door being closed at the moment, and then the only other projects being really about farming. This leads to the question and the injustices linked to the delegate's question. As she mentions, nobody goes around asking white people, 'Are you using your land productively, otherwise you cannot have it'. It is a very problematic area."

Professor du Plessis also weighed in on the question: "Around 2013 there was a draft agricultural bill that wanted to place all rural land under the custodianship of the state. In that bill, land was categorised according to how well it can be used productively for agricultural purposes and once the land is in the custodianship of the state, the state will regulate the land

use. If you do not use the land as productively as you can, you would lose that permit to farm. That was the thinking behind it – that people who have productive land must use it. Land in the Karoo is not as productive as land, for instance, close to Mooi River. You need a smaller piece of land to be a productive farmer. It also links to what Tembeka said. We had an exponential growth in the numbers of people living in South Africa, which makes it difficult. In 1994, you sit with a situation, you must have reparations, they choose the 1913 cut-off date. I have just read through the documents where they debated that again the other day. It was a pragmatic decision because the argument was that if you go back further, you will have overlapping claims.

"Those kinds of conversations have already happened and the question, when you look at having to prove that you lost land, that is the restitution process. You do not need to do that in a redistribution process. I also understand that in many of the restitution cases the court did not want to give back the land because they said it was not feasible. They would say there is a farming operation there and giving it back to the community will not be feasible because the farming operation might no longer run. I think we can have very interesting questions about that. A question I often have, students speak of competence –but it is not competence. It is productive use. Do we expect that when people get land back that they must only use it productively? Is that the only value that land has? I think this is the crux of the case. Or does land have other value as well? There is a different connection that we have. It is a sense of belonging. You may also want to have land just to have security of tenure. That idea comes with the vast pieces of land that are open and people have to live on top of one another. Why can we not give people security of tenure without that expectation that it must be used productively?

"It is a very important conversation to have – what is land important for? It is also important to note that in terms of the redistribution, we do not have legislation, we only have policies, and the policies are not always clear. In terms of redistribution, you do not necessarily have to show that you are going to use the land productively. It depends on what land you want to claim.

"The other big issue when we talk of land reform, which is not now necessarily focused on customary law, is that the Department of Housing and the Department of Land Reform are two different departments. When we talk about land for housing, it falls under a different department in government and I think there is also a great disconnect that we need to address. Those conversations are happening in the policymaking spheres, but it is very important to

start asking these questions. What is land important for? Must we expect people to farm productively if they want land back or is tenure, security or a sense of belonging also a valid reason to distribute land?"

Adv Ngcukaitobi also answered the question relating to the allocation of land to families and whether land allocated to families can be regarded as owned by them or how one would most accurately conceptualise that status as contrasted with unallocated land. He held: "The judgment in the Ingonyama Trust Board case says that the land is owned collectively and the rights of allocatees or allottees are akin to ownership. The notion of ownership is resisted because it has a common-law baggage, but it is clear that once land is allocated to a family, it can be passed to children of that family without the consent of the community and without the consent of the chief, which we would regard, for those who are schooled in the common law, as equivalent to the common law.

"However, the debate has often been a contrast between the powers of the state versus the powers of the community and less so between the powers of the individual family versus the powers of the community. In other words, can the community deprive you of land if they met and they decide that you should be deprived? The judgment suggests that it is where the land rights reside, in other words, at *umuzi* (extended homestead) level. This is for me a fascinating development – that the people to be consulted and the people to consent in the case of fresh allotments are at a level of *umuzi*. Why is this crucial? If you try and unpack the people behind the case, it was women who were heading homesteads, women heading the households, in other words, the heads of *imizi* (plural of *umuzi*) were women who claimed that it is because of their gender that they are often discriminated in allocation, in evictions, etc. What the benefits are, if no one has ever been to a village, one knows that as a matter of practice most *imizi* are in fact run by women de facto and de jure. There are no men. The men are dead. Others are in the cities. The important benefit in allocating the power at the level of *umuzi* is that it is the woman who is in charge of *umuzi* that can consent. This can be contrasted with communal decisions. If you actually go to a village meeting and you look at who the dominant voices are, often it is the man of the village. We ran the case also partly as a gender case and on that basis something is to be celebrated. Of course, we must be sceptical, its early days, it is a new judgment.

"The rights at *umuzi* level are not ownership rights. There is reluctance to claim that because we are still unsure of how to define ownership in customary terms, but there are at least rights to consent, to be consulted and not to be ejected and those rights are gender-

neutral. Any family home and any head of the family – most often the majority are women – is entitled to consent before they can be evicted. One needs to think about that carefully. For example, community meetings are held and the majority makes a decision, but the majority should not have the power to deprive tenure at the level of *umuzi* and that is the crucial part of the judgment.

"I also want to add something about the debate on why black people should be told what to do with the land. I think that the question depends on what is the land needed for. If we are talking about residential land, I think no one is entitled to tell people what they should do with residential land, but if you are talking about large commercial farms, the public as a whole is interested in their productivity because it is interested in the jobs that the farms sustain and the food that is produced by the farms. Given that there is employment, food production and a contribution to the wider economy, the state is interested in the regulation of employment and the productivity. That is why the state would be entitled to say that if you cannot use a commercial farm, which sustains the livelihoods of many families, then you should lose it.

The Constitution ultimately says the land should be used for the benefit of the public. It constantly uses justice, equity and public interest. This means that we should not tolerate a scenario in which other people get the land instead of farmers that get this land. If you come to a place like the Eastern Cape, you see adjuncts and friends of politicians getting the land. The state should be entitled to take the land so that it can give it to someone who will put it to productive use, because we need the land to produce food and we need the land to produce employment. That is not the same thing as where you are dealing with land for residential purposes. If that is the case, nobody should ask you about what you are doing it for. The second thing to be said about this point is that nobody asks this question in a restitution context, because the law says as long as you can prove dispossession after 19 June 1913, the land is yours or you must get money instead of the land if the land was not given back to you. This question is only relevant in a redistribution context. The question in the redistribution context is equitable access, which means it is needs-based. If those needs are not present, the land should be taken away and it should be given to someone who can make use of it. If we did that, we would actually take many pieces from politicians and their adjuncts and give it to actual local farmers who desperately need it to sustain themselves and to sustain their communities."

Chief Holomisa contributed to the discussion, and reiterated: "There is a need for all concerned to sit down and look at our customary-law practices and the laws themselves that

are considered as such in terms of our custom. As I sit here, there are people in the other hut here at my home. Fortunately, I am working from home because of the situation we find ourselves in. I am going to be having a conversation with them after this and I will be sharing what we have been talking about. I will be telling them that there are landmark judgments that have been handed down by our courts, including the Constitutional Court. They will wonder why it had to go that far. Do people not know that you, Inkosi, as our traditional leader, even when you refer to our land, our communal land or tribal land, we say it is your land because you are in charge of the administration of the land. It is not really yours. It is the land of the clan AmaHegebe. Therefore, when you want to do something in our land, you have to consult us as a people. If there is a piece of land that is required for some development for community interest that happens to be owned by a particular family, which has been allocated either as *insini*, that is, inarable land, or as a homestead, you cannot just take it. If it is necessary, the community has to be involved, the family has to be involved and everybody has to be convinced as to what course of action is to be taken. This is because the day your great grandfather allocated that piece of land to that family, it belonged to that family in perpetuity. Therefore, even if it is part of the communal land, once it is allocated to a family, then it belongs to that family. As such, you do not have that right even in terms of our laws, and if the white man's laws that we have inherited give you that power, then that power is illegitimately conferred upon you. It is not a power you have.

"This shows that our lawmakers, including the Constitution-makers, which I was part, had this attitude towards African law and customary practices, as something that is negative, out of which nothing good can be brought. The result is that people who feel that their way of life is under threat under this constitutional order fight back to the extent that they give themselves power they do not have. I was appalled when I learnt about the Ingonyama Trust's arrangement and how homestead owners, residents or citizens in that area are no longer the owners of their land. They are tenants in the land of their birth. This land was not fought for by the king of the Zulu alone. It was fought for by AmaZulu under the leadership of the king. Therefore, whatever spoils are found belong to the nation or tribe or community as a whole.

"Therefore, I am pleased that the points have been made here that the Constitutional Court and other courts have determined in the manner that we have been told because in truth, the traditional leader works in council. If he works alone, then people are going to revolt. If his council does not represent the true interest of the people they represent in the council, they are also not following the dictates of customary law. That is why you have a

meeting of the council – what we call *imbizo*. That is the assembly or the parliament of the people. That is where the decisions that have been taken by the executive can be refuted and vetoed and set aside. I thought I should just share this to show that the situation we are in requires that more energy be expended to ensure that we do not waste so much energy talking about something that the communities and the ordinary members know is the way things should be going."

One of the delegates pointed out that the conversations were very theoretical and academic with no practical solutions that could be of assistance to amend Section 25 of the Constitution, more especially when it comes to the dissolution of the customary marriages in rural villages in tribal land. Professor du Plessis responded: "When looking at amending Section 25, we need to have a bigger conversation around what people expect that amendment to do in the first place. When it comes to the dissolution of the customary marriages, she noted that she was not sure what the link was but that it links into the language that we use. Sometimes there is language for many things. For example, the discussion on ownership is indicative of the use of language. For example, that the land is the traditional leader's – what do we mean by that? We need more clarity on that and for that we need more engagement. That was the beautiful thing about the *Gongqose* judgment where the court said the legislation must specifically deal with customary law. It places a duty on the people that make legislation to go in and engage and to ascertain what that is and what that means before they try to regulate it. Whether the state is capable of doing this has left me a bit disillusioned this past year but I am always going to keep advocating for the need to go to the people. Yes, the traditional leaders are an important part of that, but that is not enough. You need to get the people there that have the rights to try and explain what these rights are.

"To conclude, Wilmien Wickham who was the attorney in the case, has a beautiful quote. She said she and Jason Brickhill sat there and they tried to make a legal argument out of this customary-law thing and now they must get the people to say what they need to say to put in this affidavit. They asked, 'How would you describe this right?' One man looked at her and said, 'What do you mean, a right? I do not use this language of right. This is a way of life. This is my life, but if you need to use rights language or you need to find a right, use that. I am just saying this is my way of life.' I think that also is a great difficulty, of how we are going to overcome that to make sure that the rights are not distorted."

Professor Dugard echoed what Professor du Plessis said: "If the question is about Section 25 of the Constitution and expropriation without compensation, many of us, if not all of us

here on this panel, have argued that this is already possible and that it was not necessary to amend the Constitution to achieve that aim. However, if the desired aim is, for example, the abolition of private property, then I think certainly some wide-scale changes would need to be made. It is not clear whether people in South Africa generally want abolition of private property. I think these are some of the debates and discussions that we need to have that have not really taken place. What property rights do we want? It would be even better if we had that conversation before attempting to amend the Constitution because then we would understand what we wanted to achieve. At the moment, the current bill amendment text is really confusing and potentially counterproductive."

Adv Ngcukaitobi ended with the following three things: "One, I agree with profs Du Plessis and Dugard about the pervasive confusion around Section 25. We began this in 2018 on the basis that the amendment would target Section 25(2)(b), which is the compensation provision. Even that expanded into unwieldy territory. Now there is a reference to state custodianship, but there is complete confusion about what that means. What we know from experience, particularly in restitution claims, and from my own clients in the restitution claims, is that they want the restituted land for themselves. They want it to go back to the family that was dispossessed of the rights and land. They do not want that land to go to the state. They are quite clear on that. Even in relation to the redistribution farms, the application is for leasehold for a period of five years but once that leasehold lapses, they apply for ownership. They want to upgrade those rights. Even if you look at the programme for upgrading that has been happening in the townships, people want to upgrade these rights for ultimate ownership. As such, there is still this idea in South Africa that absolute ownership is the holy grail of land reform. Most individuals who participate in the land reform process do so because they want absolute ownership. There is no evidence that the state has recognised this and instead it seems focused on state ownership, in other words, to lessen the rights they have so that the land is owned by the state.

South Africa has had versions of state ownership. In the late 19th century, the Crown was the owner of the land. After 1913, the governor-general became the owner of the land. During the Bantustan era, the Transkei Development Trust, the Ciskei Development Trust and the Bophuthatswana Development Trust became owners of the land. At every stage, black people have resisted those super-ownership structures in favour of a devolved system in which the land is held in their name. That is why this idea of state custodianship, which is slotted in at the last minute, is an extremely confusing and dangerous one, particularly if it is imposed from

the top without genuine, popular public participation.

"I am not sure if I follow the issue about the abstract nature of the contributions. I think I always try when I speak to make practical examples about cases that I have actually done. The last point is to touch on what Inkosi Patekile Holomisa has said, which I endorse fully, because what he said is a reflection of custom. However, in the absence of law and of a judiciary that intervenes between the powerful and the powerless, what you get is what happened in KwaZulu-Natal in which what he describes was custom that was distorted with the connivance of the government over a people who had no access to legal resources whatsoever. He says everyone knows in the village that you cannot make a nominal owner a true owner and you cannot make a true owner a tenant. However, 10 years ago, that is precisely what happened in KwaZulu-Natal. The chiefs, including the House of Traditional Leaders, did not speak against this system. Those families in KwaZulu-Natal had to independently solicit legal assistance. What we need is solidarity with the poor. We need solidarity from the chiefs themselves. When one of them acts in the way that happened under the Ingonyama, we need him, Inkosi Holomisa, to say so clearly, openly and publicly. We do not need to get the judges to intervene at the last stage after 10 years of rent extraction. I endorse what he says, but the reality is that people on the ground need real solidarity."

Chapter 6 Plenary 3: Good practices on transformative constitutionalism advancing equality under customary law

1 Overview

This segment focused on asking whether, when looking at customary law, culture and social justice, transformative constitutionalism has truly advanced equality and other human rights in customary law. In particular, it looked at what good practices exist in transformative constitutionalism advancing equality under customary law. The keynote speaker was Justice Mumbi Ngugi after which presentations were provided by Mr Abubakar Zein Abubakar and Ms Kanyali Mwikya.

Justice Ngugi highlighted the history of commonalities shared by Kenya and South Africa and ended with a challenge to everyone to really think not only about the language, but the stories that we tell and the way we reaffirm certain ways of thinking about certain issues, and to remember that we can change the narrative into something that truly serves the interests of social justice.

Mr Zein also picked up on the similarities between South Africa and Kenya but also highlighted key differences. He noted the tension between the colonial component of law and community aspirations and community based on culture. He called for a deconstruction process that deconstructs both the common law and customary law, with the aim of retaining positive aspects that support social justice and discarding those which undermine the dignity of human beings, in particular the vulnerable.

Ms Mwikya focused on how the Constitution of Kenya has dealt with legal pluralism. She also touches on patriarchal and masculinist influences which have resulted in men being recognised as the keepers of culture. In addition, she discussed the effects of colonialism and attempts to document customary norms. Finally, she ended with the positive aspects and progress made in Kenya in relation to customary law and intersecting identities.

The discussions centred on the relationship between religious law and customary law. Delegates were also challenged to think more about the question of national values and principles, and about legal pluralism. The main question dealt with asked: What case studies exist where we can clearly see bold, transformative constitutional moves by the Kenyan courts?

2 Keynote Address – Justice Mumbi Ngugi

I will start with considering how we have addressed the question of customary law and culture in Kenya both in the Constitution, in legislation, and in jurisprudence from our courts with a view to advancing social justice, but specifically in relation to women. Perhaps at another time, when time allows, we can delve a little deeper into other questions including those relating to social justice for persons with disabilities. We have a Constitution that is very similar to the one of South Africa and I think we have borrowed a lot from them, both in terms of the Constitution and in relation to jurisprudence. We promulgated our Constitution in 2010. This Constitution has been described by many as a transformative constitution. The critical facets of this Constitution are that it has a major commitment to transforming our society, and in that Constitution we have made one of the underlying core principles the question of social justice. However, we have also recognised, in Article 11, the important place of culture as the foundation of the nation and as a cumulative civilisation of the Kenyan people. When we consider social justice in the context of customary law, we cannot therefore divorce it from culture. We know that culture relates to the ideas, the customs and the social behaviour of particular people of society. Our customary laws consist of the laws and practices of each of our respective groups.

We have made customary law, like all other laws in Kenya, subject to the Constitution and under article 2(4) of the Constitution, which I think is similar to what you have in South Africa – any law or custom that is inconsistent with the Constitution is void to the extent of that inconsistency. We also have legislation, specifically the Judicature Act 7 of 2007, which predated the Constitution and is actually a colonial product.

We have recognised customary law as a valid source of law. However, we were subjected under the colonial regime to our customary laws facing the test of repugnancy, which is only applicable to the extent that it is not repugnant justice, immoral or inconsistent with any written law. Culture and customary law are important sources of law in Kenya, and we have given them constitutional and legislative protection. However, I think, in Kenya and elsewhere, we recognise that culture and customary laws can be and often run counter to the fundamental rights which are enacted and protected in the Constitution. In article 11 we recognise and protect culture. We also have the inclusion of social justice in article 10 as one of the core values in our Constitution and we have set up a whole gamut of rights that people are entitled to in Chapter 4. In many of our customary laws and practices observed by many

of our communities, equality and non-discrimination are not principles that are respected. In many of our customary laws and practices we have a major preference for the male child, we have a persistent belief in the inferiority of women and the superiority of men. In many of our communities we have an infantilisation of women. In some of our communities, if you visit, they will tell you they are only children at home when they are making reference to women and their children. As a result, we deny women access to economic resources and land, which is a major resource. We have customary laws and practices that discriminate against women in matters of inheritance and within the question of marriage.

It is not surprising then that here in Kenya and, I think, in many other places, we find that the denial of social justice for women and the discrimination against them is more significant in the areas of marriage and divorce, the division of property, inheritance and the custody of children. However, there are other cultural practices that are recognised in our customs, which are harmful, and which have a major bearing in access to social justice for women. These are practices that we need to mention, and I will attempt to talk about some of them. In relation to this in particular is the question of a widow's inheritance, harmful cultural practices like female genital mutilation, the question of return of dowries on the dissolution of marriage and, of course, the question of child marriages which deny girl children as young as 13 years access to education and marry them off to often older men. This, again, denies them the opportunity to, in order for them to achieve the same opportunities, get the same benefits as men in relation to the human rights that they are guaranteed under the Constitution.

I would like to move to the question of land inheritance. We have noted that, in our context, while the Constitution prohibits discrimination and provides for equal access to land and property, in practice women still remain completely disadvantaged and discriminated against. In our context, I think women comprise about 80% of the agricultural labour force. They provide about 6% of the farm income, but only 5% of land titles are registered jointly in the names of men and women. Of even greater concern is that only 1% of Kenya's land titles are registered in women's names. This underrepresentation in land ownership is a feature of the customary law and practices which enable the right to inherit land and other forms of property. You will note that in most cases women only have secondary rights to land through their relationships to either their fathers or their husbands. This exclusion of women from land ownership is manifested in both legislation and jurisprudence. I will discuss some cases which demonstrate how in the past our courts have looked at the rights of women to inherit

on an equal basis with men which, like I mentioned, has an impact on their capacity to have adequate economies that they would be entitled to. One famous case is *Mary Rono v Jane Rono & William Rono* ("*Rono*"),[35] a case that predated the Constitution. The judgment held that women, or rather daughters of the deceased who have arbitrated against their brothers in the court, were entitled only to a very small percentage of their father's estate on the basis that they were likely to get married, they would inherit property from their new families, and they were therefore not entitled to the same ownership of property as their brothers. The court in this case, in reviewing the High Court decision, held that the children of a deceased person are equal regardless of their gender and to hold otherwise was discriminatory against women. The court in that case applied the Convention on the Elimination of All Forms of Discrimination against Women[36] ("CEDAW"), which contains the equality principles that are now contained in our Constitution.

Subsequent decisions have now followed that decision in *Rono*. The court has stated that in applying our succession laws of inheritance, we cannot discriminate against women. The law should enshrine the principles of equality of distribution of property between men and women, because men and women are equal, and they are entitled to the same rights and the same benefits in relation to inheritance.

We have a similar challenge in matters of marriage, in divorce. For example, in many of our communities when women were divorced, as one writer once put it, the women would only be entitled to the pots and pans. They are workers in the kitchen. They were not entitled to any more than that. We now have article 45 of our Constitution which states that women and men are equal from the start of a marriage, during independency and its dissolution. The problem that arises is that while we have interpretation in our law and in the legislation that has been put in place to deal with that constitutional provision, we are in a vulnerable state because it talks about contribution, and women must show their contribution at the dissolution of a marriage, and the contribution that they must show is a financial contribution.

The question arises, given the respective roles of men and women within a marriage, where men may be out there earning money and women traditionally under our culture have to stay at home and look after children, how are we to value the financial contribution of women whose contribution is not in monetary terms? That question still needs to be resolved properly. There are courts which say we can give women 50/50; others want to give a lesser

[35] *Mary Rono v Jane Rono & William Rono* (2005) JELR 96925 (CA).
[36] United Nations *Convention on the Elimination of All Forms of Discrimination against Women* (1988) Treaty Series, 1249, 13.

percentage because of the courts' respective perceptions of what amounts to proper contribution in relation to property acquired during marriage.

I want to touch briefly on questions related to access to community land, specifically in relation to community land in communities where there is still a lot of land held communally. There is a petition happening before the High Court that addresses the question of women's entitlement to participate in the adjudication of land in group ranches. Amongst the Maasai, a lot of land is held communally. It has been registered in group ranches. A lot of the time, the land was divided into individual or group titles because under the customs of that community women did not own land and did not have a right to participate in the ownership of land. In that case, the court said it has a right to look at the question of whether it is proper for customary laws to exclude women in the adjudication of community land, on the sole basis that they are women and that they are also unmarried. The question then relates to gender and marital status as a limitation to the rights of women to equal treatment under customary law, and is a question that may be addressed in the foreseeable future in our country.

Therefore, we have a Constitution that can be transformative in helping to achieve social justice for women. However, to do that, I think we need to recognise that, first, culture and customary laws are dynamic. In many respects our culture and our customary laws have changed significantly. In many respects our culture and customary laws are inimical to the social justice of women in all spheres of life. We have to find a way, and in time I believe we will be able to do that, and accept and support those elements of customary law and culture that are conducive to the enjoyment of equal rights and access to social justice for all people in society, but to also find a way of discarding and disregarding those elements of custom and culture that are inimical to social justice.

The question of going back to our customs and culture arose in the morning session. I think for me the answer is that we have great difficulties in going back. It is not a possibility. What we have to do is pass legislation. Let us determine cases in a manner that advances social justice, while maintaining those elements of our culture and our customs that are in accord with the constitutional principles that we have established in our 2010 Constitution.

3 Presentation – Mr Abubakar Zein Abubakar

In relation to the transformative nature of the Kenyan Constitution and the similarities that it has with the South African one, we also have differences. One of the major differences is that the Kenyan constitution, although it provides for aspects of culture and customary law in

various parts of the constitution, in its final negotiations for enactment, the institutional framework for the implementation of those cultural and customary law provisions was taken out. For instance, one of the design and architecture features of the Kenyan Constitution is that in every substantive chapter there is an institutional framework for its implementation, except with regard to the constitutional provisions attached on culture and customary law, with the exception of the Muslim law, which has Kadhi courts. In relation to the components that I would like to focus on, the lack of an institutional framework on this matter is one. For example, South Africa has a chamber of leaders, community and cultural leaders who can negotiate and discuss some of these important issues. In contrast, Kenya does not have that. Therefore, one of the challenges that we have is that we need to, through legislation, develop an institutional framework for its implementation.

The second point I want to make is that although, traditionally, when we talk about culture and customary law, we tend to mainly focus on personal law and in particular on marriage, divorce and inheritance, there are numerous other aspects of culture and customary law that would be very important in transforming our societies. Some of them were touched on by Justice Ngugi. On the question of land, for example, and natural resources, there are very many transformative ideas from our culture in terms of environmental protection, and this normally would not be part of the discussion. When we talk about, for example, the issue of environmental justice and how to save our planet, we are charged short by not understanding and tapping into wisdom that has been developed by various communities. One of the transformative areas I believe that we can also focus on is environmental protection and creating harmony between communities and the environments that they live in.

Another important point relates to peace – how to establish peace in societies and how to reconcile peoples. We have provided, for example, for alternative means of dispute resolution and, among others, we have indicated in article 159 of our Constitution a traditional means of conflict resolution. I know Justice Ngugi has talked about the very many limitations and some of the things that we need to reform or completely outlaw, which are already outlawed by our constitutional framework, but in practice there are many challenges. Again, there are a lot of good ideas, wisdom and practices in terms of alternative means of conflict resolution, including reconciliation. The area of peace is very critical in our societies. If you look at Africa as a continent, and the world over, peace is a big challenge to us.

Let me make three more points. One is that, listening to the morning's session, I agree with those who say that there is great tension between the colonial component of the law

that has been with us and community aspirations and community based on culture, which partly formed the resistance against colonialism, and that resistance has also created a lot more tensions between us. What needs to happen is that we need to have a deconstruction process that deconstructs both the common law, which has a number of very negative things, and also deconstructs customary law and culture to tap into the positive things that support social justice and discard those which undermine the dignity of human beings, particularly those who are discriminated against – women, children, persons with disabilities and so on. The second thing I think I need to say is that in order for us to tap into these transformative aspects of culture and of customary law, we need to do a lot of research. This is something that is missing in the conversation – that research is so critical, both in terms of identifying those uplifting components of culture and customary law that uphold human dignity, but also identifying those which need to be repealed and reformed.

Last but not least, two things. One, in the morning session, there were a number of references to the process of codification of customary law. One of the challenges, at least in Kenya, is that at the last count we have more than 100-plus communities and all these communities have unique cultures and also have unique customary law. Research would be an important component that allows us not only to identify but also to start the process towards codification, which has very many contentions. Therefore, I promote the idea of research.

Lastly, I think that there is also a demeaning attitude of those who have just been oriented in the common law that tend to think of culture and customary law only in negative perspectives. I think it calls for us to have a balanced view which is also based on evidence, but I think we have started this process. Even providing, for example, for recognition of Kenyan languages in the Constitution is a revolutionary act.

I hope that we will be able to create harmony and reap the benefits of uplifting human dignity and outlawing those who discriminate. However, it is important that we do not throw the baby out with the bathwater.

4 Presentation – Kennedy Kanyali Mwikya

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

I will traverse various topics, especially in relation to how the Constitution of Kenya has dealt with legal plurality or what we call legal pluralism. The first thing that I want to talk about, is

what a legal pluralist system looks like. Usually, legal pluralism also corresponds to the diversity that we find in our country. In Kenya we have a lot of ethnic diversity. Although we are still not the most ethnic diverse country in Africa, we tend to believe that we are extremely ethnically diverse. We have between, based on who you are listening to, 44 and 110 distinct ethnic and racial groups with unique cultural practices and approaches when it comes to personhood and status, belonging and property. We also have a lot of religious diversity. Most Kenyans who identify as religious express opinions that religion should play a larger role in law and policymaking. These two aspects in particular, really inform a lot of what informs the hybrid legal system that we have here in Kenya. We also have a lot of colonial history – British indirect rule delegated the adjudication of certain civil-law matters to what they called traditional chiefs. That led to a lot of references to customary law in a limited range of issues and here I have mentioned married status as an example. We then had the application of Muslim law in what was known as the Ten Mile Coastal Strip and that particular legal approach has led to the establishment of Kadhi courts as a part of Kenya's judicial system, or what in other countries might be known as Muslim courts.

Furthermore, we have the 2010 Constitution and the constitution-making process. There was a lot of deep divisions in Kadhi courts in the Kenyan constitutional and legal system. There was also a lot of care taken to ensure that you have that respect for ethnic diversity, and that also informs how customary law is included and incorporated into Kenya's legal system. The result was that the Constitution came into effect and includes provisions for customary and Muslim law in Kenyans' lives. You will find that we still have the repugnancy clauses, but we also have a supremacy clause which overrides the application of especially customary law if it is inconsistent with the Constitution. Accordingly, we have that supremacy clause in addition to a repugnancy clause.

The Constitution provides a balance of overlapping, intersecting and competing legal regimes. For example, article 2(4) states that any law, including customary law, which is inconsistent with this Constitution is void. Article 2(5) also states the general rules of international law. I must note the limits of Article 2(5) because there is some debate about the place of international law. Although we sometimes say that our Constitution draws references from a lot of other laws and constitutional approaches, we do have distinctive quirks which make the Kenyan Constitution unique, but some of these might actually need to be resolved in a more meaningful way down the line. Therefore, when it comes to cultures, as my other co-panellists have discussed, we have Article 10 on the national values and

principles of governance. It has been mentioned that there is a need to determine how we can reconcile customary-law principles with the national values and principles of governance in Article 10. There is also Article 11, which deals with the right to culture – where culture is recognised as the foundation of the Kenyan nation and the propellant of what can be described as a distinct Kenyan identity or a Kenyan civilisation. That is something else that can be discussed because there is research in Kenya that suggests Kenyans are more likely in certain instances to identify with their religion or ethnicity than they are to identify with their nationality as Kenyans.

When looking at Article 11, which is quite limited, you will find that there is a lot of emphasis on technology and science and cultural ownership in continuation from cultural assets. This might have been informed by a big controversy that happened on the copywriting of certain distinct Kenyan designs of clothing – very important cultural artefacts from Kenya which have been copyrighted abroad. That may be what inspired the way Article 11 was designed and it would have been interesting to see a longer chapter on culture.

Therefore, Kenya is a very pluralistic state, yes, but at the end of the day it is a bit hard to implement this legal system in the country and a lot of the things that inform this have been discussed during the proceedings. Number one is the fixedness, the fixedness of cultural identity, which is in turn tied to ethnic, religious fixedness. That means that ethnic, cultural and religious identities cannot or should not fundamentally change – they stay the same and they provide society with a bit of stability in going back and recognising that some things have not changed.

There are a lot of patriarchal and masculinist influences where men are recognised as the keepers of culture. This is especially when you think about this idea of reliance on male councils of elders or male elders who are routinely called upon as witnesses in court cases to describe cultural beliefs of a community. That is one of the ways in which that patriarchal and very masculinist approach to customary law, or even the interpretation of religious texts, is in turn codified in a sense by the courts. There are also the effects of colonialism and attempts to document customary norms in particular. Most Kenyan lawyers, when thinking about or going through their law of succession classes back in law school, are introduced to all these legal treatises, which have risen to a point where they are sources of law in themselves. These are anthropological and other texts which were merely describing the ethnic beliefs of a particular community or particular communities. With this in mind, an example is a very

famous book by Eugene Cotran, which documented certain forms of customary law in Kenya. That is another way to see that contention.

You can go all the way back to times where communities which relied mostly on oral histories are said do not have a civilisation. That has been a very racist contention that has continued for a very long time. Therefore, putting documents or putting cultural beliefs or oral histories or customary law down on paper, that kind of codification legitimises some of these practices and laws. Nevertheless, at the end of the day they freeze them in a point in time and that has its own problems and challenges.

Kenya is a very cultural, religious and politically conservative country. I think people like thinking that they could go back a hundred years and they try to think that if we went back 100 years, the same things that we are doing now, the same things that were happening then are happening now. That is not really true, but the political leaning or slant is in that direction. Finally, we have a lot of rule-of-law problems, like impunity at all levels of government, lack of respect for laws and judicial decisions, and lack of trust in legal and judicial processes. Legal pluralism is a very careful balance of different legal regimes, and the rule-of-law problems that we might have in this country make it very difficult for us to have a stronger reliance and a stronger tendency toward appreciating that a pluralistic legal system is somehow good for the country and it was set up for a particular reason.

At the end of the day, we have a lot of challenges when it comes to our pluralistic legal system, but I will say that there are some good things to note about our country. Kenyans continue to negotiate multiple identities. You will find that Kenyans have multiple and intersecting religious, cultural, political and demographic identities, and they assign these identities meanings that lead to a state of social flux, and you approach certain social problems with that dynamism in mind. I think that that is quite inspiring.

There is also the softening of the power of customary law and certain customary and cultural practices which might empower women in a more meaningful sense further down the line. As someone who works for a women's rights organisation, when I see the lowering incidences of harmful cultural practices, I also see the loss of power by patriarchal keepers of tradition and then the empowerment and agency of women and girls. Therefore, it is important to consider the next step when seeing this kind of empowerment at that cultural and customary law level. One interesting example is Article 17 of the Maputo Protocol[37],

[37] African Union *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (2003).

which I believe creates pathways for women's participation in the development of culture. Article 17 of the Maputo Protocol empowers women to have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies. State parties shall also take appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels. When looking at this particular provision, we need to ask how we can ensure women's participation in cultural development. Perhaps something that we could ask, and also push for that dynamism when we think about culture or customary-law practices, is, should we set up a law and culture commission to determine and develop customary law? That could be an avenue where we are actually giving women a larger role in pushing for that dynamism and also trying to say this set of laws or this set of principles should stay, or these ones are a thing of the past.

5 Discussion

Professor Madonsela kicked off the discussion with the following question: "Like us, Kenya has a long way to go in advancing equality and human rights through transformative constitutionalism. Could each speaker share one case study where we can clearly see bold, transformative constitutional moves by the Kenyan courts?"

Justice Ngugi started by sharing the following:

> "I think we have a rich history in Kenya of trying to advance social justice for women, even before we had the new constitution. What it has done for us is give the courts the proper tools for making sure that our customary laws do not continue to oppress women and lead to them being denied various opportunities that they really ought to be entitled to. One case that comes close to what Professor Madonsela has in mind is the one I mentioned earlier relating to the rights of women to be included in the adjudication of land in group ranches among the Maasai community. I say it might come close because the case has not been determined yet and it deals with a question that has not yet been determined before our courts. Questions dealing with the rights of women within marriage and the implications of Article 45 on equality between men and women within marriage have now gone before the Supreme Court. The focus is on what the precise implications of article 45 of our Constitution are in relation to equal rights of women in marriage as it applies to the division of matrimonial property."

In relation to succession cases, one interesting aspect that has yet to be determined is the question of whether a woman should still continue to be considered a unit as we do in section 38 in the determination of the shares of children and the widow in a monogamous union where the husband has died. In relation to polygamous marriages, we have two or three interesting decisions where the courts have said that the first wife in a polygamous union should have her share of the property acquired during the marriage determined before the property of the deceased can be subjected to the rules of intestacy under legislation. When looking at the Law of Succession Act and the relationship between a widow and her children, a woman is still treated as a unit, which puts her on the same level as her children. This question has yet to be determined.

> "The question of why women should only have a life interest in an intestate person's estate while a widower does not have the same limitation, all of which stem from our cultural views that women are only entitled to inherit so long as they do not remarry, has also yet to be considered. My view of the question of how we are using or are likely to use the principles of the Constitution to advance social justice for women, depends largely on how well and how advanced our thinking is as judges and as judicial officers, as well as how committed we are to seeing that social justice is achieved for all vulnerable groups, specifically in relation to gender."

It is also important to touch on the question of domestic violence, which was mentioned by one of the panellists and its connection to the makings of a real man in our customary culture and setting. In Kenya we speak a lot about a certain culture allowing men to "discipline" their wives – used as a justification for domestic violence and an explanation for how men go overboard with their domestic violence. The issue that occurred to me is this question of culture allowing violence against women in the name of discipline. Is it also one of the distortions of our culture that we have accepted as truth? It is indeed time we interrogated some of these statements about our culture and how we use it to justify acts in a domestic setting that are not justifiable and amount to criminal offences, even if both men and women seem to find them acceptable on the basis that they are a part of culture.

> "I agree with Justice Ngugi's input. I would also like to provide an example, and that is the first case that substantively handles the question of article 43 of our Constitution in terms

of socioeconomic rights. In this case, the Supreme Court affirmed the justiciability of socioeconomic rights for everyone and extended the interpretation of the kinds of protections that the state should consider when it involves citizens' rights."

Ms Mwikya also shared the following insights: I think that the case that is at the High Court that Justice Ngugi mentioned would be a big game changer because it addresses some of the issues that we are seeing and parts of the Constitution that have not really been fleshed out, such as article 60. The High Court and Equality Now just ruled on our side on attempts to throw out the Prohibition of Female Genital Mutilation Act of 2011. The High Court held that the government is mandated to protect women and girls and every individual from harmful cultural practices. That would be my case of transformational constitutionalism. Some of the arguments by opposing counsel were quite on the mark and it is good that the High Court made that balance.

Chapter 7 Plenary 4.1: Gender Equality and Customary Marriages

1 Overview

This discussion illustrated the importance of attaining substantive equality and the need for codifying customary law in relation to marriage. A keynote address was given by Ms Charlene May. This was followed by presentations by Adv Nthabiseng Sepanya Mogale, Ms Mandi Mudarikwa, Mr Sibusiso Ngubane and Dr Keneilwe Radebe.

Ms May focused on the registration and recognition of marriage and the gender burden on women under the Recognition of Customary Marriages Act 120 of 1998 ("RCMA"). She reflected on how law, policy and custom really impact on the lived realities of people and the need to develop those laws and policies to ensure the creation of enabling environments, but also to meet the constitutional obligation of attaining substantive equality.

Adv Mogale continued the discussion on the RCMA and talked about the features that were at the time considered progressive, responsive and geared towards protecting women married under this regime.

Ms Mudarikwa dealt with the issue of same-sex customary marriages and delineated some of the experiences of same-sex couples to illustrate how, when talking about transformative constitutionalism, it is fragmented. In particular, she draws attention to the resulting intersectional discrimination and marginalisation.

Mr Ngubane interrogated the custom of ukuzila and its potential violation of the rights to *inter alia*, gender equality, human dignity, freedom of religion, opinion and belief, as well property. His discussion was aimed at testing whether the ukuzila custom can be aligned with the constitutional values of gender equality.

Ms Radebe's discussion put the challenge of proving the existence of a customary marriage in the spotlight. She advocated for legal reform of the section dealing with the recognition of a customary marriage in order to ensure that the requirements are clear.

Questions related to what it means when we speak about "according to the customary law" especially in a multi-cultural society, the need to recognise difference and whether there is a need for the codification of customary law.

2 Keynote Address – Ms Charlene May

Our conversation today is as an opportunity for the Women's Legal Centre to talk about the work we have been doing around the recognition of customary marriages in particular. It is an opportunity to really reflect, and I would like to comment on the last session where Judge Mumbi called on us to think about how law, policy and custom really impact on the lived realities of people. We need to look at how we can develop those laws and policies to ensure that the impact on the lived realities of people is that we create enabling environments, but also so that we, at the end of the day, meet that constitutional obligation towards substantive equality. That is largely what frames my input to this conversation.

This conversation focuses on marriage registration, particularly how the RCMA as a legal framework, as well as the regulations and forms accompanying it, impacts women's lived realities. We see this when we look at the statistics that Statistics South Africa has produced based on the data that they receive from the Department of Home Affairs. Therefore, because we are looking at this from a year-to-year lens, the latest figures we have is for the period of 2019. The number of registered customary marriages in South Africa is at 2 789. Every year when this report is released, we as an organisation really look at it and think about how completely impossible the numbers are in comparison to the actual lived realities of women. In 2010, for instance, that figure stood at 9 996 registered customary marriages in the country. That would have been a few years after the RCMA came into effect, and so obviously it was a lot more front and centre. A lot more work had been done around popular education, for instance, in the country around the legislation. We therefore saw that there were more registrations during this time. We then saw how registrations have been tapering off and getting less and less every year. We are aware that might be for very different reasons, but the conversation today is really around the reasons that women give to us when engaging with them on the issue.

It is important for me to clarify, for people who are unaware, that the RCMA does not require registration for a marriage to be considered legally valid in South Africa. To a large extent, I know that Professor Thuli spoke about how the Law Reform Commission at the time really tried to create this very enabling environment. They wanted legislation that would be user-friendly and easily accessible. To a large extent, they did not want to create burdens for couples and for women who were married already in terms of custom, but who might not have been aware of the legislation being passed and who would not be coming forward to register those marriages. They did not want to invalidate those marriages. I think it is

important that it came from a place that sought to create this forward-looking, enabling environment for people to register their marriages. The RCMA does set deadlines for registration, even though registration is not mandatory. In this regard, it gives you three months to register your customary marriage after the date of the conclusion of that marriage. If it is a marriage that was solemnised or entered into prior to the Act coming into effect, those marriages had a 12-month period from the time the Act came into effect for registration. However, the Department of Home Affairs has repeatedly said that they are not really playing hard and strict around the time periods for the registration of marriages. They have been very lenient in respect of the time periods, but it is worth noting that the time periods are there and not a lot of people are aware of them.

Key for us is the actual registration process. It is wonderful that we have this system that seeks to be enabling, but we also, as practitioners, look at the actual practical implementation of that legislation and where the hurdles come in. In particular, we look at the fact that the RCMA requires that a marriage officer needs to be satisfied by the spouses that go to the Department of Home Affairs that a valid marriage was in fact concluded. Certain information, which includes identity documents of spouses, the dates of marriage, the details of the lobola negotiations and the handing-over needs to be made available.

Interestingly, the legislation makes provision for a third party or third person to register the marriage on behalf of a couple. However, in our experience, we have not really seen that this has been allowed to happen. As such, we are going to focus on the couple and the individual and, more importantly, the woman attending the office of the Department of Home Affairs in order to seek legal repercussions. The key point for us then is to look at Form A, which is the registration form and what that really requires. That form looks at the declaration that the couples have to make. Both parties have to attend the Department of Home Affairs in person. They need to do the declaration in the presence of the department official. Then they need to have witnesses present who also sign the declaration to say that they were indeed present.

What we find when women approach our offices, is that women are struggling with the registration of their marriages, normally when there has been a death of one of the spouses, at the time that one of the spouses has instituted divorce proceedings or in cases of separation or abandonment. Those are really the key areas where the struggle for the registration then commences. I reflected on what the women are telling us. I will focus briefly on the requirement, for instance, that witnesses be present, that attended the marriage negotiation,

and that they are required in terms of the regulations and in the standard operating procedures of the Department of Home Affairs, to present themselves in person in order to do that declaration. What women are telling us is they often struggle to convince relatives to accompany them to the Department of Home Affairs and to do this declaration, whether it is their own relatives, or whether it is relatives from their husband's side. Normally, some kind of persuasion is necessary for people to participate in the process of registration.

What women also experience is the struggle, especially in cases of deceased estates where family members stand to benefit, of such family members being much more likely to deny the existence of a customary marriage, even when they were present and they in fact assisted in the negotiation process. When they realise that they are beneficiaries or potential beneficiaries if there is no spouse, that is really when women are struggling to convince family members or relatives to accompany them to the Department of Home Affairs.

This issue becomes compounded when we look at rural settings where women often have to travel to a city centre to a Department of Home Affairs office. That has serious cost implications not just for the woman who needs to travel, but also for anybody else she has to pay for travel and perhaps accommodation to go to Home Affairs. Women are therefore placed in a financial position where they sometimes have to compensate relatives. They physically have to pay relatives in order for them to agree to accompany them to the Department of Home Affairs, which of course places question marks around the integrity of the registration process itself and on the national population register and the marriage register itself.

Women also talk about how they struggle to convince their own family members to attend Home Affairs on their behalf. That is normally the case where lobola was not paid in full or where there are payments outstanding or gifts considered to be outstanding, where their own relatives will refuse to assist them in the registration of the marriage.

Key for us is women's positionality within their community and within their households. We know, for instance, that it is extremely difficult for women to negotiate marriage. The high number of people that have declared that they are in cohabitative relationships or domestic partnerships, for instance, is an indication that women very often struggle to negotiate marriage. There is an additional burden of having to not only negotiate the marriage itself between her and her future spouse, but also for her to be able to negotiate for that spouse to accompany her to the Department of Home Affairs.

Therefore, our experience has been that men benefit from the hurdles and the burden placed on women through the registration requirements, which make it much easier for men to deny the existence of a marriage. It is much easier for men to deny women the right to housing, land and property that were accumulated during the marriage. It is also much easier for men to enter into subsequent marriages, even under the Marriage Act 25 of 1961 ("Marriage Act") in certain instances, because of the fact that their customary marriage is not registered and is not on the marriage register or the national population register.

3 Presentation – Advocate Nthabiseng Sepanya Mogale

My presentation is closely related to the previous presentation because I was asked to focus on the RCMA, so it flows quite nicely. When the RCMA was mooted just after the dawn of democracy and finally commenced in 2000, it was hailed as one of the most progressive legal instruments to come out of parliament at the time. It was seen as an instrument that will restore constitutional rights of equality and human dignity to women in customary marriages by enabling them to inherit from their spouses. Additionally, children born of such marriages were to be protected as descendants and beneficiaries, and above all, the undermined status of the marital regime was to be removed and customary marriages were to be brought on par with civil marriages. It is true the yardstick used which implied that it was transformative was nothing new, but just an existing instrument and therefore the transformative angle was missed, as was pointed out in the previous presentation.

The objective of the Act attests to its intended vision. It stipulates that the Act was to make provision for recognition of the marriages, to specify requirements of the marriage, to regulate registration, to provide for equal status and capacity for the spouses, to regulate proprietary consequences for the spouses and to regulate the dissolution of such marriages. For all intents and purposes, the Act has several features that were at the time considered progressive, responsive and geared towards protecting women married under this regime.

The first pillar, one could say, is the recognition of already existing marriages. This Act was one of the few that was actually retrospective and I remember very well that we celebrated at the time to say, wow, this is indeed a victory. Section 2 thereof recognises already existing marriages and people can get those registered. It does not have to be in progress marriages only.

The second pillar that we saw as strong was the registration of the marriages by any of the parties. According to section 4 of the Act, the spouses in a customary marriage have a duty

to ensure that the marriage is registered. Section 4(2) states that either spouse may apply for the registration of his or her customary marriage. At the time, that was seen as a strength for women to go to the local Home Affairs office and register. The Act basically says that anyone can go on their own and that they do not have to go with anybody. That is why the emphasis was on either spouse.

The outcome of the registration would be a marriage certificate, which again at face value looks like it is a strong point coming out of this. This certificate would be irrefutable proof that such a marriage exists and that has become a form of protection for women and their children in particular. Although this is a lower bar compared to the requirements of a civil marriage, the process to register such a marriage has failed over the years.

As has been pointed out, in 2010 there were only 9 000 registrations. As we know, almost all African South Africans actually marry through this process. When you look at the other communities, your Muslim marriages, etc., we then need to ask whether this is covered? Does this cover those types of marriages and what do we mean by customary? It is a question that unfortunately, at the time, the drafters did not clarify nor did they go into it. Both structural and systematic issues include the reluctance by the parties in the marriage to register their marriages. Upon investigation, the women expressed fear of going to register alone and the men mostly refused to register and treated registration with suspicion and contempt. This is mainly embedded in the patriarchal context in which such marriages occur.

Poor registration has resulted in untold suffering for a lot of South Africans. It has also resulted in the challenges of government and legislative drafters not knowing much about the evolution of this regime, generally, and specifically not knowing the actual numbers that exist under this regime. Of these marriages, how many have more than one spouse? How many spouses do they have, if more than one and how does one monitor consent – given that the Act speaks about consent that has to be given for a spouse to go into a second marriage. We do not know what that consent means and what it has translated into. This is mainly because government has neglected to put into place proper systems to record and monitor this as a constitutional right.

The third pillar is the age limit of parties to enter into a valid marriage. Section 3(1)(a)(2) prescribes that both parties must give consent to marry each other and they must be 18 years or above. I think I stand to be corrected; this was corrected recently. At some point it was 15. If either of the prospective spouses is a minor, both his parents or legal guardian must consent to the marriage. If the consent of the parent or legal guardian cannot be obtained,

section 25 of the Marriage Act applies. It would be interesting to investigate if this legal provision is being observed or not considering the intertwined nature of customary marriages and *ukuthwala* and *ukungenwa*.

Another pillar would be consent by parties, which I have already touched on. A fifth one is the equal status and capacity of spouses. The Act clearly states that both spouses are equal as prescribed by all the other laws and one would take it to mean the Constitution. However, we know that this is not happening. In relation to proprietary consequences of the marriage and contractual capacity of the spouses, the Act states that both spouses have equal capacity, yet we still see women being thrown out by relatives and others. In relation to consent to enter into further marriages, which I have already mentioned, section 7(6) states that a court has to authorise this. We hardly ever see any men go and seek this consent from the courts. On the subject of the dissolution of marriage, once again, women are thrown out without actually getting what is due to them.

What I am trying to point out, is that this Act is, unfortunately one of those hollow victories where, after the celebrations, everybody walked away and nothing was ever put into place. It should be one of those that teaches us the need to continuously scrutinise, particularly the issue of justice and transformation under a constitutional democracy.

4 Presentation – Ms Mandi Mudarikwa

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

I will focus on the issue of same-sex customary marriages. I have titled my presentation Separate and Unequal because I am going to walk through some of the experiences of same-sex couples and look at how, when we talk about transformative constitutionalism, it is fragmented right now in a way that the benefits and developments that have been made, continue to function at different levels and would have to be repeated for other groups because of the way in which marriage laws operate.

I think the starting point is to briefly explain the marriage framework of South Africa. Civil marriages are recognised in the Marriages Act, which are opposite-sex, monogamous marriages. Then there are customary marriages recognised in the RCMA, which can be polygamous or monogamous. The debate that we are currently engaging is whether or not they also have to be opposite-sex marriages. There are also same-sex civil marriages that are recognised by the Civil Unions Act 17 of 2006 ("CUA"), which also includes opposite-sex civil

unions. That is really the general framework. There is a lot of work being done right now by the Women's Legal Centre relating to recognising religious marriages as well within this framework.

Essentially, the key aspects to emphasise about this legal framework is that, one, you can only be married in terms of one law. Once your marriage is recognised in terms of one law, you cannot then go and be married under another law. Two, you can also not convert your marriage from one law to another in the sense that you cannot convert your civil marriage into a customary marriage. You would have to terminate it first and then conclude another marriage again in terms of the requirements of the RCMA or the CUA. Third, these marriages are also recorded in separate marriage registers by the Department of Home Affairs, meaning that whatever benefits and gains developed and achieved in terms of one law cannot be passed into another. Whatever framework created by the Marriages Act stays in the Marriages Act. Whatever benefits in the RCMA, stays there and so on. This means that whatever progress and transformation has been achieved in any of these laws continue to be fragmented, as you will see from the discussion.

At the centre, we operate from a practical perspective, so I will talk about a case that we are working on right now. The basic tenets are that two women start dating each other and they decide they want to get married. They are women from families living in terms of custom and who practise their custom. They approach their families and inform them they want to get married. The families organise to have them celebrate their marriage and comply with the customary laws of whatever custom they live in, in terms of celebrating, concluding and solemnising a customary marriage. This is all done and they do everything that is required. What they then want to do is to go to Home Affairs because they want that marriage certificate. We have heard from the previous speakers why this is an important step. They go to Home Affairs to register their marriage. Home Affairs tells them that they cannot register this marriage in terms of the RCMA because the RCMA is only for opposite-sex marriages, either polygamous or monogamous.

What they must rather do is go and get married in terms of the CUA because that is the law in South Africa that recognises same-sex marriage. This couple then say that they are already married. They have concluded a valid customary marriage in terms of the RCMA in that they were both above 18 years old, they had consented to marry each other, and they also concluded the customary marriage in terms of their custom. How then can they go and conclude another marriage when they are already married? Home Affairs then emphasised

and said that unfortunately there is no way to change this. This means that the approach compartmentalises the benefit, which I have explained, in that it pretty much tells same-sex couples that you still do not have recognition here because you belong there, not here.

For these couples before us, the experience of their relationship with family is intersectionally marginalised because of race, gender, sexual orientation or social origin, among other factors. The intersection of these identity markers for this couple has compounded their burden and further places them at the periphery of society given that we are living in a country that says we recognise same-sex customary marriages, but only for these people and only in this circumstance. We are also living in a country that says we recognise customary marriages, but only for these people and only in this circumstance. How do we deal with this ambivalence relating to same-sex language in the RCMA in itself as well?

There is some language in the Act that can be read to be inclusive of same-sex marriages. If you look at the definition of customary marriage itself, it just says it is a marriage concluded under customary law. They have concluded their marriage, so you can argue that it is a customary marriage. The definition of customary marriages is also clear and also gender neutral, so again they can also say that they have concluded a marriage in terms of customary law.

The most important factor is section 3 of the RCMA. The main point I want to emphasise here is that the RCMA also embraces a heteronormative approach to marriage because it is still in the definition. There are other sections that speak about husband and wife. This is in the Act itself and also in the regulation.

How do we then take the constitutional framework of transformation within this framework in ensuring that the gains we have made in recognising same-sex marriages do not continue to fragment and marginalise some people? We understand colonisation having taken away people's ability to live in terms of customs and our courts having spoken about how culture is part of our identities as people.

We know that our courts have also accepted the vulnerability and marginalisation of same-sex couples. Our courts have accepted that. Thirdly, the courts have also explained the importance of equality within a customary framework. How, then do we move this forward if we continue to embrace binaries and heteronormativity even as we are making gains in recognising diversity in families and in relationships?

At the centre, we firmly believe that the state must be committed to reforming South African law in a manner that promotes diversity in families. We also firmly believe in *ubuntu*

and understanding *umuntu ngumuntu ngabantu*, we are because other people are. If other marriages are also being recognised, how then do we tell other people that they do not matter when we are recognising other families?

In conclusion, I want to emphasise that as we are moving towards reforming customary marriages, as we are moving towards reforming our marriage laws in South Africa, it is important to ensure that the transformation we are making as a country does not continue to put people into boxes. It should ensure that we continue to promote diversity as something that section 6 of the Constitution emphasises. Diversity is not only on paper, but diversity is also in reality and in practice, but the reality is that those people who continue to be on the periphery of society are continuing to live in a marginalised and stigmatised society where the talk of transformation really is still a value and a goal that is so far away from their reach.

5 Presentation – Mr Sibusiso N Ngubane

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

I would like to start by sharing a story. Earlier this year I came across an article titled *A Black Day: Widow Stands up for her Rights as Village Turns Against Her*. This particular story took place at Hlathikhulu in KwaZulu-Natal where Fikile Mlaba was actually chased by the village members because she refused to wear the black garment known as *inzila*. This particular article gave me an indication that we still have a long way, in fact, a challenge when it comes to the treatment of widows in customary communities or in traditional communities. This despite the availability of many instruments safeguarding widows' rights, but they are still being marginalised, discriminated against as well as oppressed under this custom. Several studies across South Africa have actually indicated that *ukuzila* consists of rituals that violate rights. These include, *inter alia*, rights to gender equality, human dignity, freedom of religion, opinion and belief, as well property. I will only focus on the attempt to align the *ukuzila* custom or to test if the *ukuzila* custom can be aligned with the principle of or with the constitutional values of gender equality.

The *ukuzila* custom is divided into three phases and all these phases constitute a violation of widows' rights. For example, the first phase is called "the sitting" whereby a widow is expected to sit in a house or on a mattress, surrounded by other married women, covered with a blanket. This restricts her movement. It also violates her rights to freedom of

expression in terms of whether or not she wants to be confined in this particular area, especially with regard to the practice of *ukuzila*.

The second phase is wearing the black garment (*inzila*), which further violates sections 9 and 10 of the Constitution. Section 9 is violated in the sense that only widows are expected to wear *inzila*, and not widowers. There is a violation there on the basis of gender. The third phase of *ukuzila* is what we call purification or cleansing. I use the term "purification and/or cleansing" because cleansing also involves or includes sexual cleansing. There is cleansing whereby a widow is expected to bath in a river every morning, and in the evening using muti or traditional herbs. There is also a sexual cleansing where there is even a designated man in the village – if there is no other elderly member in the family – for a widow to be taken. That involves a lot of other violations of women's rights.

I will interchangeably use women's rights and widow's rights because they are synonymous. I will now turn to what steps are used to try and align the *ukuzila* custom or to determine if the *ukuzila* custom can be aligned with the constitutional values of gender equality. The court in *Harksen v Lane No* ("*Harksen*")[38] adopted a three-stage approach. The first one is to seek and establish differentiation. The second one is to seek and establish if the discrimination is unfair. The third one is to determine whether the discrimination can be justified under the limitations clause. The first stage of the *Harksen* test starts with the establishment of differentiation. There is a differentiation between widows and widowers in terms of the practice of *ukuzila*. What is more interesting is that there is no rational link between this differentiation – there is no justification.

This particular differentiation is not justified. There is no justification as to why only widows have to wear the black garment. There is no justification as to why only widows have to do the sitting. There is no justification as to why widows have to undergo the sexual cleansing. Other scholars such as Makato and Ubane agree that the *ukuzila* custom is important because it brings about healing, it is the facilitation of a healing process, but there is no link to that and it can be asked: if widows need healing, why do widowers not need the same treatment to heal?

Based on this particular stage alone, there is no discrimination that can be established based on this differentiation. This is due to substantive equality. The second phase is to determine if this particular differentiation is unfair. Here the *Harksen* case looked at two categories: if the differentiation is based on a specified ground in section 9(3) and on the analogous ground.

[38] *Harksen v Lane No* 1997 (11) BCLR 1489.

Ukuzila is gendered and as such, the specific ground mentioned in section 9(3) has been established, meaning that there is a direct discrimination as a result of the *ukuzila* custom. In terms of the analogous and specified ground, women suffered discrimination in the past, which satisfies the analogous ground. Therefore, both of these grounds in step number two have been established and this differentiation is unfair.

The last phase is the limitation clause, which I am not going to get into because *ukuzila* is not law. It is a cultural practice, which, of course, one might argue is protected under section 31, but even then there is an internal limitations provision within that. First, *ukuzila* is not justified in terms of any law and this particular ritual has no evidence to support its importance or its healing process as other scholars have claimed. Its arbitrary application and gendered application creates a lot of confusion. The conclusion then is that *ukuzila* is discriminatory and it is unfair based on gender and thus cannot be sustained. I am of the view that it needs to be eliminated and prohibited using CEDAW, the Maputo Protocol and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA"). When we look into these particular instruments, they give a clear instruction that there must be policies and legislation in place to safeguard women's rights, and any cultural practice that is harmful to and threatens the project of promoting and advancing women's rights must be prohibited and eliminated.

6 Presentation – Doctor Keneilwe Radebe

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

When looking at proving the validity of a customary marriage and the burden that is often on the woman to prove a customary marriage, I am very disappointed that we still have this big challenge of having to prove a customary marriage. Today I will reflect on a recent case, namely *Tsambo v Sengadi* ("*Tsambo*").[39] This case deals with a celebrity known as HHP who was married to Lerato Sengadi. Both the High Court as well as the Supreme Court of Appeal heard this matter and it is now before the Constitutional Court.

The facts of this case are that Lerato Sengadi argued she was married to Jabulani Tsambo ("HHP") in terms of customary law or in terms of a customary marriage. What happened is that lobola was negotiated and a portion of the lobola was paid. During the day when the lobola was negotiated, celebrations took place and Lerato was clothed in Setswana attire,

[39] *Tsambo v Sengadi* (244/19) [2020] ZASCA 46.

provided to her by her late husband's aunts. This indicates they accepted her into the family. I interpret that as a handing-over taking place. It is that matter of a handing-over that is in dispute.

You can only be married in terms of a customary marriage if you are handed over. This issue is problematic because only a woman can be handed over and only women have to prove that they were handed over, which introduces an element of gender inequality. Men do not have to prove that they have been handed over.

I commend both the High Court and the Supreme Court of Appeal in the matter of *Tsambo* for stating that handing-over and customary law are actually quite flexible. Both courts held that the handing-over had happened and in that regard a customary marriage had been entered into. However, the deceased's father is questioning or challenging these decisions of both the High Court and the Supreme Court of Appeal on the basis that handing-over has not taken place. I am curious to see what the Constitutional Court is going to say.

As much as the judgments made by the High Court and the Supreme Court of Appeal are commendable, my issue relates to a challenge that was raised in the High Court judgment, where the constitutionality of the handing-over requirement was questioned on the basis that it only applies to females. My concern is that we want to retain our custom and our culture. I am against handing-over being declared as unconstitutional, but at the same time, I am in favour of gender equality and I also acknowledge the challenge that is faced by women in terms of proving that they have been handed over.

I want to emphasise that we need serious intervention in terms of legal reform regarding section 3(1)(b) of the RCMA. In terms of this section, it is only a customary marriage that has been entered into, negotiated and celebrated in terms of custom that can be recognised. The issue is, how does that take place? What are the requirements that must be complied with before we can say that a customary marriage has been entered into in terms of custom? My recommendation would be that we need a serious legal reform regarding section 3(1)(b) because if reformation does not occur, there will be an assumption of gender equality.

I also argue that we need a custom-based approach with regard to culture. This would involve not automatically assuming that there is a clash between gender equality and the right to culture when we deal with issues such as the handing-over. However, sometimes we need to question and investigate what culture entails. There could in some instances be an intracultural conflict or a conflict within culture itself and not necessarily an issue of gender

equality and culture. That is a custom-based approach – that we should not automatically assume there is a conflict between gender equality and the right to culture.

In conclusion, my recommendation would be for a serious legal reform with regard to section 3(1)(b) of the RCMA because from my experience women are going through various challenges relating to proving that they have been married in terms of customary law. The major hurdle is the handing-over requirement but as mentioned, we need a custom-based approach. We need to understand what handing-over implies or what handing over is.

7 Discussion

Mr Ngubane started the discussion with the following question on Ms Radebe's presentation:

> "I have a problem with section 3(1)(b) of the RCMA, first, about the interpretation and the scope of it according to the customary law. What is the meaning of that? What do you mean when you say "according to the customary law"?

If you say the aunt, for an example, in *Tsambo* actually gave the prospective bride the attire that is worn by a bride as an indication that they accept her and the family is actually handing Sengadi over to the Tsambo family – there are rituals that are involved when it comes to the handing-over and the integration. For example, recently my mother got married. She is quite old but what happened was that her family slaughtered a goat to say now this is our daughter. However, we are now encouraging and sending her to the Ngubanes. The Ngubanes also slaughter a goat to say we have a new daughter and we would like you to welcome her. There is also another cow that is slaughtered to give her womanhood and say that she is actually married, and she can actually be buried in this particular house as a Ngubane, not under her father's surname. That quite creates confusion when it comes to the integration and handing-over, because if you are already staying with your spouse, then the handing-over is assumed. You do not have to go and be handed over by your family and comply with all these rituals.

> "The issue of 'according to customary law' is problematic and that is why in the morning session, they spoke of codifying the law. It would help if it can specifically be stated that handing over means XYZ so that it is clear that if you have not complied with these requirements, then you are actually not married in terms of the customary law. It is still a subject that needs to be rectified and explored further."

Dr Mills followed up with the question, "Are you basically advocating for the codification of customary law?"

Mr Ngubane responded: "For now, I am on the fence simply because of this issue of acculturation and the belief in customary where we do not know the scope of how we are adopting the Western culture. As previously mentioned, in our present moment you see people getting married twice. They get married in terms of their Christian beliefs, or the white wedding, and then they also get married in terms of the customary law, the customary wedding. Where do we draw the line when it comes to that? To codify that would help and would protect women as there would not be a need for women to undergo this process.

> "In my presentation I mentioned that we cannot say, oh no, we grew up practising this culture of *ukuzila* and then you have a situation where your wife now has to run to court to claim your body, to prove that they are married to this person and that they contributed to this particular home. It is a matter for us as advocates of customary law to be active in looking at all these customs and trying to develop and match them with the standard of the modern Constitution. If we do not do that, we sit back and complain when the courts decide according to the Constitution. We ask why are we are deciding our custom using the Constitution? But we are also not being active or proactive in terms of ensuring that we develop these customs and we address them according to the custom.
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> Interestingly, last week when I was preparing this presentation, a friend of mine said to me, why are you doing this, Sibusiso? Why are you lambasting the culture that you grew up practising? Why are you talking about the rights and the Constitution that was borrowed from the Western countries? I responded by asking: what would you do if you go to a mall now and see white people who say you are not allowed to come in here because you are black? That would be a discrimination. What would you do? Which book will you use to say they are discriminating against you? Of course, he said he would use the Constitution. I then asked why it is a problem if women are now claiming the same right that he is claiming against this particular culture. That is a problem.
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> I further asked him, what did your father do when your mother passed on? He responded saying his father did nothing. I asked him to read all these customs and rituals that a woman

has to do, that do not make sense, that cannot be justified, but that they still have to do because they are women and we are just sitting here as men saying, oh no, they have to do them, it is their problem. I have a daughter, you will have a wife, you have sisters, they will one day go through this, one way or the other. If we are not challenging these customs, we are just shooting ourselves in the foot and we have no one to blame but ourselves."

This discussion related to a comment that was posed by a delegate in the chatroom: I really hope that the participants here are also willing to comment on the Green Paper that was published by the Department of Home Affairs, which has elicited a lot of controversial conversations. I find it incredibly difficult to envision how we are going to come up with a piece of legislation. That is also up in the air because the South African Law Reform Commission has proposed one piece of legislation, but I really hope that you will be commenting on the White Paper that will eventually come out from the Department of Home Affairs. If you have not looked at that green paper, I urge you to do so, because it is quite interesting to see some of the things that are not yet recognised in our legislation. There are so many problems with the way we are regulating it at the moment, but how to come up with a solution, I really do not know."

Another delegate also commented that there is a problem of different practices between cultural groups. How Xhosa people hand over a bride might differ to how Tsonga people hand over a bride. Whose practice do we follow? Suppose we follow the husband's practice, why his over the wife's? One practice might be more onerous than the other.

There was a lot of support for Mr Ngubane's comment on the registration of customary marriages. It was noted that either party in South Africa can apply for registration. In Kenya, Section 55 of the Marriage Act requires both parties to appear in person before the registrar, which is interesting and suggests that women will still have great difficulties in getting customary marriages registered.

Dr Mills noted that the green paper is rather complex and involves compounding issues of a uniform set of marriage laws. This speaks to the issue raised earlier in the session about the fact that you cannot be married in terms of the RCMA, the Marriage Act, or the CUA. This again speaks to how many issues need to be addressed.

Advocate Nthabiseng provided the following insights on the discussion: "The issue of different cultures and differentiated cultures needs to be seen within its context. The strategy of divide and rule was not only black and white. The strategy was also about disaggregating

and separating each other so that there is not one homogenous group that actually says enough is enough about what was happening. When you look at the differentiation of cultures, it is actually amplified deliberately when it is to a very large extent a non-issue. I know I am a Mosotho and I am also half-Xhosa. There are no differences, and we over-emphasise it because this cultural issue has been hammered into our heads that it is linked to who you are. No, you are a human being, you are an African and there are certain things that you can and cannot do. After all, even what we call culture now, it is not that. It has been corrupted in so many ways and we are holding onto something that is not who we are. Based on those things, we want to say that there are differences. Those differences have been deliberately in place to keep us away.

> "In the black townships in the past during apartheid, we even used to have the same street with one main street going across, perpendicular to them, and on the one side was Kgosi and on the other side it was Nkosi Street. This is because the apartheid government was making sure that you are different. You are Basotho or Zulus, so you are number 17 Kgosi Street, the other one is 16 Nkosi Street. We are playing into that. We are continuing to give credence to that. The cultural differentiations and the differences that we always talk about are not that huge."

Dr Mills added to that and noted: "We so often think that because we are different we cannot meet anywhere and that, of course, is how we divide and conquer."

Ms May also weighed in: I want to extend on Nthabiseng's comment because I think that it is very important for us not to get stuck in the existing framework. Even though the Law Reform Commission and the Department of Home Affairs have such polar opposite positions currently on what they envisage and what they want to do with marriage and family law within our country, I do think that it provides us with a unique opportunity to move forward from a clean slate. When we have had workshops with women on the Law Reform Commission's discussion paper and the draft bills and we engaged with women on the green paper, one of the things that we did was to say to women: if you could design the registration of your marriage yourself, what do you think the legal requirements should be on you to be able to do that within your context? That is what we really try to put forward in our submissions to the Law Reform Commission and to the Department of Home Affairs. Our submissions are available on our website for anyone who is interested in looking at them. Specifically, what

we said was that you are designing within a very complex construct. You are designing for individuals. You are designing for people that have different identities and as such, it might be appealing, for instance, to have a legislative framework that is simply geared towards registration and that takes away or strips away all of the aspects of custom, religion and all of the tradition that people bring into marriage ceremonies. It might be easier from a legal perspective to take all of those things away, but from the perspective of substantive equality, at the end of the day, we are not going to achieve that if we have a system that does not recognise the different identities of people and the different lived realities of people.

For us, that is critically important to emphasise at this conference. If we are going to talk about transformation and about the transformative qualities and the abilities that are within custom, then we really need to start looking at incorporating those things within our legislative framework or else the practices that some of the other speakers reflected on today will continue to be hidden away and they will not form part of our legislative framework.

Chapter 8 Plenary 4.2: Impact-Conscious Law Making: Can a Social Justice Assessment Instrument Make a Difference?

1 Overview

This discussion revolved around the importance of impact-conscious lawmaking. The keynote address was delivered by Professor Madonsela followed by presentations from Professor Khumbulani Mpofu, Professor Kanshu Rajarantam and Ms Nolwandle Made.

Professor Madonsela touched on the place of customary law in modern democracy. She also investigated the relationship between social justice and human rights as well as whether a social justice assessment instrument can make a difference. In particular, she spoke of a SIAM that will enable government to assess how their decisions will impact people, especially vulnerable groups, before making laws.

Professor Mpofu shared reflections on the use of instruments. In particular, he spoke about an instrument that has been used to understand the implications of specific decisions that individuals can make when they decide on specific options about technology. In particular, he highlighted the value of these instruments for educational purposes.

Professor Rajarantam explained how data science and such instruments can benefit social justice policies as well as other policies. He also highlighted that it is important to consider the purpose of the assessment instrument. The pros and cons of assessment instruments as well as the benefits of systems' thinking were also provided.

Ms Made provided an update on the Social Justice and COVID-19 Policy and Relief Monitoring Alliance ("SCOPRA") project, how it was developed and how it can be used to avoid unintentionally exacerbating poverty and inequality by providing some practical examples.

The discussion that ensued centred around the following questions: can we ever achieve social justice if at the point when we make a policy we never think about how it will impact various groups and where should these type of tools and assessments be located?

2 Keynote Address – Professor Thuli Madonsela

As we were preparing for this conference, a journalist asked me: does customary law still have a place in our modern democracy? As you know, the conference is on customary law

and social justice, reflecting on the extent to which transformative constitutionalism has advanced equality and human rights. In this session, we are going to be talking about impact-conscious law making. Can a social justice assessment instrument make a difference?

When this journalist asked me this question, I paused to think about it, and I ask you to also pause and think about it. I have never been asked whether the common law, a system of law developed in ancient Europe, still has a place in a modern constitutional democracy such as ours. I have never been asked if that law has a place in a multi-cultural society that has never lived in Europe and has evolved its own values and culture in this part of the continent.

However, the journalist is not alone. I once saw a poster that was stating that traditional courts are a Bantustan anachronism that have no place in our constitutional democracy. Of course, the request was that not only should we reject provisions of the Traditional Courts Bill but the creators of the posters were questioning why on earth do we have traditional courts? Should our rights not be ensuring that everyone else has access to magistrate's courts and that we are all freed from this ancient, anachronistic, Bantustan invention?

I would like everyone to pause and ask the question: does questioning the right of Africans to be governed under customary laws that organically evolved historically in line with the challenges of the environment accord with the principles of social justice? Furthermore, does imposing common-law principles that are foreign to the average Gogo Dlamini or person in Africa accord with social justice principles? These are some of the issues that emerged this morning as part of this conference, which has given us a platform to reflect on whether we have done enough to employ transformative constitutionalism to achieve progress on equality and human rights under customary law. This discussion is not going to focus on all of these questions. It is just focusing on whether an instrument such as a social justice impact assessment instrument could move the needle.

Before we get to the instrument itself and the context of its possible application, we need to be on the same page about what we mean by social justice and what its relationship is to human rights. The term itself was invented by Jesuit priests in the 19th century, concerned mostly about the conditions of workers and the implications of this for revolutions, including pseudo-revolutions arising from hunger and anger from the underprivileged and oppressed social classes. It was given prominence in 1971, when John Rawls in his seminal book, *The Theory of Justice*, coined specifically the term "social justice" and indicated that, broadly speaking, it is about fairness to all.

At the Social Justice Chair, we have looked at the development of the concept of social justice and in particular how it was influenced by developments in the United Nations. You probably would know that 20 February is regarded by the United Nations as the global social justice day, and usually on that day there are statements around what social justice is, what the pressing challenges on social justice are, and what needs to be done about these challenges.

We have also looked at jurisprudence that has emerged in South Africa, particularly at the Constitutional Court since the adoption of the interim Constitution in 1993 and the final Constitution in 1996. Key among those would be cases such as *Makwanyane* where Madala J equates social justice with *ubuntu*, and *Van Heerden* where Moseneke J and Chaskalson J equate social justice with substantive equality.

We have accordingly arrived at the definition of social justice as being about embracing the humanity of everyone. That is just the concept of *ubuntu*. I am because you are, or I am because we are. You are as human as I am, and I will protect you in order to protect myself. But I will respect your humanity as a way of respecting my own humanity.

This can be seen in *Makwanyane* and various statements or observations by judges Mohamed, Madala, Langa and Mokgoro, among others. However, there has since been more jurisprudence equating social justice with *ubuntu*. It is important to note that the interim Constitution was the only place where there was an elaborate mention of social justice and *ubuntu*. In the current Constitution, it is not mentioned. However, as I have indicated, you will see glimpses of social justice in international instruments. For example, when we have said that social justice is about embracing the humanity of everyone and *Van Heerden* says that it is also about equal enjoyment of all rights and freedoms, we then say this would be reflected in the just, equitable and fair distribution of all opportunities, resources, benefits and privileges in a society, group and between societies.

Quoting Nancy Fraser in the inaugural lecture on social justice, retired Judge President Dennis Davis distilled three pillars on which social justice must rest. The first pillar is recognition. Are we recognising everyone? And here we are talking about recognition under customary law. If we are looking at transforming customary law using the Constitution, are we recognising everyone? The second thing Dennis Davis quoting Nancy Fraser deals with is representation. Is everyone represented? Does everyone have a voice in the process of making the laws and in the processes that will emerge from the laws that we are making and policies that we are making? The last one is restitution. In the space where some have been

left behind, social justice requires relevelling of the playing field to ensure that there is that equal enjoyment of all rights and freedoms, or what the Copenhagen Declaration on Social Development refers to as public goods. I think John Rawls also refers to these things as public goods. That is the context within which we are asking this question.

I started this conversation by mentioning the colleague who deliberately asked whether customary law still has a place in a modern democracy because that person is not alone. Even those that were saying that the traditional courts should go were not alone. I also had a paradoxical journey with customary law. My very first presentation in a public platform was a paper on the human rights of women under customary law and culture. This was in the beginning of the 80s at an International Planned Parenthood Federation Conference and courtesy of Professor Thandabantu, who was my mentor and lecturer at the time. Like most people I also said customary law was oppressive to women and women would be better off if we got rid of customary law.

Later, when I was at the University of the Witwatersrand and working there at the Centre for Applied Legal Studies, I had an opportunity to do research on customary law and work with the Rural Women's Movement through having focus groups with rural women on these issues of customary law. Armed with my customary-law understanding and mind, together with my feminist legal theory, I went and had these conversations with women. I was shocked when rural women said several things that did not reconcile with my notion of customary law, gender equality and human rights. The first was when some of them were saying they do not want to go to magistrate's courts for rape. That was foreign to my understanding of things. When I asked why, they were very clear that there were two issues. One was that the alleged perpetrator has the right to remain silent and, second, they do not get compensation there. It is the state versus the alleged rapist, and they are just a mere witness on behalf of the state. This is the case given that these rules in the magistrate's court evolved from a feudal society where people belonged to the king or belonged to someone and, obviously, if you raped a subject of the king, it would be Rex versus the perpetrator. At that stage I had not really made that kind of analysis. I was shocked that, when it came to democracy, many of these women were not particularly unhappy with the arrangements in the meetings because everyone was loud hailed and everyone came in, but they did want some change.

The second thing I discovered was that these women liked some chiefs because some of these chiefs were evolving these customary-law principles. For example, one chief had already decided that the heir, unlike what Chief Inkosi Phathekile Holomisa said this morning, must

always be man. Prior to the Constitution, there was an inkosi or kgosi in Northwest who, dealt with a brother who was a lumpen and had not helped the parents when they needed help and the estate now needed somebody to look after it as an heir. Where the brother contested this estate, having come back from the urban areas wanting to now own this place, the chief did not accept this. Instead, it was decided that the woman/the daughter was going to be the custodian of the estate for the family. As such, there was dynamism there and that for me was shocking.

Let us now flip to the Constitution. When we created the Constitution, I was involved in this process and there is a book wherein I wrote an article about my involvement in the Theme Committee 2. Here I mentioned an incident where we were unhappy with how the draft we had prepared had been changed and did not allow human rights to trump customary law. We went back and made sure that that was done. We were looking at sections 30, 31, 211 and 212 because in my head, customary law was the delinquent legal system, not common law. That is how I was trained – that customary law was delinquent and needed to be reformed. We knew that common law would have to be reformed, but we did not think that common law was essentially unjust. It is only now that I have discovered that all of these laws need to be recast to embrace the humanity of everyone in line with social justice and *ubuntu*.

That takes us to the instrument that we have created. At the moment we just have an instrument that is a matrix. It is a SIAM. We are suggesting that before people make laws, they should ask themselves, how will this impact on older persons, young people, foreigners, women, men, rich, poor, etc. because the constitutional duty as we see it is that you have a duty when you make laws and decide on policies to advance social justice and related equality.

We have come up with this social justice impact assessment instrument that would ask you, for example, who is your target group? Who is going to find it easier to comply with this instrument? Who is going to find it more difficult? Have you considered your duty to advance equality? Have you built that in? This is almost like Section 149 of the United Kingdom Equality Act 2010. We get our authority to do that, as I indicated, from the case law that I have mentioned, among them, cases such as *Van Heerden*.

I would like to briefly illustrate what would happen if government fails to do this. For example, when *Moseneke* was decided, we celebrated it. Even in this little book that we created with Joyce Maluleke, we celebrated. However, we did not do an impact assessment. An impact assessment was to disinherit people who would have inherited in the extended black family if you look at the normal African family as not a nuclear family. This came to my

mind when Leslie Manyathela, a soccer player, died and his mother had to be kicked out of the house and the house had to devolve to his son because of *Moseneke*. We have also heard about law reform to change land rights so that people could have more clear rights, and they changed those rights to give people these leasing rights. Again, that was contrary to customary law. Apart from it being contrary to customary law, when we look at it from a social justice point of view, we look at it and say, will this make it harder for certain groups of people in society to exist or will it make it easier for some to exist?

To conclude, there is a list of cases that, on the face of it, look like they are moving the needle forward. However, if you look at impact assessments, you realise that children, women, older persons or rural people would be affected negatively. The question we are asking is then: if government were to adopt this kind of instrument, would it make better laws? Even the judiciary adopted an instrument of this nature, which asked: would it make a difference? We know government has its own instrument called the Strategy on Screening, Identification, Assessment and Support ("SIAS"), but it does not specifically deal with the equality question, and for us it is the question of equality that matters most. In that way it also disaggregated the different groups in society, including those whose lives are at the intersection or conflation of various forms of inequality and disadvantage.

3 Plan A: Presentation – Professor Khumbulani Mpofu

I will share some reflections that I have with respect to this issue of instruments. First, I will provide some context. I am a researcher in manufacturing and skills development. We have an instrument that we have been utilising to understand what the implications are of specific decisions that individuals can make when they decide on specific options about technology. For example, there are currently many discussions about robotising manufacturing and a lot of talk about introducing autonomous vehicles or drones for security purposes. Most of the times when these decisions are made, the global picture is not understood. For example, we identify security problems, whether in a complex or at a house, and we decide that perhaps having a security guard is not the best option. Instead, we can use drones to monitor the complex and we get rid of the individual not realising the impact that that will make in terms of the livelihoods and the value chain that is impacted.

As already mentioned, the African family is not a nucleus type of a family. When the abovementioned type of decision is made, it looks good as we have this new technology that just requires us to replace a battery once in a while, which is the end of the story. However,

the consequence and the broader impact of that decision on not just the life of the previous employee and his family, but on other extended people who depend on him, is never really analysed and does not come to the fore.

Even within organisations where they reassign people to do other things – most of the time when a decision is made about technologies, the broader impact when it comes to the training that is required or the reorientation with regard to how everyone thinks about this technology is never really thought through. Instead, a decision is made. We like the technology. A salesperson comes, sells the technology very well, and we get into it. Unfortunately, most of the time we do not realise that the decision-making is not thought through internally in the organisation or even externally with regard to the external aspects that may affect that type of decision.

That being said, we operate in a manufacturing context and we have specific measures that we are interested in for the manufacturing context – whether we are measuring the growth of the organisation or the future viability of the enterprise. Interestingly, we also speak about the employee satisfaction because we see employee satisfaction as a key driver of sustainability of manufacturing organisations. In a sense, that speaks to the rules and laws that govern how people work. People are given a specific budget and they have specific human constraints in terms of the people that they can utilise to implement the strategy. A timeframe also needs to be considered, which also varies depending on what we are interested in looking at.

The above process is repeatedly followed. This is the game we played over various levels and we then sit and take time to discuss: why did things go the way they went. Why did we grow? Why were the employees less satisfied? Why is our future viability not looking good? There is an opportunity to evaluate decisions and what is good is that we do not look at a very long timeframe. It is a very short frame of time where we have this opportunity to engage about why things went the way they did. Maybe we need to go back and revise how we looked at this and how we looked at that.

From that perspective, the question of using instruments becomes even more important when looking at the issues that have to do with those three pillars mentioned: recognising individuals, representation and relevelling so as to ensure that we embrace the humanity of everyone. This is especially important because most of the time when decisions are made, they are made at a specific point in time based on the paradigm in which decisions-makers are sitting at that time. However, that paradigm shifts with time and sometimes we still rely on old decisions that no longer fit the context which we need them to speak to. We are then

convinced that we have a platform, which we are using in the context of manufacturing, but also if we work with law experts, or with politicians, to give us inputs. We can come up with an instrument to use when decisions are made where we ask ourselves: what is the social impact and what is the social justice consequence of this decision?

The good thing about it is that the impact can be observed within a very short space of time, whereas most of the times, what currently happens is that individuals or organisations or even states wait for a five-year period before looking back and realising that those decisions that were made five years ago were not the best decisions.

Therefore, this approach of having instruments can also be used to educate. Depending on how we customise it, it can be used to educate at a lower level, it can be used to educate at a high school level and it can also be used to educate at a tertiary institution level. Further, it can be utilised within the context of Parliament to engage people about decisions that are made or directions that are taken in order to see that this is what the consequences are going to be in a five-year period of time.

The important part of all this is not playing the game and utilising the artificial and the neural networks behind the scenes to arrive at specific decisions, but the conversations that can emerge from this, where people are having informed conversations and making valid decisions. In that context, the Social Justice Explorer that we are working on developing will have a very important role in making sure that we attain the social justice values that we want to attain. There is currently a lot of talk about social compacts and oftentimes we speak about social compacts very theoretically. However, through this type of instrument, people can engage, have conversations and arrive at a better, more just society.

4 Presentation – Professor Kanshu Rajarantam

Professor Mpofu and I share similar thoughts on whether or not instruments can make a difference. I will begin by stating that I am not a legal expert. I am purely in the data-science world, but I do believe data science and such instruments can benefit social justice policies as well as other policies. Assessment instruments have been used in policies for a long time, for example, data models where historical data has been used to look at how behaviours change as a result of policies. Simulation models have also been used to understand how behaviours change prior to implementing a policy. Many people would also have heard of monitoring and evaluations, which is a tool to evaluate policies that have been implemented. Random control trials are tools that one can use to decide on multiple different options or, for example, two

different options to see which should be implemented on a large scale. Another example would be where you replicate a system digitally, also called digital twins, and then look at what happens when you change a specific parameter in that digital model. Of course, these are all mathematical models that make assumptions about the real world and simplify the real world.

I think it is important to take a step back and think about what the purpose of an assessment instrument is. I think of it in two ways mainly, but there is also a third which I will touch on. The first way is that it helps us make policy decisions. Do we take action A or B based on our population? The second is, after you have made your policy decisions, you evaluate the effectiveness of the policy. Those two ways are really inherent to how you implement a policy or how you re-evaluate a policy. The last way of looking at it is that you could use an assessment instrument for education, as Professor Mpofu mentioned. I think that could be a powerful tool to educate and start the conversation, using Professor Mpofu's words or parlance.

I would like to focus on two things. First, why we should not use instruments and why we should use them, after which I will provide two examples. Second, I will propose a framework for how we think about assessment instruments. I will start with the negative side of assessment instruments and why we should not use them. First of all, assessment instruments are not a panacea for social justice. They are purely a mathematical model. Additionally, not all instruments are the same. Different instruments bring in different types of biases; therefore, the decisions you make have those biases in the decision itself.

We know that when data and data models are built on historical data, on various assumptions and models, this is done to simplify the model. This means practically that we use the biases in the data in making future decisions. Data by its nature, contains biases. A good example is how, in the United States, credit was given to various populations and African Americans were not treated fairly in the credit-granting process. This illustrates how using historical data to build future models results in those biases being incorporated into your approach. Second, history may not repeat itself. The prevailing environment you are talking about may not exist, when it existed when the historical data was created. When you rely on that data to build your model, you do not necessarily get accurate answers and the prevailing environment cannot be modelled easily. For example, you might have a model that talks about credit and giving credit to various populations but the environment around which it exists, such as unemployment factors etc., might not be modelled easily and we may not be able to link unemployment to credit risk. Therefore, we can disadvantage people as a result of that.

Models are generally built in isolation and when you do so, you do not incorporate necessary, realistic and current thinking processes or current scenarios or environments into that model. Sometimes it is difficult or even impossible to incorporate such factors. Therefore, you end up with a model that does not represent the behaviour of people or the behaviour of the system and you make wrong decisions.

Finally, when you implement any policies, ultimately you want the humans to make different decisions in how we treat people or how we think about equity, but human decision-making is much more complex than mathematical models. I do not believe that mathematical models as an example of a tool of an assessment instrument is necessarily, as I mentioned, a panacea. I think it does bring in a lot of other worries.

I will now explain five different threats. First, Eric Siegel speaks about machine learning, which is the mathematical modelling or data-science model method. He talks about discriminatory characteristics. For example, one could use race and gender from historical data to build future models and once you do that, the historical discrimination gets carried forward in future decision-making. Second, I deal with privacy. Very often the models reveal private information about individuals, even if you do not use direct private information. I can use another variable as a proxy to figure out how much an individual is earning, which is typically private information. The same thing can be said for discrimination. I do not necessarily have to use protected variables such as race and gender. I could use other variables, such as the location of where they live or postal codes, with a high probability of accurately determining a person's race, as an example. Therefore, it is easy to discriminate through these models, even if you do not use those protected classes as a variable. It can also be exclusionary. If you think about apartheid South Africa where blacks had difficulty in accessing credit, and you use data from pre-'94, that exclusionary principle would then be carried on today and result in discrimination. You can also infer sensitive information – not just private information – about children, etc., through these models. Finally, you could have predatory micro-targeting which is when companies use these models to target individuals or vulnerable individuals in taking their products.

As such, machine learning has opportunities or ways of bringing about outcomes that social justice warriors would not want. Therefore, when building these models, one must be very careful. While I have spoken about why these mathematical models as a tool for assessment instruments should not be used, I will now touch on why we should use them.

First of all, it allows us to model something in a very controlled environment and that can be quite beneficial. If you control everything in a mathematical model and then change one variable, it allows us to see the impact of that one policy change on the system. That can be quite a powerful way of modelling policies, which is commonly used in economic policies. Of course, when one does build these models, one has to be careful of all the issues I spoke of above.

These models give really good direction for initial guesses or an initial scope of one's work. One does not look at all the different directions one could go in, but you could look at a few directions. It narrows down the various decision actions or policy directions one could take. When used after implementing a policy, assessment instruments are really good to evaluate policy. You can evaluate the reach of policy, as well as the impact it had on the people it reached.

As I mentioned earlier, assessment instruments could be a way to educate people, both in policy decision-making with respect to social justice, as well as in terms of policy decision-making in general. Professor Mpofu mentioned that parliamentarians and assessment instruments are great ways to educate people about the implications of policies in areas where they may not work as well as where the areas will impact the work. If you bring a diverse set of people, that allows them to then play with a policy in a very closed, non-threatening environment.

I will turn to two examples where data models have been really effective in the social justice context. The first is the court case of *Swain v Alabama*,[40] where an African American was convicted of rape in Alabama and sentenced to death by an all-white jury panel. In Alabama the eligible jurists were 26% black but Swain's court case had an all-white jury panel. Swain then took the matter to the Alabama Supreme Court, which I think declined him, and it went all the way to the US Supreme Court, which I think also declined him, but that was then overruled in 1986. This case happened in 1965.

The decision was overruled because you could use a data model to determine the probability of zero black people in a randomly chosen panel. It was almost impossible to choose a panel, in a population where a quarter of the population were black people, that had zero black people. There had to be another set of decision-making that was happening on top of that to prevent black people from being represented in the juror panel. This is an example of how data models showed that actual data is not consistent with the population

[40] *Swain v Alabama* 380 US 202 (1965).

representation and could help to overturn certain paths and policies and bring in more equality or equity in the legal system in this case.

The second example relates to various work that has been done in data science for social good. One could use historical information to identify characteristics of at-risk populations. For example, one can look at children who are at risk of gang violence. One way to look at it is, of course, through experience – we know certain areas have more gang violence than others. However, if you wanted to narrow it down, you could look at historical data to see what characteristics will result in greater propensity for gang violence. It could be location, it could be the kind of school a child goes to, etc.

Data science models are used in visualisation to help us make better decisions. There are many examples related to this. In the United States, for example, by using visualisation or visual models, one could decide where to have voter registration because one could see that voter registration is lower in some areas compared to other areas.

What is good about using these types of models is that you can dynamically update them as new data comes in. If you update them, you can also change policies dynamically as you become aware of new things happening in the system, because a system also evolves as you implement policies.

Whether it relates to social justice policies or economic policies, sometimes you get the behaviour you want, sometimes you get the behaviour you do not want. Sometimes you get the outcomes you do not want and sometimes you get the outcomes you want. If you start seeing outcomes that you do not want, where for example it expands inequity, then you immediately become aware of this, and you can change it dynamically.

I have provided some examples of how data models and mathematical models can be used as assessment instruments for social justice or any other policy implementation. However, I think that one needs to go beyond that because data models are just that, they are models. They are a representation of the world with lots of assumptions and lots of biases. When one creates an assessment instrument, one needs to think at a higher level than that and here I want to propose a framework around systems thinking as an assessment framework. Systems thinking is a way of looking at a problem and making sure the various decision points as well as various stakeholders are considered. I want to put that in a framework of constrained social justice.

When you implement a social justice policy, you may have an objective, but that objective has many constraints. For example, the objective of vaccinating the population. You might go

ahead and use policy that attracts people to register on the Electronic Vaccination Data System ("EVDS"), a tool that might increase registration. However, at the same time you might find after the fact that Gogo Dlamini, for example, did not register because she did not have access to the tools to register. A systems thinking framework allows you to consider both the objective and constraints that will affect the social justice policy that you want to implement. Therefore, it allows you to determine what is within the policy and what is not within the policy, what you want to consider and what you do not want to consider. You can rule out all the things you do not want to consider in terms of actions, include all the things you want to consider and then choose either one or some of those actions. What is key to this is stakeholders, because if I build a model in isolation, I am bringing my own baggage into this model and I am not thinking about the lived experience of the many people the policy could affect. The idea is to bring in as many stakeholders as possible, or at least the ones that a diverse group would think is important.

This then brings in diversity of thinking and diversity of lived experience. It also increases the number of outcomes you could have because every lived experience might react to a policy in a different way. It also allows you to think about the qualitative impact of your policies, because if one or two people are thinking about it, we are mired by our own experience and what we bring to the table.

The biggest advantage that the systems thinking brings, is that it allows you, in a systemic manner, to think about who the stakeholders are and bring them into the policy decision-making before you try to build a data model, so that when you do build it, the data model does what you want it to do and does not worsen inequity. Instead, it reduces inequity in the system. The idea is that all the inputs you get from the stakeholders can then be put into the data models as either an objective, a constraint, or an action. This is what I want to really leave you with: how to think about an assessment framework, not just as a mathematical model but also as a framework that sits on top of a mathematical model.

In conclusion, can a social justice assessment instrument makes a difference? The answer is yes, an emphatic yes. Data models have been used in multiple different places for the benefit of people, and social justice is no different to that. What I tried to do is to provide some sort of guidelines to the systems thinking framework in how we should think about it. Ethics is important because one can always go in the wrong direction when one uses data models. That is why I started off with why data models are not ideal, because one can really go the wrong way. I want to emphasise that multiple and relevant stakeholders become part of the decision-

making in building the model, which then helps in decision-making in the social justice context. I have provided a framework, but I think that this framework can be developed further to apply in a social justice context so that we can use assessment instruments better than we historically have.

5 Presentation – Ms Nolwandle Made

Update on SCOPRA projects

I have been working with Professor Rajarantam and Professor Mpofu on our SCOPRA project, which is what I will discuss today. In describing exactly what SCOPRA is, I will use Professor Madonsela's words when she gave her inaugural lecture in November 2019. She said the right way to breathe life into the Constitution insofar as social justice is concerned, is to view everything, particularly facially neutral policy reform, through a social justice lens. This entails leveraging data analytics to assess the likely impact of planned policy on diverse groups in society, including the potential to exacerbate or cement historical disparities.

Leveraging data analytics, which can be done manually or using algorithms, seeks to alert policymakers to the unintended social justice impact of planned or existing policies, thus affording them an opportunity to reconsider such policies or implement compensatory strategies. Professor Madonsela went on to talk about the Organisation for Economic Co-operation and Development ("OECD") countries and the United Kingdom which are increasingly adopting such approaches for their generic policies to avoid unintentionally exacerbating poverty and inequality. From this, SCOPRA was born and was then nurtured by many consultations with various partners, stakeholders, inputs and collaborations. Some of our collaborators are, for example, Professor Rajarantam and Professor Mpofu. This, of course, is anchored in our nine-dimensional matrix, the SIAM, which assesses the impact of these policies to advance equality and reduce poverty.

Like Professor Rajarantam and Professor Mpofu I am not a lawyer, but I am a water resources management specialist and I was involved in institutional development when the National Water Act 36 of 1998 was first promulgated, which replaced the Water Act 54 of 1956 – an apartheid era law. Chapter 8 of that Act speaks about a transformation of the former irrigation boards into water-user associations. Something like SIAM would have been a very good tool to use in this regard because the unintended consequence of that was that it kept formerly disadvantaged landowners, emerging farmers of the time, from actually participating in the allocation of water in South Africa. When dealing with water we say

riparian ownership. When a river runs past your property, it is your water and the water belongs to all when you talk about the state. This excluded a lot of formerly disadvantaged farmers. It did not intend to do that though. The intention was to manage the water better but the result was different. This is why we make policies like these and that does not directly link to customary law, but it is an apartheid law and I am referring to that.

When I started working with SCOPRA, in January this year, we were at the height of the second wave of COVID-19 and COVID-19 was chosen to pilot SIAM in a municipality. We need disaggregated data and we need that at ward level. As such, a municipality, Swartland in this case, was chosen as a pilot municipality in the Western Cape. This project that we are currently working on is showing us in real time how the Disaster Management Act 57 of 2005 and the policies around disaster management can have unintended consequences on, for example, Gogo Dlamini. However, because we are looking at a predominantly Afrikaans municipality, we need to ask how these COVID-19-related regulations are affecting Tannie Anna or somebody in Swartland.

Inequality in South Africa is currently so high. Yesterday two news articles really brought this home. In KwaZulu-Natal there was the unrest which apparently resulted in a loss of 0.9% of the gross domestic product according to experts. As already mentioned, we have extremely high levels of unemployment that were reported this year. Inequality and poverty in South Africa are increasing. It is a powder keg. We have seen in KwaZulu-Natal and in parts of Gauteng what happened when people with nothing to lose are given a chance to run amok. They will take the law into their own hands and I have seen that first-hand living in Durban. We had to queue for food and basic necessities because we did not know how long this would take.

Where are we now with SCOPRA? As I mentioned, we have started our data collection in Swartland, and we have had to jump through a lot of hoops and challenges which, with COVID, some of them are made easier and some could be made much more difficult. We had to get ethics clearance and that took a long time, but that was very necessary because of the enactment of Protection of Personal Information Act 4 of 2013 ("POPIA") this year, which can be burdensome at times as you would have seen from the messages from various service providers. How it affected us here is that the municipality was worried that their consumers would have their privacy invaded by our data collection, which is telephonic due to COVID. However, we are covered by POPIA as an academic institution, but also by our ethics

clearance. It is of course a learning process because this is a pilot, which we would like to implement in all the other municipalities.

COVID-19 also affected the municipality in ways that we did not think it would and, again, it affected the progress of our project. However, we have students who are collecting data. We have also had to recognise the subject matter of COVID itself, the general subject nature of the questions you are asking about food security, about people's worries, about a lot of things, all of which are heavy for students, for young people, and for anyone. As such, we also had to have a way to address mental health so that they can handle this at any given time.

We are learning a lot from this data collection, but hopefully with the data we are collecting we can then see how SIAM can help government make more impact-informed decisions. As I said, we are collaborating with various stakeholders including the Gibela Research Chair at Tshwane University of Technology, Professor Mpofu and his team, the School of Data Science and Computational Thinking, Professor Rajarantam and his team, and the African Institute for Mathematical Sciences ("AIMS") and their team.

As mentioned by Professor Mpofu, we are trying to develop an instrument or a tool that will be used to help with applying SIAM in a virtual space for training purposes for government, for schools, for universities and hopefully for policymakers, to help them make better informed policies. As Professor Mpofu said, it will also hopefully help spark conversations that will help us reduce inequality and poverty in South Africa.

Part of the work we do in SCOPRA are parliamentary submissions. Those are also important because we are helping with the rule of law. Many bills go through parliament but a lot of people do not actually take time to sit down and interrogate those policies or bills. We are also unable to do all of them, because then we will never get anything done, but just to mention the few that we have looked at – one that was spoken about in a previous session on expropriation. We have also looked at the GBV bills – three bills that are being reviewed, that are in front of parliament, which are very important in this country. Recently we have also looked at the Disaster Management Bill, which is actually due this week, and the Land Court Bill, to name just a few. The work we are trying to do is to get government to be more responsive and to think a bit more before they enact any law.

6 Discussion

Professor Madonsela highlighted the importance of interdisciplinary work and research especially given that the panel comprised a water resource specialist, a data scientist and an engineer. As aptly noted by Professor Madonsela,

> "You do not need to be lawyers, dear colleagues. In fact, you are better equipped than us on this. Nolwandle has been doing systems thinking and looking at how we manage our water resources, who gets to be advantaged in the policy decisions we make and what is the impact on the relationship between water and land usage. Professor Rajarantam is an expert on data science and Professor Mpofu is an engineer who is entrenched in systems thinking. That is why you as a team are driving this process."

Professor Madonsela started off the discussion with the following question:

> "We can recognise that data science has pros and cons, but I want to know from any of the panellists, is proceeding without using these data analytics fair? Can we ever achieve social justice if at the point when we make a policy we never think about how it will impact on the gogos and mkulus or how it will impact on young people or how it will exacerbate existing inequalities or decrease those things?"

For example, I asked a question to the Minister of Justice: is it not time to codify customary law? His answer was very prompt. No, we do not think so. Do you think that that answer should be given without using some kind of predictive data analytics to say if we go this way, who will benefit, for example, from this current uncertainty? As a social-justice researcher, I know that the people suffering the most are poor people who cannot hire lawyers to clarify the uncertainties.

You heard Advocate Ngcukaitobi speak about how the Ingonyama Trust issue took 10 years. In one of my papers, we went to a place called Emanzimaleni in KwaZulu-Natal. There we had created a forum similar to what was used at the public protector office, where we bring people from government to answer to people on the ground. One of the concerns there was precisely an issue about government's predictive policy and planning. This was before the Ingonyama Trust case. Government allowed the chiefs to run amok and interpret customary law as they deemed fit. This particular chief, not the Emanzimaleni chief, one from a

neighbouring place, decided his interpretation of Zulu customary law is that when your father dies, your right to the land is gone. This family had planted sugarcane and the man of the family died. The son wanted to harvest the sugarcane and the chief said, no, you cannot harvest the sugarcane because the right to the land belonged to your father. You have to pay me to get the right again.

> "This is one example of how not codifying leads to everyone doing as they want. Despite these potential dangers that you have picked up, Professor Rajarantam, which one would you choose between using a predictive assessment and not using it going forward? This would apply to use by government and even those who make decisions in court."

Professor Kanshu responded: "I think we must use data but we need to understand that data cannot answer all questions and that one must be careful when one uses data. If we go back and look at the data, we can try to figure out who the action disproportionately affects, perhaps a certain law? Or whether it make inequities worse than it would have because behaviours change? If you implement a policy and then observe the behaviour, it might be too late because time goes by and you affect when people can benefit from good policies. As such, one should look at data models and one should use them. I do not think government is using them well enough. Many of the problems that we see in the country cannot necessarily be solved using data models, but the data models could have helped in ensuring that government did not taking certain policy actions. Thus, my presentation was more of a warning on how to use it but I do believe data science and data models must be used, both in the beginning stage and the re-evaluation phase. It should be used in the phase where you think about a policy, and by modelling it using data or a mathematical model, it allows you to see various impacts on people. If the impact of the individuals, what we call agents in the model, is negative or an impact is not one that you expected to see, then you can almost immediately get rid of that action or that policy and you could think of another way to implement that policy. That is what is useful about a model – you can implement it in the digital world before it impacts anyone negatively.

> "After a policy is implemented, one must re-evaluate the policy to see if it resulted in the outcomes that you wanted or were looking for. That, I think, government is doing. They have a whole monitoring and evaluating department, but of course we could do that better

by using data science, where we bring in what I will call unorthodox data as well as new kinds of models."

Another question posed by Professor Madonsela was: "Where should this be located? At the moment we have, for example, state law advisers. Do you think the state law advisers should have a multidisciplinary team that includes data scientists and engineers to look at the likely impact of the laws they are about to pass?

Ms Made agreed with what Professor Kanshu said and stated:

"The monitoring and evaluation department is there, but I do feel that each and every government department, provincial department and municipality should have that capacity to monitor and evaluate. If we leave it to one department, things are not evaluated properly and data is not used the way it is supposed to. That is a problem with the law in South Africa. We have such beautiful laws, but we are not conducting a monitoring and evaluation of the beautiful law that we have in place."

Professor Madonsela emphasised that this new model is highlighting assessing impact before it happens, which would give government an opportunity not to implement a law if it will exacerbate inequity. Or at the very least, when implementing it, doing so with a compensation strategy.

"This is an example of the SCOPRA work that Ms Made is working on. If they had this instrument in advance, they would not have remembered halfway down the line that education will be impacted negatively or township businesses will be impacted negatively. That would have been done in the assessment process and, therefore, if that was the only way to proceed forward, the compensation strategy would have been crafted at the same time as the policy and implemented on the same date when the policy was implemented."

One of the delegates also contributed to the discussion: "This is very interesting because I figured the discussion may have just been confined to customary law and this is a welcome surprise that we are moving policy formulation to a new phase through this new project. I have been working on something that is similar to trying to evaluate some policies that we

have and the impact they have had in society, which is where the data analytics could help in better understanding the policies that we have.

"I was listening to Thandi Modise now as she left parliament and her statement was that we need to question if we need more laws or whether we are not just overregulating everything and living out the human factor, which is what Professor Rajarantam is talking to. As much as data models can give you a certain conclusion or ideas, the conclusive analysis would come from its impact, which would require some interaction with people at a certain level. As such, your project is welcomed. It is something that other people are also looking at and it is where we are moving towards. In alignment with what comes out of parliament, it is a way to say that the work we have been doing has not quite measured up, looking at where society sits today and without really delving into the data that drives it.

It is clear that the policies have not had enough impact. As such, we need to find the gaps and combine the models together with the human interaction at some level, which is what this model is trying to formulate, I presume, and which is some of the work that I have been looking at individually. Hopefully with time I will share it and we can take the debate forward."

Chapter 9 Plenary 4.3: 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

1 Overview

This session began with a keynote address by Adv Joyce Maluleke followed by presentations from Dr Nyasha Karimakwenda, Ms Siziwe Jongizulu and Dr Pretty Mubaiwa. Adv Maluleke reminded delegates of the importance of August in remembering and recalling the struggles of our women heroines and veterans. She also brought to the fore the disturbing statistics relating to teenage pregnancies and its link to rape. She then spoke about the harmful nature of practices such as *ukuthwala*, female genital mutilation and primogeniture. Furthermore, she highlighted the failure of government to communicate with the communities as opposed to merely passing laws.

Dr Karimakwenda shared some observations and main conclusions from her research relating to *ukuthwala*. In addition, she touched on how *ukuthwala* came to be in the public sphere. She investigates whether violent *ukuthwala* is a modern phenomenon and not part of custom or rather, is a distorted version of custom. Her work illustrates the importance of addressing trauma relating to *ukuthwala* across generations. She also touches on some of the complexities stemming from violent *ukuthwala*.

Ms Jongizulu shared some of the programmatic experiences and data around *ukuthwala*, female genital mutilation and other practices that are prevalent in the Eastern Cape and KwaZulu-Natal, with the aim of showing how widespread the practices are. She highlighted the socioeconomic implications of these practices. Contributing factors to child marriages, including good intentions on the parents' part, as well as some of the programmatic interventions, were also shared. Finally, she explained the importance of having legislation and policies that address these practices.

Dr Mubaiwa reiterated the importance of understanding the different forms of violence that women suffer and why they are exposed to this violence, in order to properly address it. She highlights how regional and international instruments and bodies need to take more steps. She also shared some results of her empirical studies that consisted of interviews, which highlighted women's experiences of having lobola paid for them.

2 Keynote Address – Advocate Joyce Maluleke

As the director-general of the Department of Women, I cannot miss an opportunity to talk about the National Women's Month, because this dialogue takes place within the National Women's Month. I cannot not talk about the context in which we find ourselves. The context in which we commemorate this year's National Women's Month is a difficult one as we fight for survival in the global COVID-19 pandemic. It has certainly forced us into undertaking activities such as the one in which we are in today, because if it was not for COVID, this event would be taking place in Stellenbosch. COVID-19 has forced us into the Fourth Industrial Revolution ("4IR") epoch – whatever that means – because everybody is talking about how we are in the 4IR. I am looking at what exactly does the 4IR mean because for me it means a bigger thing. It means us pushing the engineering to its limit and everybody being connected. However, we talk about the 4IR epoch, whatever it means for different people and contexts, because for some it has enhanced their economy and others it totally shut down their economy.

August is a very important month in our national calendar annually. It is the time when we concentrate our focus on remembering and recalling the struggles of our women heroines and veterans for women's emancipation, women's rights and women's suffrage for the vote or enfranchisement. For some it might seem like 27 years is long. For others it is not that long because we cannot forget where we come from.

This year we commemorate National Women's Month under the theme the "Year of Charlotte Manye Maxeke: Realising Women's Rights". In the context of this gathering, I would like to change it to the "Year of Charlotte Manye Maxeke: Realising Children's Rights", because it seems as if we have a serious challenge relating to this in South Africa.

The year 2021 marks the 150th anniversary of Charlotte Manye Maxeke and cabinet adopted the decision earlier this year to commemorate the year of Charlotte Maxeke, and that all national days and commemorations should be marked under the theme of Charlotte Maxeke. She was the first woman in South Africa to earn a science degree, the first black female to earn a science degree, which she did internationally. She was a teacher, a social worker and the first child probation officer in court. I am stressing this because some of the things we are struggling with now are issues she raised then. She was a church leader, she had an employment agency to employ women who were arrested for *inter alia* selling alcohol

illegally. The list goes on. Over her lifetime, she has played a leadership role in communities and personified sound values, principles and integrity.

Dr Mamphela Ramphele, at a conference on witchcraft violence in Limpopo some time in 1998, said, "Culture is like an umbrella under which some people like to hide from rain and also to shade themselves from the sun, but sometimes you need to fold it." I think we are at a point where some of it definitely needs to be folded. It does not matter whether it is loxion culture. Loxion is your township or local areas. These areas have their own culture that can be problematic, even if it is not customary or traditional. Or, for example, you have a Black Economic Empowerment ("BEE") culture where people have sugar daddies, more colloquially known as "blessers". All these customs or cultures affect the girl child. All of them need to be folded because they undermine our democracy.

I am going to speak like an administrator in government. I am not going to speak like an academic. The academics have spoken. They have done research. I am going to speak my mind because I am supposed to give a keynote address and a keynote address is different from the others. The recent statistics of 23 000 children in Gauteng who are either pregnant or have already delivered is beyond shocking. We have not yet looked at Eastern Cape or KwaZulu-Natal because the reasons might be different in these provinces. *Ukuthwala* in Gauteng could be something else. Whatever the culture that exists there, it affects the human rights of children. These statistics traumatised me. I am scared out of my wits to be a citizen of this country where its members are not afraid to rape and kill children and where they rape children and walk the streets without being arrested.

Yes, I am in government. Where are the 23 000 people who have raped the children who have just been identified as pregnant? We should be having 23 000 people in prison, arrested, and we should be having specialised courts set to fast-track the prosecution of the perpetrators. As a director-general of the Department of Women, Youth and Persons with Disabilities, I have called a meeting with the relevant departments and the directors-general thereof so that I can ask them when we are establishing the specialised courts to arrest perpetrators in these types of cases. I am not saying Gauteng specifically is important, but I am saying that we need to start somewhere.

Traditional practices reflect values and beliefs held by members of a community for periods often spanning generations. Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members of the communities, while others have become harmful to a specific group, such as women and children. These harmful

traditional practices include any enforced marriages and *ukuthwala* as currently prescribed. I say *ukuthwala*, but personally I defined it a long time ago as abduction – the practice of abducting or kidnapping children and raping them. Most traditional leaders have fought with me. Fortunately, somebody spoke about *Jezile v S* ("*Jezile*"),[41] which confirmed what I have been saying for a long time. That it is abduction, kidnapping and rape, which qualifies for the maximum sentence. If a child is a minor, that person must get the maximum sentence.

Female genital mutilation, primogeniture rule practices and others are also important. While some might say that these practices have been abolished, in reality it exists. Practices such as a cleansing after male circumcision also exists, something I discovered in the Eastern Cape. A woman called me and said we want to speak with you as another women. She said that in the Eastern Cape, after the males go for circumcision, all the girls must run away from the streets because when they come back, they rape the girls they find on the street under the guise of cleansing themselves from whatever concoctions they have taken at the circumcision and witch-hunting. However, for the purpose of this discussion, I will focus on virginity testing and *ukuthwala*.

Despite the harmful nature of these cultural practices and their violation of national and international human-rights laws, such practices persist because they are not questioned and we know that there are laws and that some, for example *Jezile*, have been arrested. However, the community said it was wrong and would continue practising it. They challenge the laws that result in the arrest of the people who are practising that.

I think the biggest failure is that of government. As government we are not communicating with the communities. We pass the law and we communicate when we pass that law. After that, that is it. We do not care whether women, youth and persons with disabilities have heard what we said about the law. People also forget or other people are born. For example, the RCMA came into operation in 2000. You cannot expect that because you educated the public in 2000, the public continues to know up until today. That is one of the challenges we have.

Additionally, the constitutional guarantees of traditions, culture and customs and the practices derived from them were supposed to have been preceded by a national dialogue on the character of our ancestors and what is really indigenous. The reason for this is that some of the cultural practices that were necessary then are unnecessary now due to development, globalisation and other factors, mostly due to the promotion of human rights of all persons.

[41] *Jezile v S* 2016 (2) SA 62 (WCC).

The two cultural practices that I want us to scrutinise is *ukuthwala* and virginity testing. Virginity testing still continues. Even though in some areas people say it does not happen, it happens. Virginity testing is mostly practised in KwaZulu-Natal and the Eastern Cape. It is of course a controversial practice, both because of its implication for girls tested and because it is not necessarily accurate.

There are two schools of thought with regard to virginity testing. One school submits that it is a form of sex education and enforces abstinence from sexual activities before marriage. It says that girls are taught not to allow boys and/or men to take away their pride by having sexual intercourse with them before marriage. It is believed that young women will abstain from sex because they fear being discovered to be no longer virgins. The implications of this are what I have a problem with. This is a stigma not only for the girl, but for her entire family. It is believed that virginity testing substantially reduces the spread of sexually transmitted diseases, including HIV/AIDS, and further that it reduces teenage and unplanned pregnancies that lead to school dropouts. If it was that easy, then the number of teenage pregnancies in KwaZulu-Natal would not be so high.

The other school of thought, to which I ascribe, holds that the intention of the practice of virginity testing may be good and I do not want to challenge that. However, its flipside is gender bias. It does not treat a boy and a girl child equally. There are implications for gender equality and human rights as guaranteed in the Constitution. The practice also appears to threaten and objectify the girl child so that the fathers may get full lobola or *bohali* on marriage. This school of thought argues that the practice of virginity testing puts the entire responsibility for safe sex, abstinence and countering the spread of sexually transmitted diseases solely on the shoulders of the girl child and young women, who are often the victims of GBV and gender inequality in so many other respects.

Women and girls are always expected to maintain a very high level of morality to be married to honourable men who might have deflowered or impregnated a string of girls and might possibly be HIV positive, as is the case in most *ukuthwala* cases. On the other hand, virginity testing poses a threat of discrimination against girl children who are not virgins and who, in many instances, have been raped. There was a case in KwaZulu-Natal where girls who were found not to be virgins were not given a bursary by a mayor. The reasons advanced for virginity testing do not focus on prevention and protection.

On the other hand, we can look at *ukuthwala*. In ancient Africa *ukuthwala* was condoned as a path, albeit abnormal, to marriage that targeted certain women of marriageable age. It is

important to look at the term marriageable. When we grew up, even in Shangaan, they called different women or females who are children by different names. They are women that are named a certain word which indicates that they are still young. There are those that are called a certain name to show that they are ready for marriage.

Ukuthwala was not performed with impunity. It incurred delictual liability. For those women who were at a marriageable age when it was performed, it incurred a delictual liability for the culprit in the form of payment of a herd of cattle to the father or legal guardian of the girl. Today *ukuthwala* involves kidnapping, rape and forced marriage of minors.

I have been in the Eastern Cape where I met an 11-year-old who was abducted, kidnapped and raped. They took her to a sangoma because she was not falling pregnant. They wanted the sangoma to help her fall pregnant. At 11 years old, she was not ready. Yes, some would be pregnant, but that specific child was not ready because she was also physically small. She would not be able to carry the pregnancy. At that time, we insisted that the police must arrest everyone, including the sangoma.

Ukuthwala of young girls was also prohibited under the Transkei Penal Code Act 24 of 1886. However, in the Eastern Cape people will tell you that it is their practice. The penal code criminalised the abduction of children under 18 years, yet you still hear of children that are 11 years old being kidnapped. The social aspect of *ukuthwala* is that it retards childhood development. It has many hazards, for example health and developmental hazards. It also poses the danger of them being infected with HIV, other STIs and pregnancy-related complications, such as infant and maternal mortality and fistula-related illnesses.

I have already indicated that the government needs to educate, arrest and ensure the laws are implemented. However, communities also need to develop. For example, communities no longer wear *amabheshu*, a type of African attire, and they understand that they have to develop. Communities no longer ride on donkeys but instead use cars. However, when it comes to women, women must stay where they are. *Ukuthwala* was practised in donkey years, ages ago, but *ukuthwala* must continue. I think it is about time that we also take responsibility as communities.

When looking at *ukuthwala*, it is the children of the poor that are being abducted. You will never find the child of a teacher being abducted or the child of a police officer being abducted. It is deeply linked to poverty. This means that as a country, if we can develop or facilitate development for all people, especially people in the rural areas, I think we can reduce *ukuthwala* because of the link between *ukuthwala* and the lack of education, under-

development and poverty. *Ukuthwala* deprives a girl child of an opportunity to be educated and develop themselves. Furthermore, research indicates that the majority of the girls and young women that are victims of *ukuthwala* are from poor families, as I have indicated above. This means their children are most likely poor because they were not able to go to school. Their children then also suffer the likelihood of them being abducted if we do not interject and stop this practice.

There is another case apart from the well-known *Jezile* case. This case took place in Cape Town where the aunty and other people who were involved in the negotiations and the perpetrators who abducted the child were all convicted. I think the aunt was convicted to eight years or 12 years. This is an example of how we can reduce the number of cases. However, the challenge is that many of the perpetrators have not even heard about these cases and therefore they continue. As such, there is a need for government to educate the public. However, everyone, including for example tertiary institutions and civil society organisations, also have responsibilities. We all need to be involved.

I will not talk about the Sexual Offences Act 23 of 1957 or the definition of a customary marriage because many are familiar with this. However, I would like to focus on the realities. What do we do about children that are abducted? There are even instances in Gauteng where it might not be customary law, but there are cultural practices that lead to young girls being impregnated. Some of them do not go back to school. In fact, most of them will not go back to school and will not be able to find a job.

3 Presentation – Doctor Nyasha Karimakwenda

Problematising policy and formal legal perceptions of *ukuthwala* and violence through women's voices

This paper will provide some of the observations and main conclusions I have made in my research relating to *ukuthwala* that exists in the public sphere, in legal discourse and policy discourse. I will deconstruct two of these conclusions by juxtaposing some of my research findings in an attempt to show some of the nuances of our discussions about *ukuthwala*.

To begin, we need to ask: what is *ukuthwala*? This, of course, is a very contested question. In general, this concept refers to different ways of making a customary marriage happen quickly, including through abduction. That is the simplest way to understand it. It is also important to note that there are different types of *ukuthwala* practised across South Africa. *Ukuthwala* is the Nguni language term for the practice, but there are a myriad of other language

terms and cultural expressions for it, some of which are benign, romantic and consensual, and others which are characterised by extreme violence. It is the latter that I will be discussing today.

Another thing to note in terms of background and context is how *ukuthwala* came to be in the public space. This happened in the last 10 years or so. From about 2009 there was a lot of discussion and discourse in the media about the fact that violent *ukuthwala* was taking place, especially in the Eastern Cape and KwaZulu-Natal. This *ukuthwala* was characterised by things such as rape, kidnapping and assault by much older men who were targeting girls as young as 12.

This prompted significant, concerted and ongoing responses from different sectors of South African society, including *inter alia* traditional leaders, national leaders, provincial leaders as well as legal scholars. Many may be familiar with the *Jezile* case, which was handed down by the Western Cape High Court in 2015 and which set the bounds of what the courts felt *ukuthwala* should be. Thereafter, there was an extensive study conducted by the South African Law Reform Commission that happened over about six years. This is the context of how *ukuthwala* came into the public space. Once again, the discourse is all concentrated on the violent forms of the practice. This is where we have a lot of discord and disconnect between outsider and insider perspectives of *ukuthwala*.

I will examine two conclusions about the practice. The first is the conclusion that violent *ukuthwala* is a modern phenomenon. The view that is very prominent in the media, literature and public discourse is that violent *ukuthwala* is devoid of historical precedent. I will interrogate that perspective. I will also question the view that violent forms of *ukuthwala* are not customary.

I have conducted a lot of research over the past decade or so and looked at *ukuthwala* from both a historical and contemporary perspective. I have also looked at this empirically, which means that I have spoken to women, and women who work with women who have been subject to *ukuthwala*.

There is sufficient evidence in the historical record to attest to the fact that the violence of *ukuthwala* goes back as early as the 1800s, and perhaps even before that. Based on the historical record, there have been documented forms of men abducting and raping very young girls, sometimes with family sanction and sometimes without. Most importantly, through my research, what I have tried to do is to access the voices of women, because women are extremely important repositories of history. Although they are not always considered in this

regard, women have a lot to share on customary practices. In fact, they should be our first port of call.

I had the opportunity to work with a women's rights organisation in the Eastern Cape called Masimanyane where they have an *ukuthwala* project. The staff in Masimanyane told me that when they started to work in the communities, they were focusing on young girls because, of course, it was the young girls being abducted and targeted. However, the older women noted the reason they were working with the girls but also wanted the organisation to work with them and actually start with them. Their reasoning was that they were subjected to violent *ukuthwala* in their youth and that they have been carrying the scars and trauma of this practice with no outlets to express their trauma and to heal. Masimanyane then started working with the older women in the community and I had the opportunity to speak with some of the survivors of *ukuthwala* who are now in their 70s. They were subjected to the practice in the 1960s and 1970s. These are women who grew up in the former Transkei Bantustan of Eastern Cape.

What the women spoke to or what the voices attest to, again, is the fact that the violence of *ukuthwala* is multigenerational and when these women were subjected to the practice, it was the norm and the violence was very explicit. It was very explicitly agreed upon as well. These women were raped as part of the process. In fact, one of the women I spoke to said that when she was raped, her husband's family stood outside the room, waiting for the rape to be complete because this was part of an accepted way of making her into a wife, forcing that status upon her, preventing her from escaping and preventing her from being able to return to the life of girlhood. This is the nature of the violence across generations.

This ties in very closely with our second conclusion, that violent *ukuthwala* is a distortion of custom. This perhaps is an even more contentious argument given the dominant view that violent *ukuthwala* is a violation of custom. First of all, it is important to remember the historical precedents that I have spoken about. This does not mean that historical precedent alone makes a custom valid. However, historical precedents attest to the fact that even alongside the romantic forms of the practice, from the 1800s onwards there were a sufficient number of communities that ascribed to the view that violent *ukuthwala* was also part of customary practice. We continue to see this in the present.

There are some fantastic studies that have been conducted relating to ethnographies of violence. We need ethnographies and we need empirical work to assess the workings of violence. These studies have demonstrated the extent to which in modern-day South Africa

in certain communities, abduction, force, coercion, violence and rape are part of the norm. These practices are orchestrated by both the girls' and the husbands' families. This is the reason why girls are not rescued from these marriages – because their families condone it. This is not always the case, but here I am speaking to the fact that violent *ukuthwala* is considered to be customary.

A very insightful study was also done with Jezile's community. Jezile is a man who was prosecuted for *ukuthwala* and his case ended up in the Western Cape High Court. Two scholars, Lea Mwambene and Helen Kruuse, went to his community and found out that the community was livid about what had happened. They were livid about the fact that Jezile, their son as they called him, was imprisoned for practising what they deemed to be their traditions. They could not understand it. They could not understand why he had been prosecuted for rape because in their mind, and this is very common, rape does not exist within the framework of marriage. They were confused because they had supported the marriage, he had paid lobola, they had sanctioned it and therefore everything had been done according to custom.

A further attestation to the violence of *ukuthwala* being held as custom are the narratives of the women that I spoke to who worked with Masimanyane – the women who were abducted in the 1970s. They spoke about the fact that when they were growing up, violent *ukuthwala* was the customary norm and many girls were subjected to it. It was something that girls in their age cohort went through. Some of them were so devastated that they wanted to commit suicide. That is something the women shared because they could not escape the fate that they were dealt. They could not go to their family because the family knew what was happening. They knew about the rapes and the sexual violence, but told them to stay there as that was their family now. That was the customary status and that was the way in which they were compelled and coerced into marriage.

Lastly, I want to discuss some of the complexities stemming from violent *ukuthwala,* which are connected to two prevailing discourses. The first is that from a sociolegal perspective, we are concerned with the human experience. I am a feminist scholar, therefore I prioritise women's experiences of violence. This means not idealising custom or romanticising custom. However, what is happening is that because of this dominant view of *ukuthwala*, different perspectives of custom are being eclipsed. We are not able to access the point of view of communities who are saying that this is what they believe in and this is what they think is right. I am not condoning it and I am not saying that this should happen – it should not happen. However, we have to understand why violence happens. That is part of undoing it.

Another thing is that the historical and customary nature of violent *ukuthwala* remains largely acknowledged. Again, this is not something that is in the mainstream space. We do not find it in the jurisprudence in the post-apartheid era. It is not something that you find in the policy sphere. This remains largely unacknowledged and means that we are only accessing a small portion of women's experiences of violence, and this is very problematic. We are not fully understanding the nature of violence.

An important thing to note is that violent *ukuthwala* will be extremely difficult to undo. Yes, we are gaining traction. Men are being arrested. Girls are speaking out. Some older women are changing their minds about the practice, even though they were subjected to it. However, communities' adherence to violent *ukuthwala* is still very, very strong. This means most girls will not report their families and cannot escape from the marriages, because to do so would be to risk ostracisation. This is what some of the empirical studies speak to – how girls are immersed in a context in which violence is normalised. This is no different, in my opinion, from the fact that GBV is normalised. The difference is that sometimes when we think of custom, we make it this reified notion or this thing that applies only to black people – this thing that is sacred. However, custom and tradition are what people do and believe in, so we need to understand this in more accessible terms and not as something reified.

In conclusion, it must be emphasised that we need much more empirical research about *ukuthwala*. We do not know enough about it. Most research has been conducted in the Eastern Cape and some in KwaZulu-Natal, but these practices exist across South Africa. They exist across Africa in general. In a previous presentation, one of my colleagues from Zimbabwe spoke about how his grandmother had been forced into marriage through this kind of practice. We need far more research than we have. Our understanding of *ukuthwala* is only partially complete and we need to keep asking questions and undoing some of the prevailing conclusions about the practice.

4 Presentation – Ms Siziwe Jongizulu

I am not a lawyer but I will be building on the previous paper by Nyasha. We have worked extensively in Eastern Cape and KwaZulu-Natal as the United Nations Population Fund ("UNFPA") to support programming around *ukuthwala* and other cultural practices. This paper aims to share some of the programmatic experiences and data around ukuthwala, female genital mutilation and other practices prevalent in Eastern Cape and KwaZulu-Natal.

The aim of this is to show how widespread the practice is, even in some of the developed countries.

In terms of the definition, traditional cultural practices reflect values and beliefs held by members of a community for periods spanning generations. For example, the previous paper touched on the work with Masimanyane in the Eastern Cape and how some of the women were subjected to *ukuthwala* in the 1970s. It is important to highlight that globally, every social group has specific traditional cultural practices and beliefs. Some of them are beneficial to some of the members of the society, but others are harmful to specific groups, in particular to women and girls. These harmful traditional practices include female genital mutilation, child marriages, virginity inspection and other practices and they mostly target women and girls.

In terms of data, it is important to note that we do not have concise data for South Africa but are working on that because it is needed as evidence. However, there are examples in some parts of the world and in specific regions, for example, in the Eastern Southern Africa region, where we are, one in three children is married. In Western Central Africa, two in five children are married. In Latin America and the Caribbean, one in four girls is in a marriage. In developed countries, children also experience these harmful practices. Between 2000 and 2005, more than 200 000 children were married in the US. This is of course just data from a few countries. This practice is especially common in our region.

Child marriage is really a human-rights violation. It threatens girls' lives and health and it limits their future prospects. These girls that are pressed into child marriage often get pregnant while they are still adolescent. For example, *Jezile* involved a 14-year-old. We have had cases in Lusikisiki in the Eastern Cape where 13 year olds are marred to 40-something-year-old men. There are also similar cases in KwaZulu-Natal. This practice increases the risk of complications during pregnancy and childbirth. The girls affected often drop out of school so they can assume household responsibilities, and they are denied the basic right of education. The girls who leave school have worse health and economic outcomes than those who stay in school, and eventually their children fare worse as well. This perpetuates poverty.

When looking at some of the contributing factors or drivers, girls in child marriages tend to be less educated and they are more likely to live in rural areas. We found patterns in Eastern Cape and KwaZulu-Natal where these girls are moved to cities with these older men, who then take the girls and move with them. For example, men might move from Lusikisiki to East London with the girls. Some perpetrators were apprehended by police in some of the

cases that are closer to the cities, and that is when you see that the girl has been moved from a rural area.

Many impoverished parents believe that marriage will secure their daughter's future. This is true in both development and humanitarian contexts where many parents fear they will be unable to protect or care for their daughters and they believe that marriage will protect their daughters from sexual violence, which is often exacerbated in times of crisis, especially in humanitarian contexts.

Female genital mutilation is another practice prevalent in some areas in the Eastern Cape, especially on the borders of Lesotho. You will find that older women protect this practice, and they believe that when younger women go through female genital mutilation, the practice is supposed to make them ready to be married and ready to be women.

There are approximately 200 million girls and women today that have undergone female genital mutilation, and countries with high rates of female genital mutilation are Egypt (92%), Guinea, Mali (90%), Indonesia (49%), and girls as young as 11 have been subjected to this practice. Developed countries also experience harmful practices to some extent. We find that 1 300 girls in Portugal have been through these practices and 11 000 in Sweden.

In terms of addressing *ukuthwala*, in Eastern Cape and KwaZulu-Natal we have prepared a documentary on teenage pregnancy and *ukuthwala*. This was developed in the Eastern Cape because some of the girls who are pregnant go to health facilities pregnant and when the healthcare workers are treating them, they realise that the girl is actually married. With their consent we have prepared a documentary which we have used to engage young people in urban areas, in townships, in informal settlements and in some other rural areas so that they know that this practice exists, that it is unlawful and how it impacts on these young girls.

We have also taken some of the key players in these provinces for a learning exchange to Ethiopia in a region called Amharam where we sat with the Ethiopians and looked at the best practice models they have used for preventing child marriage and promoting reproductive health among rural girls, especially in Amhara. We have taken the executive mayor, the House of Traditional Leaders, the Department of Cooperative Governance and Traditional Affairs ("COGTA") and some of the key people in these communities to Amhara for this learning exchange.

I will briefly highlight some of the programmatic interventions. When we returned from Ethiopia, we adapted the manual they use for social change to the South African context and used it as a discussion guide for facilitators. We worked with our partners, for example Sonke

Gender Justice and others that really engage men as partners on this, and ensured that they are not supporting this. We have also had specific engagements with traditional leaders and some of the key people that are leading in the rural areas. Some are not necessarily chiefs but just people that are in leadership positions. We engaged with them so that they can also assist in preventing this practice in their areas. We worked with the local municipalities to prevent this practice along with the Department of Health and the Department of Social Development. We also had community action teams that targeted specific wards to prevent the practice of *ukuthwala*.

What we have learnt in terms of strategies to address these harmful practices is that parents who subject their daughters to these practices, sometimes do so with very good intentions. They wrongly accept that female genital mutilation, for example, must factor into acceptance by peers in communities where this practice is widely accepted, and they mistakenly believe that marrying off a child will secure her future. Some are unaware of the physical and psychological health risks that the child may be subjected to. Therefore, when encountering a social practice, one wants to change, one must first understand it by asking, what is this practice? By whom is it practised and how or why is it practised? This is very important in engagement with communities and to get a history of the practice. For example, one of the things we noted is that as much as *ukuthwala* has been practised for many years, it has not been done to young girls. We now have 12-, 13-, 14- and 15-year-olds that are being subjected to the practice.

One of the key things that we learnt through supporting these communities was that having legislation and policies that address the practice really helps. For example, *Jezile* was extremely helpful because we could use it. Additionally, making health and social services available to women and girls is helpful for addressing harmful practices, as is strengthening education and economic support to these girls and families, because most of the time poverty is the underlying issue. Furthermore, fostering community discussions through social behaviour change initiatives and supportive, collective commitment to abandon the harmful practice through community engagement have also been helpful. This assists in getting commitment from all the community members: men, women, young women, young girls, and the young men that are used for abducting these girls. Therefore, there is a host of knowledge and attitude-change interventions that we must embark on to reach a collective decision that this practice will be abandoned.

UNFPA also has a programme on social norms change that we are using to engage and support the communities that are going through *ukuthwala*, female genital mutilation and other practices. We are also working with the Human Sciences Research Council ("HSRC") on qualitative research to investigate this practice more broadly. We are hoping that the report will be finalised in early 2022 so that it can support the national efforts.

5 Presentation – Doctor Pretty Mubaiwa

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

To reiterate what Nyasha mentions at the beginning of her paper, 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. My topic is on the practice of lobola, violence against women and customary law. Essentially, I focus on the challenges present in the current dual legal system in protecting women from violence that arises from harmful cultural practices. Since 2012, CEDAW has forwarded its concluding observations to Zimbabwe, Zambia, Kenya and Uganda, urging them to take necessary steps to eliminate the practice of lobola because it is a harmful traditional practice. Looking at the discourse around this practice of lobola, there is a lot of contention around it because it is a very well-regarded and respected cultural practice that signifies marriage in African cultures. As such, when I did my PhD, on which this paper is based, I noted that lobola is a cultural practice that is prevalent in a lot of African countries. It was thus worrying for me that when looking at the different concluding observations by the CEDAW committee, they have only made these remarks to these four countries. Additionally, urging states to take steps to eliminate this practice has not been done under the reporting of the Maputo Protocol. It seems like CEDAW and the Special Rapporteur on Violence Against Women within the United Nations are the only bodies that have looked at this practice and held that it is a form of violence against women.

My research aimed to explore the practice and then to understand why it is called a form of violence against women or whether it aggravates it. This was done by analysing some of the customary laws in Zimbabwe, Zambia, Kenya and Uganda. Under customary law, lobola is a requirement for the recognition of the validity of a customary marriage. This means if women were to seek legal recourse in respect of divorce or a marriage, they would need to prove that they were married customarily. The exception is in Uganda where lobola is not

stated as a clear requirement for the validity of a customary marriage. It is thus important for us to understand what lobola is. In essence, it is a cultural symbol that validates marriage. It consists of the exchange of goods and/or money by the groom to the family of a bride. It is that exchange of gifts, money and other ceremonial performances that have to happen for a marriage to take place in some African cultures.

When looking at violence against women, I use the definition from the Declaration on the Elimination of Violence Against Women ("DEVAW"), which defines violence against women as any act of GBV that results in or is likely to result in physical, sexual or psychological harm or suffering to women. This includes threats of such acts, coercion and arbitrary deprivation of liberty, whether occurring in public or private life. This definition of violence is all-encompassing and very broad in a sense that it allows for us to interrogate some cultural practices and determine whether they are a form of violence against women. It is also deep enough to help us understand the many manifestations of violence against women arising from cultural practices.

As I have stated before, lobola has been a topic of contention amongst scholars. Even on the internet, it is always something that people are interested in and are always discussing. My research and approach were to use previously conducted empirical studies that consisted of interviews that highlighted women's experiences – women who had lobola paid for them and women who were going to have lobola paid for them. In order to understand violence, it is also very important to focus on women's experiences when trying to define and understand violence. In this regard, I looked at studies like Ansell who held interviews in Zimbabwe, for example. I drew on some of the questions around gender roles against perceptions, beliefs of entitlement to women's bodies and how lobola can create asymmetrical power relations.

My conclusion was that lobola itself, the act itself, does not necessarily amount to a form of violence against women. When people meet and exchange gifts or money, it is not necessarily an act of violence against women. Although it is kind of discriminatory in that it is men who pay lobola for women, we find that in today's society, those things are changing. For example, with same-sex marriages, couples can choose to pay lobola for each other. In itself, lobola as a practice is not really a form of violence against women. However, we must look at the experiences of women who have had lobola paid for them and some of the interviews with men who expressed these entitlements to women's sexual, productive and reproductive capacities. Once a man has paid lobola, they think the woman must have children, and that the woman may not decide how many children she wants to have or when she wants to have

these children. Additionally, the woman is working in his home and her productive capacity therefore belongs to the man. Sometimes, when women earn a salary, they have to give it to their husband. In this regard, lobola creates very rigid gender roles for women because it then prescribes that once lobola has been paid, women must take part in domestic chores. In that way, some of these discriminatory practices that lobola reinforces expose or aggravate women to different forms of violence. This could be physical, emotional or even economic abuse. In most cases when men were asked, if you have paid lobola for a woman, can she refuse to have sex with you, the answer was predominantly, no, she cannot because I paid lobola for her and, therefore, I am entitled to have sex with her whenever I want.

It was these nuances that I drew upon. I used Heise's framework on the aetiology of violence and how violence occurs and is reinforced from the micro to the exo levels. However, in this paper I am merely trying to highlight the bigger picture of my research and how lobola is linked to violence against women and discrimination. Overall, the findings were that because lobola influences perceptions and entitlements to women's bodies and productive and reproductive lives, it creates gender roles. Marital conflict also arises and that further disempowers women. Therefore, there is a positive correlation between lobola and the perceptions and entitlements that influence violence.

Another important conclusion from my research was that there are certain cultures where it is a requirement for lobola to be returned upon divorce. This disempowers women because if you are economically disadvantaged, the first thing you think about, if, for example, you face violence in your marriage, is not to just leave. Instead, you have to think about whether you have enough money to return the lobola for the divorce or whether your parents still have the lobola that was paid so they can return it. This therefore creates an asymmetric power relation between men and women because women are stuck in marriages they cannot leave because they do not have the economic means to leave.

We have noted that there have been some very instrumental cases, such as *Mifumi (U) Ltd v Attorney General Kenneth Kakuru* ("*Mifumi*")[42] in Uganda where the courts were challenged to think about how disenfranchising the returning of lobola is. However, you find that in most cases the courts, in all four countries that I studied, have been a bit wary of really going deep into the practice and actually finding ways to eliminate it because of the negative consequences that it has with regard to exposing women and aggravating violence against women. As such, courts have simply decided to look at one aspect of lobola. In the *Mifumi* case, for example,

[42] *Mifumi (U) Ltd v Attorney General Kenneth Kakuru* [2015] UGSC 13.

courts decided to just look at the return of the dowry upon dissolution of marriage, which they held is unlawful because it exposes women to violence unnecessarily if they are economically disadvantaged.

In most cases where lobola is involved, it exposes women to violence and therefore necessitates further inquiry. In addition, states and the international community at large also need to look at our constitutionally based rights as women and think about how we can apply them even within customary laws that are inconsistent with those core and fundamental rights.

In looking at lobola in these countries' case studies, I have drawn some conclusions around how lobola can be eliminated or how states and international communities can start to think about ways to contain it or regulate it, which is very difficult when it comes to customary practices. The difficulty arises when looking at states and governments in general, because they are voted into power. As such, in most cases when discussing different marriage bills, because of these contentious issues around lobola, political actors are not willing to take extreme steps to ensuring that women are protected. Instead, they try not to cause friction and havoc around customary practices that are tantamount to discrimination and are harmful towards women and girls. For example, in Zimbabwe we currently have a marriage bill that has been tabled and has lapsed twice. We thus find that the domestic legislation in these four countries that I studied was very limited, because in most cases they are dual legal systems where there is civil and customary law. In the case of Kenya, for example, there are different instruments governing marriage, like the Hindu, Christian and African Marriages Acts. In all of these different legal instruments you find that there are certain cultural or religious aspects that are forms of violence against women or harmful to women, or expose women to violence. However, the law is not necessarily helpful in protecting women because, for example, there is a requirement for lobola to be paid in order to recognise a customary marriage.

There are definitely opportunities available at both the international and regional levels with regard to understanding these issues, because women have a right to take part in positive cultural life, but we must ask: to what extent? It is extremely important to take part in these discourses and to raise different cultural practices that may put women in a disadvantaged position. I therefore think that this conference was extremely insightful because it is a first step in understanding all of these cultural practices that are inconsistent with fundamental human rights as well as constitutional rights domestically. It is from this point of departure

that I believe lobola needs further interrogation, and there needs to be mechanisms or policies, etc. set up in order to protect women from violence that arises out of it.

Chapter 10 Plenary 4.4: Equality and Succession /Inheritance Challenges in Traditional Leadership and the Family

1 Overview

This session started with a keynote address from Judge Tandazwa Ndita. This was followed by presentations from Commissioner Busisiwe Deyi, Dr Muneer Abduroaf and Ms Lethabo Tloubatla. Judge Ndita looked at the male primogeniture rule as well as the missed opportunity by traditional leadership to contribute to this issue. She also asks the question: Have the legal inroads made delivered justice and equality to women who are subject to traditional leadership? In addition, she reminded delegates about how traditional leadership is still being entrenched in a patriarchal system and how we need to educate women on equality. Judge Ndita ended by emphasising the need to develop programmes focused on raising women's, and in particular rural women's, consciousness about their rights.

Commissioner Deyi looked at succession in traditional leadership and what it means to have equal entitlement to leadership roles or traditional leadership roles. She also highlighted the need to question what we mean when we speak about equality in succession as it should not be understood 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 woman.

Dr Abduroaf presented on the impact of the South African Constitution on the recognition of Islamic marriages for purposes of intestate succession law. In doing this he provided a brief background to the development of the place of Islamic marriages in South African law, including the challenges. In particular, he focused on polygamy.

Mr Tloubatla shared his insights on cultural influences and practices of inequality in customary-law succession and inheritance in South Africa. In particular, he focused on the nuances of inequality practised within the customary law of succession, specifically looking at intestate succession. He noted that male primogeniture still continues in practice despite the decisions of *Bhe* and *Shilubana*. In addition, he looks at Pedi culture where the last-born in the family inherits and the disputes that arise from this.

The discussion included the following questions: When talking about customary law's failure to recognise nuances involving the ability and capability, what is the definition of this

ability and capability when we speak of equality? Do we conflate sex and gender in these discussions?

2 Keynote Address - Judge Tandazwa Ndita

As an eight-year-old child growing up in a rural village I watched with disbelief as my mother and her four daughters were evicted from their home after the death of our father, simply because she had not borne a male child who would be an heir to the estate of our late father. Fast forward 30 years later as a magistrate, I was administering estates applying the rule of primogeniture. The rule has its roots in the Black Administration Act of 38 1927 ("Black Administration Act"), specifically section 23, which purported to give effect to the customary law of succession. Central to the customary law of succession is the primogeniture rule, which in a nutshell prescribed that only a male who is related to the deceased qualified as intestate. Women did not participate in the intestate succession, and the eldest son of the family head was his heir. If a deceased person is not survived by any male descendant, his father succeeded him. If his father also did not survive him, an heir would be sought amongst his father's male descendants related to him through the male line.

This resulted in exclusion of women from intestate succession. In the words of Pius Langa in *Bhe:* succession was in keeping with a system that is dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of their fathers or the head of the extended families, or their husbands for that matter. In *Bhe*, the Constitutional Court declared Section 23 of the Black Administration Act inconsistent with the Constitution and invalid. More specifically, the court declared the rule of primogeniture as it applied in the African customary law of inheritance of property, to be inconsistent with the Constitution to the extent that it hindered women and extramarital children from inheriting property. It is against this background that questions of equality and succession/ challenges in traditional leadership and the family should be interrogated.

In the summary of the judgment, it is noted that because of the issues that were to be canvassed, the chief justice directed the registrar of the court to deliver copies of the directions and the two applications before it for confirmation to the chairperson of the National House of Traditional Leaders. However, no submissions were received from the House of Traditional Leaders. The rationale behind this invitation was premised on the provisions of Section 211 of the Constitution to the following effect: One, the institution,

status and role of traditional leadership according to customary law are recognised subject to the Constitution. Two, a traditional authority that observes a system of customary law may function subject to any applicable legislation and custom, which includes amendments to or repeal of that legislation or those customs. Three, the courts must apply customary law when that law is applicable subject to the Constitution and any legislation that specifically deals with customary law.

For most women in South Africa, more specifically in rural areas, their first interaction with the law is through the traditional courts. They are subject to customary law. It is therefore regrettable that the institution of traditional leadership missed the opportunity to make submissions during the hearing of the matter. However, that must be understood in the context of submissions made by the Eastern Cape House of Traditional Leaders on the Customary Law of Succession Amendment Bill of 1998, wherein they argued that the laws of succession are inextricably linked with the African concept of family and kinship.

The report of the South African Law Commission on customary law, Project 90, states that the House of Traditional Leaders in a written submission declared itself fundamentally opposed to the Eurocentric approach prevalent in our country, and decried the extension of Roman-Dutch law principles to customary law. Langa CJ in *Bhe* also notes that the codification of customary law, which in turn led to marginalisation, denied it of its opportunity to grow in its own right and adapt itself to changing circumstances.[43] The learned chief justice remarked as follows: "Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of dispute, they provide a setting which contributes to the unity of family structures and fostering of cooperation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*. These very valuable aspects of customary law more than justify its protection by the Constitution".[44]

However, as I have already said, the application of customary law is subject to the Constitution. Section 6 of the Traditional Courts Bill of 2017 also provides that traditional courts are intended to promote equitable and fair resolution of certain disputes in a manner that is underpinned by the value system applicable in customary law and custom, and function in accordance with customary law subject to the Constitution. Traditional courts recognise

[43] *Bhe v Khayelitsha Magistrate* 2005 (1) BCLR 1 (CC) para 43.
[44] Para 45.

that the consensual nature of customary law must be constituted and function under customary law and custom in a manner that promotes restorative justice, *ubuntu*, co-existence, reconciliation and in accordance with constitutional imperatives and the provisions of the Act. The issue of inheritance by women has, through judicial intervention and legislation, been settled as all estates are administered in terms of the Intestate Succession Act 81 of 1987 ("ISA"). However, that said, law is but the means, justice the end.

The question then that arises is, have the legal inroads made delivered justice and equality to women who are subject to traditional leadership? Professor Madonsela says, and I agree that, "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."

I started my address by referring to what had happened when I was eight years old. To complete the story, that institution of traditional leadership showed its redeeming features, because when my mother returned to her maiden rural village without a male figure to speak for her, the then chief of the village immediately allocated a plot for her so that she could build a home for her four children, which was out of step with the subservient and subordinate position of women in society of not owning land.

I also remember administering an estate of a certain family in 1992 at the Magistrate's Court and when I advised the eldest son who would be heir that he would then inherit all of his late father's estate, his reaction warmed my heart and he said, loosely translated, "Magistrate, my father has been working at labour centres throughout all the years of my growing up. I was raised by my mother. How is it that she must now be subordinate to me?"

The foregoing anecdotes clearly demonstrate the shifting of context of African customary law. That said, rural women's first interaction with the law is at the level of traditional court. In fact, many people in South Africa are still subject to customary law. It cannot be denied that the institution of traditional leadership is entrenched in patriarchy and masculinities which still define a woman's place in society and in their home.

How do we ensure that institutions of traditional leadership uphold the constitutional values of equality and human dignity? How do we ensure that they will not use culture to discriminate against women? Although there have been progressive legislative reforms, this will not work without vigorous education. Governmental agencies, commissions, international bodies and non-governmental organisations all need to educate citizens on women's rights,

including the right to equality within marriage. Women themselves may impede implementation of a law advancing equality if they do not understand what equality of treatment under the law means. Programmes focused on raising women's consciousness about their rights, especially rural women, must be developed.

3 Presentation – Commissioner Busisiwe Deyi

I will look at the use of traditional courts in the determination of a number of legal concerns, one of them being divorce in succession. When we speak about succession in traditional leadership and you look at the framework, what are we truly speaking about when we say women deserve to have equal entitlement to leadership roles or traditional leadership roles? Does that mean we change our conceptions around who is entitled to land and the customary principles? It is of no use if we understand 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 woman.

Another aspect of what it means and what succession looks like relates to the issue according of traditional leadership roles and succession in that particular area and the use of the concept of communal land by royal families or chieftaincies to exploit the communities.

You are effectively renting and as such do not have the security of tenure that you would have had as part of communal land security. Instead, you are renting and this creates a situation where the chief, when you fail to make your rent, which is essentially land tax, can repossess the land on which you live. This introduces another dynamic around what we are speaking about when we speak about equality in questions around succession, in the family, but also in traditional leadership roles. What are the systems, regardless of how we understand our succession, what are we calling for succession into? Are the systems that have kept women marginalised and immobilised within this context still going to continue, or as part and parcel of challenging the exclusion and marginalisation of women within that context must we dismantle the very customary practices and systems that have continued to marginalise women within the rural context?

4 Presentation – Doctor Muneer Abduroaf

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

This afternoon's discussion topic is an analysis of the impact of the South African Constitution on the recognition of Islamic marriages for purposes of intestate succession law. How did the South African Constitution impact upon Islamic marriages with regard to Muslims in these Islamic marriages and their ability inherit?

As a brief background, Muslims have been in South Africa for over 300 years. The population of the Muslim community in South Africa is over three quarters of a million in number. These Muslims or these persons are required, in the private sphere, in terms of their religion, to follow Islamic law. Within the South African Constitution currently, we find a right to freedom of religion and the right to equality. Essentially there is nothing preventing the government from enacting legislation that governs, for example, religious marriages.

Prior to 1993 and before the Constitution, the state of affairs was not very welcoming as far as these Islamic marriages or marriages concluded in terms of Islamic law were concerned. In 1927, in the case of *Seedat's Executors v the Master of the High Court*[45], the Appellate Division held that foreign polygamous marriages are not to be recognised. The issue here was concerning the allowance or the permissibility of a man having the right to marry more than one wife. In 1983, in the case of *Ismail v Ismail*,[46] the Appellate Division confirmed the position that a marriage under which polygamy is allowed is regarded as *contra bonos mores*, and it stated that under South African law it should accordingly not be recognised.

The judgments referred to polygamy, which is the general term that could either be polygyny or polyandry. Polygyny would be where the husband has more than one wife, which is allowed in terms of Islamic law, and polyandry is where a wife has more than one husband. We have heard the discussion around this in the Green Paper that was published by the Department of Home Affairs earlier this year. Subsequent to 1993 when the interim Constitution of South Africa was enacted, it provided through the Bill of Rights, in both the interim as well as the final Constitution of 1996, the right to equality, the right to freedom of religion and the right not to be unfairly discriminated against. As such, the status of the Islamic marriages subsequent to the Constitution then had to change because the Marriage Act might

[45] *Seedat's Executors v the Master of the High Court* 1917 AD 302.
[46] *Ismail v Ismail* 2007 (4) SA 557 (E).

allow for couples, as well as Muslims, to marry in terms of the Act and their marriage would be recognised. However, the consequences of that marriage is not necessarily in terms of Islamic law. Many South African Muslims then took the option of not concluding those marriages, but the consequence for that was that their marriage should not be recognised.

In 1993, an issue arose in terms of the recognition of Islamic marriages for purposes of succession. The husband passed away and he was married to his wife in terms of Islamic law. However, when he passed away, he died without executing a valid will. The issue was whether or not the lady he was married to was regarded as a spouse for purposes of the ISA. In the case of *Daniels v Campbell*[47] in the then Cape High Court and now Western Cape Division of the High Court, it found that the provisions are unconstitutional as it does not recognise a spouse married in a monogamous Muslim marriage or an Islamic marriage. The matter was then taken to the Constitutional Court for confirmation and it was confirmed to the effect of recognising a surviving spouse in terms of a monogamous Islamic marriage. However, at that time it did not recognise a polygynous marriage.

The next case is *Hassam v Jacobs*.[48] This case also started in the Western Cape Division of the High Court and ended up in the Constitutional Court. The argument was again made that not allowing the surviving spouses married in terms of Islamic law to inherit, infringed on their right to equality, the right to human dignity, the right not to be discriminated against, and so forth. It was further held that the Constitution allows the spouse, as citizens of this country, to claim inheritance from a deceased person in the event where he or she passes away intestate or without a will. This seems to be a move in the right direction given that non-recognition of the marriage would result in the widow or the widower being entitled to nothing. However, the problem with the scenario at hand is that the distribution of the estate is not necessarily in terms of the Islamic law of succession. In terms of the primary sources of Islamic law, in the Quran, Chapter 4 Verses 2 and 12, more specifically 12, refers to how the estate should be distributed. The ISA does not necessarily coincide with what is stated there. A possible solution to this could be the enactment of legislation in terms of the Constitution. This is in line with Section 53 of the Constitution which states that there is nothing preventing parliament and government from enacting legislation that governs a religious marriage or customary marriages.

[47] *Daniels v Campbell* 2004 (7) BCLR 735 (CC).
[48] *Hassam v Jacobs* 2009 (11) BCLR 1148 (CC).

A testator, however, could also make use of the right to freedom of testation in order to enact or give effect to his or her private sphere religious requirements, and draft that in a duly drafted and executed will. However, in the absence of said will, it would unfortunately lead to a situation where the distribution would not be in terms of religious premise. There is also nothing that prevents a party, by way of a gift as well as Islamic law, to distribute the estate accordingly and that is also allowed in terms of South African law.

5 Presentation – Ms Lethabo Tloubatla

This paper is based on the cultural influences and practices of inequality in customary law succession and inheritance in South Africa. *Bhe* and *Shilubana* held that discrimination on the grounds of gender was unconstitutional. However, I have found that there are other nuances of inequality practised within the customary law of succession. In particular, I focus on the intestate law of succession. The testate law of succession is protected by the freedom of testation of the testator and is thus outside the scope of this paper because that is an issue for the courts.

The male primogeniture practice is continuing despite the decisions that came from the two cases mentioned above. In the African family structure, you will find this patriarchal and hierarchical structure, which is premised on inequality. When looking at the structure in the families, the seniority in the family is given based on the houses, which focuses on the birth of the eldest son or the male in the family, who will then inherit the family property and also, in terms of the customary law of succession, become the family head. This example is already indicative of the nuances of inequality in that the younger children will be overlooked. They are not considered on the same level. They are denied equality and dignity based on their chronological way of being born in the family.

In the Pedi culture there is another, very different, perspective found in a principle called *mojalefa kemoletantlo* (ultimogeniture), which means the last born in the family has to inherit the family property. This is another example where the siblings are put in an unequal position which denies equality. I have identified several challenges that are linked to this practice and that need reform. One is the economic impact of the practice of male primogeniture. The practice fails to recognise that even though by birth you may be senior in the family structure, you may not possess the skills and capabilities to lead the family or even lead the family-owned businesses. If you look at what was happening in the townships pre-'94 or maybe even in the '90s, you will see that there were many successful black entrepreneurs who owned spaza

shops. At that time the person who actually started the business would take it and grow it, but when that person passes and the business needs to be passed over to the heir apparent, issues arise. This is the case given that the heir may not be qualified or skilled, and also does not focus on the best interest of the family.

This practice then leads to disputes in the family because, for example, the younger male siblings are reduced to be subservient to the heir apparent, the eldest male member, and they must serve him. Selfish interest or self-interest, as we know, is inherent in all human beings, and often results in family disputes where one feels they are serving the other. This has led to bigger challenges and other consequences involving poverty, where the family business fails due to poor leadership or lack of strategy and competitive strategies. This results in inequality, separate development in the family and diminished family ties because the younger siblings feel they do not need to invest in the family business, because either way, they will not inherit. As such, they seek out independence, leadership and dignity away from the family. This is a disservice to the family itself because the families will no longer be closer to each other, which is against the spirit of *ubuntu*.

In the '90s, spaza shops were doing well. Now they looked derelict and that is due to various issues, one of which, the main contributor, is the succession issue that is based on the male primogeniture of the eldest-born son who sometimes does not have interest in the shops and instead feels that the duty to continue the family legacy is imposed on the eldest-male born. Given what our country is going through economically with the issues of jobs, this is a disservice to the development of black communities. The Pakistanis and Somalians then seize these opportunities. When I go home, sometimes I drive by and I am so depressed when I see all of the shops that I knew the owners of, who saw me as a child of the community. Now I see the Pakistanis, I see the Somalians and of course this is detrimental to economic growth, especially local economic growth. As such, the customary law of succession needs to be amended in order to enable families to continue with the family-owned businesses and to take them to the next level.

I will now move to the psychological and social impact of the male primogeniture in the law of succession. The practice unfortunately divides the family. It encourages that insider-outsider principle and family members become enemies. This results in sibling feuds and some of the situations that I have seen and read from literature, highlight how sabotage becomes the order of the day in the family where the elders, who are aggrieved and feel betrayed by the family, sabotage the business to the detriment of the whole family.

In the customary law of succession, status is afforded based on the seniority of birth and age. Therefore, not only is inequality based on birth, it is actually based on the age where the younger siblings' voice is marginalised in conversations and where they are subdued or oppressed by the senior members. This is because only senior members have the power to make decisions that bind the whole family, thus not giving effect to the voice of all members of the family. Given that this is patriarchal and hierarchical, equality becomes impossible.

I will now move to the Bill of Rights. A violation of section 9 as well as section 10 is apparent. The dignity of the lower-ranked family members is infringed in that they are treated as sub or peripheral to the system and to the structure in the family. They are merely there to support, not necessarily to voice their dissent or a negation on their part. This is a disservice to nation-building and family-building. As such, I think the law of succession needs to be reviewed in this regard.

Some of these practices are defended with reasoning that may appear altruistic. However, I have a different view. African spirituality has to do with ancestors and the lineages were decided by ancestors, which will continue to happen and so many lower-ranked family members generally end up accepting this position and their subordination in their families. In addition, the lower-ranked family members really do not have a voice, which is why it makes sense for them to migrate and to become CEOs elsewhere, away from the families.

I will now turn to *ubuntu*. *Ubuntu* has various definitions and there is no consensus on its objective meaning. However, for the purposes of my discussion I will work with former Justice Yvonne Mokgoro's definition: *Ubuntu* is perceived as central to Africanness. It is a concept that is understood by Africans. It is regarded as a notion and belief born from African culture to express compassion, reciprocity, dignity, harmony, humanity in the interest of the community.

I have already noted that my focus is on the intestate because testate is a different issue altogether. The reason I mention *ubuntu* is that there is a very compelling paper written at the University of Free State around the hidden and oppressive practices of *ubuntu*. Even though the Constitutional Court held that discrimination on the grounds of gender is unconstitutional in the customary intestate law of succession, they found that *ubuntu* was discriminative. It is for this reason that I decided to enter *ubuntu* into the fray – because it is assumed that it is a fair process. Most of the time when we speak of *ubuntu*, we speak about it in a positive manner, but there are the hidden negatives. For example, the hidden oppression in *ubuntu* due to the hierarchical structures in the family. It is my view that Section 2 and

Section 5 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 needs to be reviewed.

6 Discussion

The first question related to Ms Tloubatla's presentation and was posed by Dr Diala as follows:

> "When you talked about customary law's failure to recognise these nuances involving the ability and capability, my question will be, what is your definition of this ability and capability when we speak of equality? If we begin to get people's ability, what do you mean by ability? I see you raise this point on the economic impact. We are talking about the ability and capability. Is it based on the economic aspect of it or is there any other meaning to this ability and capability? There are also issues relating to equality. Briefly explain what this ability and capability means in terms of equality."

Ms Tloubatla responded:

> "What I mean by ability and capability is that we know there are skills of leadership and there are also skills that you need to acquire – hard skills, like having your degree in marketing or having marketing skills, business management skills or accountancy skills. You find sometimes in the intestate law of succession that property devolves on someone who possesses none of these skills in order to take the family business forward. That is my meaning of abilities and capabilities."

Ms Tloubatla then posed the following question: "When we speak of the rights of women to equality, especially in the law of succession and in every other sphere of life, whether it is in the workplace, in any legislation, any sphere of government or sphere of business, there is a conflation of gender and sex, because the Commission of Gender Equality is perceiving gender as sex because sex is male and female, while gender, we know, relates to the LGBTIQ+.

> "I also want to understand what their view on gender fluidity would be. There are men who have transgendered into women, which now leaves a grey area. While we are still trying to advocate, fight and vindicate the rights of the marginalised women who are born that way by birth, there are now other women who also deserve to be protected under

the law and under section 9 of our Constitution. My view is that with these new nuances that are entering in the fray, how is the Commission for Gender Equality ("CGE") reconciling these two issues because it brings another dimension in my view."

Judge Ndita responded: "I think it need not be women or any particular definition, but just vulnerable groups, because when you talk about vulnerable groups, you include each and every person, including the gay and lesbian groups – those people who are vulnerable in society."

The response given by Ms Tloubatla was: "I think there are still grey areas, particularly because we had the CGE at the University of Pretoria for another conference. I still heard the same narrative, the same rationale being applied in those conversations, that sex is now conflated with gender. In my view we need to separate the two because they do not speak to the same thing. I think one person was speaking about a situation which involved a woman who was looking for a job, and they said they preferred a woman. However, they found that this man was in the process of changing into becoming a woman and he now used the assigned sex. That led to this man getting a job and a woman who was born that way by nature did not get that job. It is these nuances that are important because we are conflating the two issues.

"In response to Judge Ndita's answer, when she says vulnerable members, I can partially agree to that and then we can perhaps refer to the specific groups under vulnerable members, which will be black women, white women, LGBTI members etc. When you say women, it becomes a grey area because then the person will focus on gender while they actually mean sex."

Judge Ndita provided some final comments: "As we move forward as a nation, it seems to me that our steps are quick and yet our steps are very slow because we are not uplifting the rest of the women, and let me say for Lethabo's sake, the rest of the vulnerable groups. It is very important that women should be spoken to so that they can be conscientised to their own rights. I was hoping that perhaps from this discussion something will come up that will put in place a way of reaching out to those women who we have left on the sidelines.

"There really are no rights to equality and dignity if the people for whom they were designed are unable to access them. We can see that those who can access them are those who have and those who have not, do not know how to access them. I am hoping that this conference will then move forward towards reaching out and making sure that at the very least they know who they are, because the rights can only be effective if people are conscious of their own rights."

Dr Muneer shared his final thoughts: "With regard to my presentation and the issue concerning the Constitution and its application in inheritance challenges, traditional leadership and the family, it does not seem that the Constitution plays a very important role and has a very big impact upon the rights of these communities. If we look at the *Bhe* judgment, it shows the lived realities are quite different from the original reasoning behind the custom or the rule, for example, the rule of male primogeniture. I therefore believe there must be further discussions regarding these matters and these types of conferences are a move towards the right direction."

Ms Tloubatla provided her final remarks: "I share the same sentiments as Dr Muneer, that these debates or conversations are necessary for constitutional development and to give effect to the rights to section 9 and section 10 of our Constitution. When looking at the values of *ubuntu* which are encapsulated within our Constitution, they speak to fairness, inclusion, reciprocity and humaneness. I believe this discourse is necessary and I was glad and honoured to be part of it today."

Ms Lourens also added: "When looking at the recent case of *Mahlangu v Minister of Labour*[49]*,* where domestic workers now have to be brought into the protection of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, it is important for us to realise that the courts are successful in making these progressive transformative decisions, like Judge Ndita has noted. However, how do we then effect real change on the ground? I think this speaks to some of the questions and comments that also came from NGOs. What do we do now? How do we get this message to all excluded groups, not just to women, to say that these are their rights? We need to do much more in terms of activism and to have the implementation of these laws effected on the ground so that there is not this disjuncture between policies and implementation."

Dr Diala ended the discussion by saying: "I quite agree with you because I feel the work mostly relates to how we meet the people on the ground. Especially when we advocate for a bottom-up approach. How do we meet these people that are at the grassroots level? I gathered this from what all the panellists are saying. From Judge Ndita when she said that we need to raise consciousness, we need to educate women on equality and when she raised issues of how to reach the rural women. It also reiterates the final comments of Ms Tloubatla and Dr Muneer. I think all the three panellists have one thing to say: we need to educate people on the ground and raise awareness. I think the conference is a starting point for that."

[49] *Mahlangu v Minister of Labour* 2021 (1) BCLR 1 (CC).

Chapter 11: Final Remarks

The following sections provide a short summary on each of the breakaway sessions. A representative of each discussion group presented these summaries. Thereafter, Professor Madonsela provided some final remarks.

1 Gender equality and customary marriages

The discussion centred around the problems that are experienced with regard to registration of customary marriages and the fact that women find it very difficult to register. This is still the case even though the RCMA allows for a single spouse to register (i.e., you do not need both spouses to be present, as is the case in Kenya that was discussed). The issue is that women do not know how to go the Department of Home Affairs. They cannot go on their own. They feel unsafe. When they try to convince family members to accompany them, especially in instances where there is a contestation of a deceased estate, it often depends on whether family members are also beneficiaries in terms of the estate and that will determine if they will be accompanying the women. There are also questions related to lobola payments that are outstanding that could influence this.

In addition, the proof of customary marriages is also a big problem. It was said that in customary marriages, it is only the woman that has to be handed over, and for that reason, it is very easy for men to deny the existence of a customary marriage. This leads to numerous consequences in relation to the denial of access to property. An issue that stems from this lack of proper registration is that there is not an accurate assessment of how many customary marriages are concluded every year in this country.

Another issue that was raised relates to the age that we still allow children to get married, and there was a proposal that we abolish it and just have a prohibition on child marriage completely. Another matter was raised in relation to the fact that there is no real equality of spouses. Even though the Act states that the equality of both spouses should be recognised, it is still not practised in real customary settings.

There are also other practices such as *ukuzila*, which is a spousal mourning process, where the widow is expected to put on garments, sit on a mattress and mourn, but there is no such expectation for a widower to do the same. Even though this is just a practice, and is not recognised in law or not legislated as such, it is still a practice that is discriminatory.

We also heard from a speaker about the problem of same-sex couples' ability to marry if they are practising a custom because the Department of Home Affairs says they should be married in terms of the CUA. When they want to say that they have actually practised their custom and got married in terms of that custom, it is not recognised in terms of the law.

Finally, there were proposals for a custom-based approach to culture and that we should recognise that there are differences between culture and the customs and that perhaps the Green Paper published by the Department of Home Affairs and the South African Law Reform Commission's proposals for a new single marriage statute can be seen as an opportunity to start with a clean slate and completely transform our marriage laws in this country. However, there are a number of problematic aspects, specifically with regard to substantive equality being reached.

A question that arose from this discussion was related to the fact that African customary marriages allow men to remarry, while the same is not true for women. The question is then how this inequality can be transformed to align with the Constitution? Essentially the question related to whether the choices made in the RCMA allow substantive equality between men and women. Why are we allowing men to remarry or to marry more than one wife while the same is not true for women – women cannot have more than one husband.

Professor Madonsela noted that the first draft submitted to the state law adviser allowed women to also have multiple husbands if they so choose. Unfortunately, the state law adviser disagreed. The provision at the time also recognised the mujaji who has multiple wives and it is quite a complex situation because she is a woman, but she marries other women. It was then held that this is not a proper marriage.

Mandi Mudarikwa from the Women's Legal Centre also responded and drew attention to Section 6 of the RCMA that talks about equality of spouses in customary marriages. Within that framework it would allow whatever benefits that are given to the male spouse to also be given to the female spouse. However, there is ambivalence in how rights are being granted in the Act, which was alluded to in the plenary discussions. She held further that within the framework of section 6, the point made about the differences of rights given to certain people, would really be the answer in her opinion. It should be possible for both men and women to be able to marry more spouses if they wanted. The limitation really comes from how people are interpreting patriarchal roles and patriarchal values that still continue to exist within some of the ways in which customary laws are practised.

Professor Madonsela also prompted Mshai to briefly talk about Kenya given that there was a proposal in South Africa that women be allowed to have multiple husbands if they so choose.

Mshai commented that this issue came up in Kenya. There are actually communities where this has been practised in the past and the Constitution allows for polyandry. As such, it has been something that people have had conversations on, and I think that there have been one or two cases on this.

2 Impact-conscious lawmaking

This discussion focused on impact-conscious law making and asked the question: Can social justice assessment instruments make a difference? Our keynote address started by asking if customary law has a place in our modern constitutional democracy? We looked at whether policies do not have unintended consequences and increase inequality and poverty in our society, but rather reduce that. This is in line with the project that we are working on which has introduced an impact assessment matrix to assess the impact of policy and its consequence on various groups. The social justice in this case will equal substantive equality. Our keynote speaker said that transforming customary law is important so that everybody is recognised in our society. As noted in the previous discussion, people within customary marriages feel unrecognised. This is our point of departure when we are checking for impact.

We had a very diverse group of people –an engineer, a data scientist, a water specialist and a law professor. Our engineer spoke from the point of view of technology. When technology is introduced in an industry, for example, if a company wants to introduce a certain technology, they make decisions based on what they want to achieve, not on what the technology may do or the unintended consequence of that technology. They do not look at, for example, the training required and how it is going to impact people differently because it is not a one-size-fits-all. Additionally, they do not look at the organisation itself, the viability of this technology within the organisation, the employees, their satisfaction and how they are impacted by the technology and by the work that they are doing. The discussion then moved to the need to embrace the humanity of everyone. Whether you are in industry or in government, when you make a decision, you need to embrace the humanity of everyone. That is where *ubuntu* comes in.

As such, this instrument we are developing seeks to educate at policy level. It will be in parliament as well as at an educational and academic level. We want to see it in schools so that everybody starts having this conversation about policymaking, about the impact of policy

and how that works to bring about an equal society. Those conversations will be important to inform where we are going, where we want to be and to ensure that we do not just have a one-size-fits-all approach.

We also looked at the role of data in this, specifically predictive data. This is important given that it can be used for good or bad. It has its advantages and disadvantages because while data will help us make more informed policies, it may also be biased, especially when historical data is used. That is why in our project we are collecting data in real time – disaggregated data at a ward level. We are starting with one municipality where we collect data to test the impact of policy. In particular, we are using COVID-19 as a real-time everything. We have all become epidemiologists. We are all doctors. We have so much knowledge that we are all vaccine specialists. That is the amount of information we are bombarded with on a daily basis on our social media or news, everywhere we go. There is nowhere where we are not talking about COVID-19. There are so many regulations. We have the "family meetings" to talk about the regulations and we also talk about the impact of each regulation. That is why we do not want government to have regulation only to realise the impact of it later after children have missed school, for example, because of online learning or when the informal sector traders have lost business because of lockdown regulations. This is what we are trying to do. We are trying to ensure that government first tests the efficacy of policy in a virtual space before they can see if it will work in real life so that they do not cause undue harm to the people they seek to protect.

Overall, it was an interesting conversation about the dangers of using data and data analytics in that you still have to teach the machine how to think, and you teach it by feeding it the data you want it to use as a basis for predicting what will happen in the future. That data can be outdated, and that data can be biased, which means the use of algorithms to predict the future could exacerbate inequality. I think our colleagues from the data science, Professor Rajarantam answered the question, yes, we must use data analytics, but we have to be careful about the data.

3 Human rights dimensions of ukuthwala and other girls' rights issues, including finding spaces to move the needle on GBV and other gender challenges in traditional communities

We had some incredibly profound levels of insight from Adv Maluleke, who is the director-general ("DG") of the Department of Women, Children and People with Disability, as well as some really brilliant insights from the academics, the women in the space who are doing really important research in both the qualitative and quantitative sense. Of course, many dimensions are involved in defining exactly what *ukuthwala* is and where it emanates from. A number of the speakers pointed out that this practice is not a modern phenomenon. It is something that was situated in certain practices numerous years ago. However, there are misunderstandings about what it means and fundamentally, the abuses that are wrought on young woman through this, as well as misunderstandings and the abuses related to lobola.

The pivotal issue which came through as a common theme was that social inequality and poverty make young women much more vulnerable to forced marriage and rape, particularly at young ages where they are legally unable to consent to things like marriage, sex and forced sexual intercourse. One of the most profound points was that a number of the groundbreaking steps taken were really about giving voices – not only to the young women who are experiencing this now, but to the older women who had experienced it as children and carried a lot of the embedded trauma with them about what had actually happened. It is thus important to approach these issues not only from a policy level where government implements policy to protect women and girls, but also on a social empathetic level where those older women who carry the trauma with them are systemically assisted and given a voice.

There needs to be a dialogue or conversation with communities about these practices, which very often are seen by the families that consent to them as being intrinsic to survival of the girl child and to survival of the girl child's family. This is also linked to the HIV/AIDS statistics relating to teenage girls with HIV infection as a consequence of unprotected sex being massively high. This speaks to what the DG spoke about, the so-called "blesser" phenomenon where young women are involved in relationships with much older men as a mechanism of social and economic survival, often with the consent and knowledge of their family in order for the family to survive. Certainly, in terms of some of the reporting that I have done, we have had scenarios where young women embark on these relationships

because, for instance, they cannot afford sanitary towels. As such, this is a pivotal issue for their economic survival.

There are also knock-on effects related to issues such as *ukuthwala* and the abuse of young women which are well documented. For example, the report of 23 000 young girls in Johannesburg who are pregnant, some as young as 10. These practices are extremely limiting on the lives of young children as they are taken out of school so that they can be wives or fall pregnant at a very young age and are removed from an educational opportunity. They are thus not likely to get out of that poverty that is so damaging to black women. The face of poverty in South Africa is black and female. That is one of the pivotal drivers behind why women or young girls find themselves forced into abusive or sexually exploitative, I do not even want to use the term relationships, but situations, because they need to survive. They can then not get out because what kind of future do they have outside of these scenarios? How will they survive? How will they get food? How will their family survive?

It is about approaching it with an understanding that education should be a pivotal factor for young women to enable them to have a sustainable and an economically beneficial life for themselves and to ensure that sexually exploitative relationships are not the only mechanism that exists for them. It is also of crucial importance for women to be able to tell their stories, deal with their trauma, and get buy-in from the communities themselves in which these practices happen, that this is not a positive and societally beneficial practice that takes place.

I really appreciated the fact that the research conducted was very broad in that it gave the statistics, the general patterns where this occurs as well as the specific areas where it is prevalent. More importantly, the researchers themselves – who are all women, who are all looking at this practice and trying to understand why it is still prevalent in a constitutional democracy which seemingly prefaces the constitutional rights of all people to bodily integrity, education, etc. – all had such a deeply empathetic approach.

One of the stories that was brought up was an older woman talking about how she had been raped with her husband's family standing outside and listening. This is indicative of ownership and the normalisation of women not belonging to themselves – not being seen as having agency. In particular, women in economically vulnerable positions are seen as pawns that are moved around according to the wishes of their families or the men who embark on these abusive relationships.

In conclusion, yes, it is a story of social inequality. It is a story about denial of opportunity. But, fundamentally it is also a story of how we start shifting the attitudes of certain groupings

within society that this is normal, that this is okay and start prefacing women as having agency and an ability of their own to make choices and pursue their own futures and education in a way that is supportive and ultimately beneficial to the entire society and its economic survival.

A question was then posed in relation to the tendency for researchers to only understand particular cultures. The question related to whether white women are going to research the same kind of GBV issues that affect South Africa amongst the white population? The idea behind the question is that it would assist in developing programmes to know the magnitude of this issue.

Ms Maughan responded by saying:

"I spent a huge amount of time in my formative years at the Cape High Court documenting intimate femicide and I have done a lot, for example, on the Susan Rohde case which is in the Supreme Court of Appeal where the accused in that case is a very wealthy white man who has attempted to claim the defence that his wife killed herself. I see in privileged echelons of society replications of the same levels of denials that occur in a lot of others. For example, with typical intimate femicide cases, men, and this is across the board, will typically say they cannot remember what they did. They just lost their temper, the next minute they are standing over this woman and she is covered in blood and dead and they just lost their emotion. That is a typical stance that is adopted in many of these intimate femicide cases where men refuse to take accountability. I have seen especially in rape matters as well, that there is a refusal to take responsibility for the fact that you have exerted yourself upon the autonomy of a woman, whether that woman is in a privileged space in society or whether she is very poor. However, I do see a very fundamental problematic, discursive problem in terms of a prefacing. The trauma of, for instance, privileged women is given far greater airtime and airplay than marginalised black women.

I think that in that sense voices are important, and it is pivotal that women need to be given the spaces to articulate these stories. But I think the criticism is correct. We have huge rates of intimate femicide in this country, we have huge rates of rape. Those exist across all echelons of society. As a child who survived sexual violence, I certainly am aware that this is not something that just occurs within specific communities. It is something that is endemic, and it is spread across all race groups and all levels of society. It is very, very

damaging. That is why we need to talk about it openly, honestly, and put the voices of victims forward so that this can be dealt with."

4 Equality and succession, inheritance challenges in traditional leadership and the family

Judge Ndita spoke of the rights of women, her own experience and how she has seen the legal protection of women's rights evolve throughout the years. She spoke of the milestone in *Bhe* which opened the door to the vindication of the right to equality in the customary law of succession. She spoke about some of the disadvantages where women are forcibly removed from their lands because of the lack of a male voice. She also spoke about the patriarchal practices that still persist, even today.

The CGE then highlighted some of the undertakings that they are leading. They spoke about the situation involving the Ingonyama Trust where women are not allowed to own land without the voice of a man. This clearly speaks to the concerns raised by Judge Ndita of women needing a male voice in owning their own land.

The next speaker dealt with an analysis of the impact of the South African Constitution on the recognition of Islamic marriages for the purposes of intestate succession law. To illustrate their plea, the speaker spoke of the timeline, which spans over 300 years with over 750 000 Muslim people seeking and pleading for the recognition. He also spoke about the possibilities for change under section 15(3) of the Constitution. He focused on the right to freedom of testation according to the Islamic laws which can also be used as a way to avoid disadvantaging women and giving effect to their rights. For example, he spoke about gifting during marriage and how this could be challenged in the constitutional democracy based on other constitutional principles.

We then moved to the cultural influences and practices of inequality in the customary law of succession and inheritance in South Africa. While *Bhe* is the milestone, the male primogeniture rule continues in the practice of African family structures where seniority is based on the hierarchical structures in the family which are also patriarchal, and where the male elder of the family stands to be the one who will inherit the family property. This resistance or lack of deviation of the male primogeniture has led to family businesses in the rural communities failing. The Somalians and the Pakistanis have adopted and perfected the business model of rural township spaza shops and supermarkets. This development has led to

some families, in order to have some income, resorting to renting out the shops in order to sustain themselves.

The lack of deviation of the male primogeniture in the customary intestate law of succession has also led to bigger challenges of poverty, inequality, separate development and diminished family ties. For example, younger siblings who do not stand to inherit, migrate and develop skills to achieve some independence and sense of leadership and dignity away from the from the family. Furthermore, it has led to the insider-outsider principles where family members become oppositions to one another, resulting in sibling feuding and sabotage as a way of rebelling against the inequality. Reform requires that Section 2 and Section 5 of the Reform of Customary Law of Succession and Regulation of Related Matters Act be relooked.

Based on the debates after the presentation, the conclusion was that there should not be this juncture between policy and advocacy. Furthermore, more awareness is needed on the negative practices which infringe on equality, and sessions of this nature need to be increased to achieve a change in policy.

5 Final concluding remarks

Professor Madonsela concluded the session by highlighting Nancy Fraser's key anchors of social justice, the first being recognition, which means I see you, I understand, and I appreciate you. The second one being representation, being given voice in decision-making. Thirdly, restitution. This is one group, those affected by customary law, which find themselves particularly excluded when it comes to recognition, representation and restitution.

She ended by saying:

> "Today, we have heard people accepting that transformative constitutionalism is an injunction of the South African Constitution and the Kenyan Constitution and that a component of this injunction, to use the Constitution to transform relations in society, systems in society, processes in society and culture in society, is social justice, which at the Social Justice Chair we regard as crucial. In a more robust sense, we regard it as in accordance with Justice Moseneke's understanding where he equated it to substantive equality, which is embracing the humanity of everyone and ensuring equal enjoyment of all rights and freedoms by everyone. This would be reflected in a just, equitable and fair distribution of all opportunities, resources, privileges, benefits, and constraints or burdens in a society and between societies. That is our understanding of social justice, and we

believe that it is an injunction from the Constitution. This has been confirmed by *inter alia* the Makwanyane and Van Heerden cases.

We heard that this constitutional injunction is the same for South Africa and Kenya because of the similarities of the constitutions. We heard that South Africa and Kenya courts have been at the forefront of advancing social justice, particularly gender justice in customary law. Many cases were cited both from Kenya and South Africa. In South Africa, cases such as *Bhe*, *Moseneke* and *Shilubana* were mentioned, to name a few."

These cases have touched on areas such as family law, succession, land, children's rights, and GBV. We also heard that their success has been limited and constrained primarily by the fact that the paradigm tends to be colonial. There is still a default paradigm of viewing customary law as a suspect system coming from those colonial clauses that viewed customary law as a repugnant legal system or a legal system with these repugnant provisions. This has been seen in how, for example, the courts, as we heard from Adv Ngcukaitobi, have dealt with land rights, concluding that under customary law there is no ownership. In my presentation I also indicated that this has also explained why instead of developing customary law in some of those cases, such as *Moseneke*, we simply superimposed common law with unjust consequences.

There was also a major concern that transformative constitutionalism has not dealt with cultural practices that, despite changes in the law, remain and render women as subhuman beings, in terms of GBV, marriage, widowhood and many other cultural practices. However, it was noted that things are changing, both in Kenya and South Africa. The South African landmark case that was cited for us was the Ingonyama Trust case where the Constitutional Court deviated or broke away from the treatment of customary law as repugnant as well as the tendency to fossilise customary law, to homogenise customary law and to distort customary law. In this particular case a decision was made that customary law does not allow a traditional leader to superimpose himself or herself as a trustee, make the residents tenants and charge them accordingly. This was upheld as a landmark case that is indicative of the fact that customary law is dynamic, and it need not be fossilised. It also highlights that it is a system that is anchored in communality, in the interconnectedness of humanity and ensuring that everyone is looked after.

We proceeded to go into the breakaway groups where the discussions focused on four key areas. The first group discussed issues such as *ukuthwala* and GBV. The second discussed gender equality in marriage and other areas. The third looked at impact-conscious policymaking, and the final group dealt with challenges in addressing *ukuthwala* and GBV. One of these groups came back with the understanding that we have made progress in advancing equality and human rights under customary law through using transformative constitutionalism, but that gaps still remain. The conclusion was that we need to consider restating customary law and that the conversation around how we restate customary law, particularly in areas such as marriage where a lot of people are stuck in a situation where they do not know whether they are married or not, and similar questions are arising when it comes to land rights and succession.

The conclusion is that the conversation should proceed and hopefully we could have 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 that understands and accepts diversity. In so doing, issues such as, for example, gay marriages under customary law could also be incorporated because currently, this is one of the fault lines in terms of how the RCMA is interpreted.

Overall, this reading room will continuously look at how we can ensure that people living under customary law do not have an effort that is more difficult than the rest of us. In addition, if they want to be governed by customary law, the system should not force them out of being governed under customary law. They must be given the same rights, the same recognition, the same opportunities and the same privileges as everyone else. Furthermore, common law and customary law must be treated as laws that both need transformative constitutionalism without one of them being regarded as delinquent or repugnant.

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