THE JUDICIAL DEVELOPMENT OF AFRICAN CUSTOMARY LAW AS PER SECTION 39 (2) OF THE CONSTITUTION OF SOUTH AFRICA: AN EXAMINATION OF SELECTED CASE LAW

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Submitted in fulfilment of the requirements for the degree

MASTER OF LAWS

School of Law,

Howard College

DECEMBER 2018

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ACKNOWLEDGEMENTS

To my supervisor Mr Norman Mpya, may God richly bless you for your efforts and sacrifices to ensure that I cross the finish line. My deepest grattitude goes to Devina Perumal, for your hardwork, guidance and counsel.

I am extremely indebted to the mentorship of Prof DD Ndima, Prof BO Fagbayibo, Prof N Ntlama, Prof Emmanuel Mgqwashu and Prof David Mcquoid-Mason and Mr L Mofokeng. All your rich insights have brought me to this point.

To my grandmothers oMakhumalo bami, I thank you for your prayers that have carried me, my aunt (deputy mom) Bongiwe Magubane and umalme Mbongeni Mkhize, it would have been impossible to soar to such heights without your love, support and belief in me, even when my dreams didn't make sense.

It gives me immense pleasure to acknowledge that I did not get here by myself, the following people walked with me: Asante Chiliza, Nomusa Zungu, Nkule Khalishwayo, Zwakele Mbanjwa, Samukelisiwe Lembede, Nqobile Dlamini, Fezile Nene, Ayanda Mthembu, Slindokuhle Mpisane, Kershan Pancham, Moeletsi Moletsane, Mmatsie Mooki and Kedibone Chembe. I appreciate the friendship, unwaverring support, but most importantly, may God bless you for always vetting my ideas.

DEDICATIONS

I dedicate this dissertation to my late parents. To my mother Nomusa Teressa Nxumalo, for the long hours that you stood on your feet mommy, working as a registered nurse at Prince Mshiyeni Memorial Hospital. *Uyohlale uyiNdlovukazi yami, mawami*!!!To my father Elegius Mandla Nxumalo, for the bullets you took for me as an inspector of the South African Police Services, all so that I could be afforded opportunities that were not at your disposal. May your souls continue to rest in perfect peace.

Contents

Chapter One

1.1 Introduction and background information

Prior to the Constitutional dispensation, African customary law (ACL) was in a confused state. Its official version remained impenetrable, but when dissected, revealed the traditions and culture of African people[1] existing alongside manipulated ACL rules.[2] The former is a true representation of the lived realities of the agrarian African society, while the latter was the law of the state that was legislated to regulate the lives of African people. Thus, the introduction of the Constitution[3] fostered the severance of living ACL from its official version.

The new constitutional values and standards triggered the re-organisation of the South African judicial system. Courts were cautioned to take into consideration ACL's pre-democratic background that was influenced by the political climate of the time, which also extended to the judiciary.[4] As such, all judicial attitudes[5] and procedures which were inherited from previous regimes that contradicted a pluralistic legal society, were stripped off. In light of this expansion within the South African legal system, consistency became a fundamental concern. However, the '1996 Constitution' that serves a universal standard, responds by testing all laws for legitimacy. [6]

Furthermore, the judiciary gained protection from the principles of constitutionalism, particularly the doctrine of 'separation of powers' and the 'independence of the judiciary'. As a result, the Constitutional Court (CC) gained inclusion in the structure of South African courts, while the former Appellate Division received a facelift to mirror Section 166[7], as the Supreme Court of Appeal (SCA). The jurisdiction of the CC included deciding on "matters of general public importance in addition to constitutional matters, making it the highest court in all matters."[8] The

[1] Department of Justice 'SCA History' 1 November 2018 http://www.justice.gov.za/sca/historysca.htm (Accessed 5 November 2018).
[2] CWT Rammutla 'The Official Version Of Customary Law Vis-À-Vis the Living Hananwa Family Law' 2013 http://uir.unisa.ac.za/bitstream/handle/10500/10614/thesis_rammutla_cwt.pdf?sequence=1&isAllowed=y (Accessed 16 October 2018).
[3] The Constitution of the Republic of South Africa, Act 108 of 1996 (1996 Constitution).
[4] *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC), 51.
[5] This refers to judicial behaviour towards the treatment of ACL, as a system which was previously not recognised.
[6] Note 1 above, 2.
[7] The '1996 Constitution'.
[8] Note 1 above, 1.

determinations made by this Court have a blanket effect on all inferior courts. Thus, the CC continues to have the most important task of unraveling official ACL in order to redress its discriminatory impact.

The most significant provision in the Constitution is Section 39(2) of the Constitution of the Republic of Africa, 1996 which provides that "when interpreting legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[9]

The extract above illustrates a pivotal moment for judicial development in the recognition of ACL as entrenched in the Constitution. This is because the Constitution introduces values that underpin the South African legal system which was absent during the pre-constitutional law era.[10] Thus, this judicial development was necessary to ensure that ACL is consonant with human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, the supremacy of the Constitution and the rule of law.[11]

It is against this background that ACL is currently recognised by the Constitution, as a fully-fledged component of the amalgam of South African law, based on its own values and norms.[12] Furthermore, the Constitution protects the right to culture and the right to participate in cultural activities.[13] The vision of the Constitution is that the courts should reflect on all these features as they develop ACL, to ensure that in its recognised form, ACL embraces the principles of the democratic dispensation.[14]

However, the South African courts have not always conducted their mandate in a satisfactory manner. Rather, they have compromised the development of ACL's patriarchal features, including the rule of male primogeniture. Disappointingly, until recently, maleness has been upheld as a

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[9] The '1996 Constitution'.

[10] Section 1 of the '1996 Constitution' reads in part:

The Republic of South Africa is one, sovereign, democratic, state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) …

[11] Ibid.

[12] *Alexkor* (note 4 above) 51.

[13] Section 30 and 31 of the '1996 Constitution'.

[14] DD Ndima 'Re-imagining and Re-interpreting African Jurisprudence in the South African Constitution' 2013 http://uir.unisa.ac,za/handle/10500/13854 (Accessed 30 October 2017).

sufficient criterion for appointing beneficiaries for a deceased estate.[15] Meanwhile, women, junior males, children, and illegitimate children were prejudiced through no fault of their own. This disillusionment has been shared even by scholars such as Ntlama,[16] Ndima,[17] Nhlapo,[18] and Ndulo[19], in a series of contributions which suggest that more judicial adherence to constitutional demands can and should produce better results.

Section 39 (2) provides for the interpretation of legislation and the development of ACL and common law. However, this study focuses solely on the development of ACL under the Constitution, leaving the common law discussion aside. This subject gained interest following its historic recognition. It is this first time experience that saw ACL couched in an authoritative instrument and treated on the same level as the common law. Such efforts indicated its new status within the South African legal system. In addition, the courts were enjoined in imperative terms, not only to apply ACL when it was applicable[20] but also to develop.[21] This engenders the imperative to "promote the spirit, purport and objects of the Bill of Rights."

[15] *Mthembu v Letsela and Another* 1997 (2) SA 936 (T); *Mthembu v Letsela and Another* 1998 (2) SA 675 (T); *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA); *Nwamitwa v Philia and Others* 2005 (3) SA 536 (T) and *Shilubana and Others v Nwamitwa* 2007 (2) SA 432 (SCA).

[16] N Ntlama '"Equality" Misplaced in The Development of The Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)' *STELL LR 2009* (2) 333-356.

[17] Ndima (note 14 above) 177.

[18] T Nhlapo 'Customary law in post-apartheid South Africa: The vexed question of Cultural diversity, Women's rights, living law, and appropriate law reform' (2014) www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Nhlapo.pdf (Accessed 30 October 2017).

[19] M Ndulo 'African customary law, customs, and women's rights' 2011 Scholarship.law.cornell.edu › FACSCH › FACPUB › 187 (Accessed 28 October 2017).

[20] Section 211 (3) of the '1996 Constitution'.

[21] The '1996 Constitution'.

1.2 Research problem

Currently, the judicial reform of ACL has become an exercise of assimilation through the transplanting of foreign norms and values under the guise of development.[22] Historically, South African courts did not have a constitutional mandate to develop ACL. Rather, the courts were simply mandated to interpret colonial and Apartheid law. The new constitutional democracy guaranteed full rights-of-membership to ACL, being interpretation, application and development in line with the Constitution. Consequently, s 39 (2) guides the achievement of this development in the democratic South Africa.[23] While trying to relieve the plight of women, the Constitutional Court has failed to work out a formula for development as demonstrated in the *Bhe* case.[24] Indeed, in the *Bhe* case, the Court avoided developing the male primogeniture rule altogether.[25] Conversely, where the Court did engage with development in *Shilubana*, it failed to give two equally recognised rights (s 9 and s 30 and 31), the same treatment. The Court cemented the equal position of women in traditional leadership, and in the same spirit, it failed to define the future of succession with certainty.[26]

1.3 Research questions

1) In what ways do South African courts develop African customary law?

a) What is the attitude of South African courts towards the ascertaining of living African customary law?

[22] Ndulo (note 19 above) 91.
[23] The '1996 Constitution'.
[24] *Bhe and others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004), 111.
[25] Ibid 111.
[26] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (4 June 2008), 90.

1.4 Research aims and objectives

The aim of this study is to examine the progress of South African courts with regards to their duty to develop ACL. This assessment is based on selected case law with the intention of exposing existing gaps in judicial interpretation and development. Furthermore, it examines the viability of the flexible approach[27] as an effective judicial interpretation tool. As such, ACL development must be achieved without assimilating it to Western norms or contravening the Constitution.[28]

1.5 Methodology

This is a qualitative study which focuses on the development of ACL in line with the spirit, purport and objectives of the Bill of Rights.[29] The achievement of a meaningful and well-informed contribution requires observing and engaging with as many scholarly writings as possible. Thus, this literature review includes the discussion of cases, statutes, constitutional provisions, and journal articles with the hope of unveiling the significance of the flexible approach to ACL development.

[27] The flexible approach is a 3 part strategy that will assist in judicial interpretation and development. It requires that courts first, assess the proposed development for any constitutional contraventions. Secondly, the court is required to deconstruct the policy or custom to reveal the value/principle which is an integral part of the lives of people which needs to be kept intact. Thirdly, the court will be required to conduct a cultural feasibility study of the proposed development, to ascertain whether it will fit into the lived realities of the community concerned. R Bowen 'Explaining the different types of Feasibility Studies' 30 April 2013 www.brighthubpm.com/project-planning/56372-types-of-feasibility-studies/ (Accessed 18 November 2018).

[28] Western norms refer to a European model of principles and standards which guide the way in which individuals and societies lead their lives. S Hall 'The West and the Rest: Discourse and Power' 1992 https://analepsis.files.wordpress.com/2013/08/hall-west-the-rest.pdf (Accessed 5 November 2018).

[29] The '1996 Constitution'.

1.6 Literature Review

Maluleke[30] and Ndulo[31] establish that there is a relationship between customs, practices and norms and gender equality. The Constitution prioritises the interpretation, application, and development of ACL. Moreover, constitutional limits dictate the scope of the achievement of development. However, Ntlama[32] and Ndima[33] argue that such interpretation, application, and development needs to occur according to its own terms.[34] These ideals forbid the imposition of foreign (Western colonial) values and norms or assimilation simply to seek reform. Essentially, judicial interpretation should be aimed at restoring cultural meaning in ACL norms and practices. Ndulo adds that ACL fundamentally impacts matters of inheritance and succession to a position of leadership, thus, the courts should play a key role in reforming problematic aspects of ACL through development.[35] Nhlapo reiterates the courts' significance in post-apartheid South Africa, where the constitutional recognition of ACL has led to an influx in the courts with regards to ACL matters.[36]

Post the ACL recognition, its conflict with human rights has become clear.[37] The conflict emerges because for the first time, ACL is recognised as a valid legal system, equal to the Western legal system. This resulted from the fact that the Constitution acknowledges the rights to cultural practices, as well as the rights to equality and human dignity respectively.[38] Therefore, there is no hierarchy of rights. Yet, in instances where ACL matters are brought before the courts on the grounds of inequality under, the judiciary (Constitutional Court or High Courts) has responded by religiously deciding in favour of human rights protection, at the total sacrifice of ACL.[39]

[30] MJ Maluleke 'Culture, Tradition, Custom, Law and Gender Equality' *PER/PELJ* (2012) 15 (1).
[31] Ndulo (note 19 above) 89.
[32] Ntlama (note 18 above) 342.
[33] DD Ndima 'The Resurrection of the Indigenous Values System in Post-Apartheid African Law: South Africa's Constitutional And Legislative Framework Revisited' *SAPL* (2014) 29 (2), 310.
[34] *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013), 24.
[35] Ndulo (note 19 above) 102.
[36] Nhlapo (note 18 above) 1.
[37] Ndulo (note 19 above) 102.
[38] Ibid 102.
[39] Ndulo (note 19 above) 102.

ACL privileges men and suppresses women. This is despite the fact that throughout history, women such as Queen Modjadji have led matrilineal societies.[40] However, this matriarchal nature of the African people has been limited. In light of the above, the predominantly patriarchal agrarian African society influenced the African belief system about gender roles. This is in contrast to the Constitution that provides for the right to equality along the lines of liberal constitutionalism. As such, jurisprudential evidence and case law reveal the absence of equality under the most contentious subjects in ACL such as marriages, inheritance, and succession.[41] The court's response to these equality claims brought before it has been the perception that the liberal interpretative adjudicating is eroding ACL. This approach is detrimental to the identity of African people as it assimilates African customs to look like Western customs. The erosion of identity takes place when judges continually invalidate customs, which also invalidates culture. This is not only true to the position of ACL, but also of Islam and Hindu as well.

Undoubtedly, constitutional norms place the duty to develop ACL on South African courts. This can either take the form of modifying existing policy, custom or rule, or the courts can create a new one altogether.[42] Thus, the reformation of ACL under the Constitution must be proportional. This reinforces the idea that it is not sustainable to completely favour either the African legal system or the Western legal system, at the total demise of the other. Hence, the Constitution compels the seeking of middle ground by equally recognising two opposing rights. Sibanda suggests that the mandate of South African courts includes balancing the complexity of such rights.[43] Thankfully, one of the merits of living ACL includes its ability to be brought into compliance with the Constitution.[44] Thus, moving forward, the dilemma of two equally recognised competing rights must be approached with care. Ndima insists that since the Constitution has

[40] 'Modjadji, The Rain Queen' 10 March 2011 http://rainqueensofafrica.com/2011/03/modjadji-the-rain-queen/ (Accessed 7 November 2018).
[41] The cases of *Bhe* and *Shilubana* were both brought before the courts on the basis of gender inequality arising from the operation of the patriarchal rule of primogeniture.
[42] W Lehnert 'The Role of the Courts in the Conflict between African Customary Law and Human Rights' *SAJHR* (2005) 21, 252.
[43] S Sibanda 'When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation' *Human Rights Brief* (2010) 17 (3) 6.
[44] Living law refers to ACL according to the lived experiences of its people. According to Lehnert, courts should utilise living law as a point of departure for development, not as a tool to radically transform ACL into something that it is not. Lehnert (note 42 above) 253.

envisioned this position, efforts made must ensure that both rights are equally advanced by South African courts.[45]

The courts are tasked with application and development of the law, meaning that they are positioned at the centre of all legal activities in their capacity as interpreters of the law. [46] Most importantly, courtrooms are seen as the most legitimate dispute resolution platform in society. Since the development mandate for courts is still a new one, the variation in their decisions indicates that there is a need to formulate a standardised approach for judicial interpretation and development. This approach must be uniquely suited to ACL and also remain coherent with the Bill of Rights.[47] Thus, living ACL was identified as a viable medium for development since it is in accordance with to the lived experiences of its people.[48] Arguably, living ACL is not without its faults. The challenge is that the living version is difficult to ascertain primarily because of its dynamism from community to community. Further challenges include the fact that development according to the living version has to be conducted on a case by case basis and not holistically.[49] The abovementioned contestation can be resolved by utilizing the flexible approach to give effect to the constitutional mandate of developing ACL.

Through the adoption of the flexible approach, this work proposes that developments made by the court need to pass a cultural feasibility test.[50] In this context, a cultural feasibility study is extended to allow the community to participate in the development of their own law, and the court plays a supportive role.[51] Lehnert suggests that an introspective exercise is the answer towards the ascertainment of living ACL which is practiced by its people.[52] In line with his thinking, the test must be done on the community which the development is meant for.[53] Moreover, this flexibility and dynamism found in the nature of ACL is not new to courts, as showed in the case of

[45] DD Ndima 'The Resurrection of the Indigenous Values System in Post-Apartheid African Law: South Africa's Constitutional and Legislative Framework Revisited' *Southern African Public Law* (2014) 29 (2).
[46] Section 165 of the '1996 Constitution'.
[47] The '1996 Constitution'.
[48] *Shilubana* (note 26 above) 74.
[49] Lehnert (note 42 above) 251.
[50] Ndulo (note 19 above) 102.
[51] Lehnert (note 42 above) 251.
[52] Ibid 251.
[53] The courts when conducting such a test will also have to be guided by the principle of legal certainty. The pursuit of development through flexibility should be balanced against the protection of constitutional rights and vested rights must also be respected. Furthermore, courts must consider the tradition of that particular community as well as the community's right to develop their own law. *Mayelane* (note 34 above) 45.

Shilubana.[54] According to the cultural feasibility test, the developed rule, norm or policy must be accepted for practical usage by the community concerned and it must have the intended impact on the culture. Lehnert discusses the likelihood of affected communities to accept a rule, policy or norm that is developed, rather than a new rule, policy or norm altogether.[55] This means that there must be traces of African values and norms within the development. Once the affected community cannot identify with the court's development, then it runs the risk of rejection. Thus, it is not workable for courts when developing ACL to throw out the baby with the bath water, in the name of redressing inequality. As such, the imposition of foreign norms and values will not serve South African courts in their duty to develop ACL.[56] However, courts would benefit from this cultural feasibility test so as to counter resistance when it comes to ACL development.

The value of the Constitution is to cultivate equality, inclusiveness, and respect for all peoples and their legal regime without any subordination to other indigenous legal regimes. It would be unfair to say that the judiciary has not promoted culture, as some cultural practices continue to exist with no claim and challenge. To date, the great responsibility resting on South African courts is equally complex. As such, they must be commended for their relentless efforts towards the achievement of equality and the advancement of African women. Moving forward, the task only promises to get tougher. It is the critical approach with which courts have confronted the claim to equality that is the subject of this challenge. Thus, the judicial approach to development must evolve to meet the needs of those people who are not in favour of the erosion of African values. As previously alluded, development must be done according to its own terms and without assimilating ACL to Western norms.

The marginalisation of ACL as a system regulating personal relationships has contributed immensely to this current issue. It is also worth noting that African women are the ones bringing the equality challenge before the courts, as they are not content with the manner in which ACL deals with them. This work aims to provide an alternative approach for judicial interpretation so that both belief systems are accommodated without one having to assimilate to the other, and most importantly without contravening human rights.

[54] *Shilubana* (note 26 above) 66.
[55] Lehnert (note 42 above) 225.
[56] *Alexkor* (note 4 above) 51.

1.7 Conclusion

The pre-constitutional position of ACL reflects blatant marginalisation. Official ACL is largely patriarchal in composition, having endured manipulation during the process of legislation. The introduction of the Constitution birthed a new vision which recognised ACL as a valid legal system. Thus, under the constitution, South African courts are mandated to separate the living version of the law from its distorted version in order to align it with constitutional values and norms. Furthermore, the duty of the courts extended to interpreting and developing living ACL according to its own values and norms. The next chapter will discuss the significance of the recognition of ACL.

Chapter 2

THE RECOGNITION OF AFRICAN CUSTOMARY LAW

2.1 Introduction

The recognition of ACL in South Africa requires development by the courts. The promulgation of the 1996 Constitution marked an important moment as it was for the first time that ACL was given a seat at the table and granted equal status alongside common law as a valid legal system. The new constitutional dispensation guaranteed ACL all the benefits of membership; being the rights to interpretation, application, and development as per the Constitution of South Africa. This chapter aims to assess how the courts have carried out the Section 39 (2) development mandate post the recognition of ACL.

2.2 The significance of the recognition of African customary law

The promulgation of both the interim Constitution[1] and the final Constitution of South Africa in 1996, solidified the formal recognition of ACL as a valid legal system. This recognition allowed ACL to exist as a legal framework which could evolve and stay relevant to its people.

The court in the *Alexkor* case corroborated the above position by stating that:

> "It was clear that the Constitution acknowledged the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time, the Constitution, while giving force to indigenous law, made it clear that such law was subject to the Constitution and had to be interpreted in light of its values. Furthermore, like the common law, indigenous law was subject to any legislation, consistent with the Constitution that specifically dealt with it."[2]

[1] The Interim Constitution of South Africa, act 200 of 1993 (Interim Constitution). This document captured the negotiations of the transition to the new democratic South Africa.

[2] *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC), 51.

The formal recognition of ACL ensured the dawn of a new day for the South African legal system, affording both common law and ACL, equal status. ACL emerged as an independent legal system that is capable to regulate those it serves and cater for their changing needs and lived experiences.[3] Four aspects of this development are as follows:

a) The supreme moral standard

Essentially, when dealing with an ACL matter, the Constitution is vital for determining the validity of that policy, custom or rule. Its objectives serve as a boundary within which the acknowledgement of the rights to culture,[4] and cultural association of choice ensure formal recognition.[5] Consequently, the Constitution furnishes guidelines for the purposive interpretation of ACL. Furthermore, through Section 211 (3)[6], the Constitution also guarantees the application of ACL when it is applicable. This is subject to the Constitution and any specific legislation dealing with ACL.[7]

b) Regulation

Formal recognition allowed for ACL to be easily regulated. The key feature with regulation is to ensure fair treatment of all citizens through a standard that is no respecter of persons. This is in line with the right to equality[8] envisioned by the Constitution. South Africa has committed itself

[3] DD Ndima 'Re-imagining and Re-interpreting African Jurisprudence in the South African Constitution' 2013 http://uir.unisa.ac,za/handle/10500/13854 (Accessed 30 October 2017).

[4] Section 30 of the '1996 Constitution'. "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

[5] Section 31 of the '1996 Constitution':
1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that
community—
(a) to enjoy their culture, practice their religion and use their language; and
(b) To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

[6] Section 211 (3) of the '1996 Constitution'.

[7] Ibid.

[8] Section 9 of the '1996 Constitution'. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly
against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection.

to the protection of women's rights by adopting domestic and international human rights policies.[9] These include The African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol),[10] The Universal Declaration of Human Rights (UDHR),[11] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[12] Based on South Africa's commitment to achieving gender equality, the African Union (AU) expressed concerns with regards to the enforcement of laws allowing cultural practices that violate women's rights.[13] The Constitution contains a safeguard which reads that promulgated laws which are inconsistent with its founding principles, must be declared invalid.[14] This is the protective mechanism for all human rights and ACL is not exempt from it.

C) Accountability

The Constitution ensures that ACL is held accountable for its short-comings, through recognition. One of the greatest short-comings of an undeveloped ACL as a legal system, under the influence of apartheid legalism, is the negative impact that it has on women and children. Furthermore, ACL development under the Constitution guarantees the preservation and protection of the rights of women and children, against any harmful African custom or law. Ndulo argues for directing greater concern at the courts ability to interpret ACL in a manner that furthers gender equality. [15] This is despite the fact that recognition is essential to ACL reform and therefore must be celebrated.

(3) National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[9] 'Women's Rights are Human Rights' 2014 www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf (Accessed 22 January 2018).

[10] African Union, 'Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa' 2017 http://www.achpr.org/files/sessions/58th/state-reports/2nd-2002-2015/staterep2_southafrica_2003_2014_eng.pdf (accessed 25 June 2018).

[11] The Universal Declaration of Human Rights, 1998 UNESCO ISBN 92-3-103513-4.

[12] The Convention on the Elimination of all forms of Discrimination against Women, 2000 CEDAW/C/TUN/3-4.

[13] Note 11 above, 6.

[14] Section 1 of the '1996 Constitution'.

[15] M Ndulo 'African customary law, customs, and women's rights' 2011 Scholarship.law.cornell.edu › FACSCH › FACPUB › 187 (Accessed 28 October 2017).

d) South African courts

The most significant manifestation of the recognition of ACL happened in South African courts, which are granted a great deal of influence in the new constitutional democracy. The High Court, Supreme Court of Appeal and CC have the power to "declare legislation unconstitutional."[16] In accordance with assertions made by Ndima:

> "In the South African context, this task must entail effecting a change in the role of interpretive institutions from their pre-constitutional culture of denigrating African culture under the alienating repugnancy dispensation towards refashioning African law with indigenous values as envisioned in the ethos of transformation."[17]

Undoubtedly, the formal recognition of ACL had the most impact on the judiciary. It gives judges a responsibility to apply[18] and develop[19] ACL where applicable, but most importantly to enforce the moral guardianship of the Constitution at all times.[20] Moreover, living ACL has the potential to be aligned with the founding principles, which is why it enjoys the embrace of the Constitution.

2.3 The Courts' Approach to women post -1994

The challenge is that South African courts have not been consistent in their interpretation of matters relating to marriage, inheritance, and succession. Particularly, the contestation arising from gender equality. While providing relief for the plight of women, judges should be wary of interpreting custom in a way that will erode it.[21] Therefore, it is imperative that they should find such a relief in a manner that does not degenerate ACL. The following cases are instructive in relation to the said degeneration:

[16] Section 172 of the '1996 Constitution'.
[17] DD Ndima 'The Resurrection of the Indigenous Values System in Post-Apartheid African Law: South Africa's Constitutional And Legislative Framework Revisited' *SAPL* (2014) 29 (2), 294.
[18] Section 211(3) of the '1996 Constitution'.
[19] Section 39 (2) of the '1996 Constitution'.
[20] Moral guardianship means that the Constitution's purpose is to serve as a guideline to achieve the best quality of human life.
[21] Erosion refers to the "gradual destruction" of ACL. www.dictionary.com (Accessed 6 December 2017).

a) The first case is *Mabena v Letsoalo*.[22] After the death of Mabena, and in order to inherit according to Section 23 of the Black Administration's Act, the respondent argued before the Magistrate that she was married to the deceased under ACL. She was required to supply confirmation that a valid customary marriage took place if she were to prevent the father-in-law from inheriting the estate. Contrary to the cultural norm, the *lobola* was negotiated with the mother of the bride, subsequently, the father-in-law denied the existence of the marriage. He also queried the fact that his deceased son had negotiated *lobola* with a woman, who in this instance was the mother of the bride, in the absence of his father. Accordingly, he filed an appeal against the decision of the Magistrate's court. The High Court embraced the development of ACL in accordance with s 39 (2) by affirming both the rights of the junior man, who was an adult and independent, to negotiate his own marriage with the mother of the bride. Thereupon the court declared the existence of a valid ACL marriage.[23]Thus the law was developed to cater for previously excluded groups.

b) The *Mthembu v Letsela*[24] matter dealt with the question of the ability of African women to inherit under intestate succession rules of ACL. Tebalo Letsela died intestate after making the first payment towards the *lobola* of his would-be wife, Mthembu. He died prior to the completion of the *lobola* payment. The High Court considered Mthembu's argument that she was thus validly married to Tebalo Letsela. She had also provided the Magistrate's court with a receipt of the money paid. The father in law sought to reject the daughter in law's argument that the marriage was valid even though payment had not been made in full. He argued that he was the heir to the deceased estate. Thereupon Mthembu brought in Tembi, the child born to the couple, to claim as the only heir to the estate.[25] After the High Court found that there was no valid customary marriage, because Mthembu had failed to provide sufficient evidence to prove the existence of a valid customary marriage, and that Tembi was thus illegitimate, the SCA confirmed this judgment. The Black Administration Act preferred senior males and prevented women and illegitimate children from inheriting.

[22] 1998 (2) SA 1068 (T).
[23] *Mthembu* (note 23 above) 14.
[24] 1998 (2) SA 675 (T).
[25] *Mthembu* (note 23 above) 18.

The question whether the development of ACL to remedy this problem was not appropriate in light of such circumstances raised. The Court required that the provision be brought in alignment with the objectives of the Bill Of Rights. It heard compelling arguments from the applicant's legal representatives in dealing with the issue of development. The Court reasoned:

> "In the present case, I, therefore, decline the invitation to develop the customary law of succession, which excludes women from participating in intestacy, and which also excludes children who are not the oldest male child. In any event, because the development of that rule, as proposed by Mr. Trengrove, would affect not only the customary law of succession but also the customary family law rules, I think that such development should rather be undertaken by Parliament."[26]

Thus, the Court refused to develop the law and decided in favour of the male primogeniture rule in its discriminatory state, endorsing women's suppression and minority status, and preventing their inheritance under the matrimonial property regime. The problem with this is that it does not reflect the imprint of the lived experiences found in living ACL.[27]

The main criticism of the *Mthembu* case surrounded the fact that in its approach, the court failed to give due regard to the difference between official and living ACL, and did not take account of the negative impact that the official ACL had on the lived experiences of those it served. Diala[28] regards this omission as problematic, as it leads to distorted versions of ACL being imposed as living ACL. Nhlapo highlights the dangers of such an approach:

> "In deciding to assess an African customary practice on its own merits without assuming its inferiority to some other mainstream notions of

[26] *Mthembu* (note 23 above) 880 E.
[27] *Mthembu* (note 23 above) 8. Mpati AJA insisted, "whether or not Tembi is the deceased legitimate child, being female, she does not qualify as heir to the deceased's property. Women generally do not inherit in customary law." AM Janse van Rensburg 'Mthembu v Letsela: The Non-decision' *PER* (2001) 4 (1), 59-74. Mentions that the CC in *Du Plessis and Others v de Klerk and Another* 1996 3 SA 850 (CC) cites Sachs J, "…sooner or later, the question of the relationship between the Constitution and customary law will have to be confronted."
[28] A Diala 'The concept of living customary law: A critique' *Journal of Legal Pluralism and Unofficial Law* (2017) 49 (2), 143-165.

> propriety, the court sent a strong signal about the future of customary law in a constitutional dispensation."[29]

Nhlapo further identifies a gap which could have benefited from development in this case. The court passed on the opportunity to resolve such a dispute that involved two tribes (Zulu and Sotho) and that an examination of two different systems of rules might have contributed immensely to ACL scholarship.[30]

Also, Nhlapo cites Ndima in order to ascertain the court's perspective on why the father in-law's version of events was not put to question.[31] According to Ndima, if the claim was properly founded on ACL then the grandfather would have fought for the granddaughter's rights, instead of fighting against her. The grandfathers' claim was misplaced because the mother of the child was not even formally married to the family. [32]

b) The matter of *Mayelane v Ngwenyama* [33] was brought before the CC. It concerned two parties who sought to register their marriages as contemplated in s 7(6) of the Recognition of Customary Marriages Act. According Mayelane custom obligated a husband to obtain consent from his first wife if his second customary marriage is to be valid. However, the provisions of the RCMA did not expressly state that as a requirement for the validity of a second customary marriage. After establishing a strong argument for the requirement of consent, the majority ruling by the CC found that there was no certainty about this requirement as some witnesses confirmed it whilst others said the first wife merely needed to be informed about the impending further marriage. The Court went on to weigh the two versions of evidence against the constitutional values being equality and human dignity. It found that the version of requiring consent from the first wife to be the most

[29] T Nhlapo 'Customary law in post-apartheid South Africa: The vexed question of Cultural diversity, Women's rights, living law, and appropriate law reform' (2014) www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Nhlapo.pdf (Accessed 30 October 2017).
[30] Ibid 18.
[31] Ibid 9.
[32] Ibid 9. In highlighting that, all three courts failed to identify African values within Hleziphi's (the father in-law) argument. Ndima states that "admission alone was enough for the court to hold the deceased's father to his customary commitments as he had based his claim on African law which did not allow the head of the family to condone cohabitation in the family house. The deceased's father should have been estopped from claiming that a woman who had stayed at the house of which he was the head, as his daughter-in-law, was in fact not so, whilst he relied of African culture's primogeniture rule as the basis of his title." Ndima (note 16 above) 164.
[33] (CCT 57/12) [2013] ZACC 14.

desirable and consistent with human dignity and equality. On that basis, the Court decided to develop Tsonga ACL to require the consent of the first wife.[34]

d) The *Gumede (born Shange) v President of the Republic of South Africa*[35] case is examined next. Mrs. Gumede approached the CC on the basis of gender equality resulting from an unfair discrimination claim decided in the court a quo. Several issues were before the court which led to an investigation of the status of women in relation to marriage under ACL.[36] The CC was in consensus with the High Court's findings, which considered the following provisions: Section 7 (1) and 7 (2) of the RCMA, Section 20 of the Code of Zulu law in KZN and Sections 20 and 22 of the Natal Code of Zulu Law as invalid, because of their discriminatory nature in that it allowed her husband to be the rightful owner of all family property with authority over all family members.[37]

The CC proceeded in terms of Section 9 of the Constitution which grants equality to everyone before considering the merits of the complaint that Section 7 (1) of the RCMA gave protection to pre-recognition marriages only, whilst Section 7(2) excluded post-recognition marriages from that protection. The CC found this differentiation invalid and declared it unconstitutional in so far as monogamous marriages were concerned. The effect of this judgment was that all pre-and post-recognition marriages would be in community of property.[38] After going through the conditions of a customary marriage with great detail, in terms of Section 7 (1), the Court determined that it would apply exclusively to monogamous marriage only, excluding the marriages that ended through divorce or death. The Court was aware of the discriminatory impact that such a decision would have on polygamous marriages. However, the Court cautioned parliament to refrain from transplanting Western law but rather should seek to preserve the values of the polygamous institution.[39]

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[34] *Mayelane* (note 33 above) 70.
[35] (CCT 50/08) [2008] ZACC 23.
[36] *Gumede* (note 35 above) 2.
[37] *Gumede* (note 35 above) 3.
[38] *Gumede* (note 35 above) 51.
[39] J Bekker and G van Niekerk 'Gumede v President of the Republic of South Africa: Harmonisation, or the creation of new marriage laws in South Africa?' 2009 https://repository.up.ac.za/handle/2263/11811 (Accessed 28 November 2017).

The distinction between living and official ACL could not be clearer. Bekker and Van Niekerk have this to say:

> "The *Gumede* decision further deepens the divide that is evolving between the unwritten, living customary law and the official customary law entrenched in legislation and judicial decisions. In fact, it rids official customary law of some of the last substantial vestiges of African customary marriage and so, in effect, brings the piecemeal legislative and judicial obliteration of the official African customary marriage to a conclusion."[40]

The case of *Bhe v Magistrate Khayelitsha*[41] remains one of the most groundbreaking decisions in ACL. In this case, an application was brought before the court by a mother, on behalf of her two minor daughters, whose father had died intestate and unmarried. In accordance with the male primogeniture rule, reflected in the Black Administration Act, the deceased father was the sole heir of the estate.[42] The issue concerned the constitutionality of the rule of primogeniture, especially in its exclusion of women, as well as children born out of wedlock from inheriting. Particular interest surrounded Section 23 of the Black Administration Act and Section 1 (4) (b) of the Intestate Succession Act, which excluded blacks from participating under the Intestate Succession Act.[43] There were two issues before the court. The first was the constitutionality of the male primogeniture rule envisaged by the provisions of the Black Administration Act.[44] The second was whether there was a need to develop the rule of primogeniture. [45]

The CC did well in setting up the status of ACL post-democracy. The Court recognizes all the rights-of-membership afforded to ACL by the Constitution such as Sections 30[46], 31[47] and 39 (2)[48]; interpretation and development to be in line with the spirit, purport, and objectives of the Bill Of Rights. Section 39 (3)[49] reiterates the existence of cultural rights provided, they are in line with the

[40] J Bekker and G van Niekerk (note 35 above) 207.
[41] (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).
[42] *Bhe* (note 41 above) 10.
[43] *Bhe* (note 41 above) 1.
[44] *Bhe* (note 41 above) 31.
[45] *Bhe* (note 41 above) 109.
[46] The '1996 Constitution'.
[47] Ibid.
[48] Ibid.
[49] Ibid.

Bill Of Rights as well as Section 211[50] which guards the distinctive institution of culture. It also declared the primogeniture rule unconstitutional thereby restoring the position of women.[51] The Court went on to declare Section 1 (4) (b) of the Intestate Succession Act as unconstitutional.[52] Thereupon, the Court imported the Intestate Succession Act to the ACL of succession.[53] After the necessary modifications to accommodate polygamous situations the Court proceeded to provide for the distribution of child portions to customary beneficiaries.[54]

The most significant result of the constitutional recognition has meant that courts were able to acknowledge the two versions of ACL, and determine that the living ACL, through its flexible and dynamic nature, has potential to be aligned with principles of the Constitution, historically this has not always been the fate of ACL.[55] This is the aspect that women have come to challenge on grounds of equality and dignity. The court plays a vital role in separating official ACL from the living form.[56] Furthermore, it holds a key position in ascertaining living ACL, and without a uniform standard to establish the content of living ACL, courts have reverted back to applying the official ACL in its oppressive and harmful nature, the case of *Mthembu* confirms this position. [57]

In accordance with the case law discussed above, across the spectrum of South African courts, there seems to be an assorted approach to interpreting ACL matters that are brought before the courts on the ground of gender equality. There is lack of uniformity and consistency, partly because living ACL is not defined in itself, but also because the judges in South African courts have not established a standard with which to interpret such African law matters. It is puzzling how the cases of *Mabena* and *Mthembu* are similar in position, where both are seeking the right to inherit under African customary rules, yet the findings of the courts in each matter have adopted opposite approaches to interpreting ACL. In *Mthembu,* the Court fails to recognise the dynamic nature of

[50] Ibid.
[51] *Bhe* (note 41 above) 136 (4).
[52] *Bhe* (note 41 above) 136 (2).
[53] *Bhe* (note 41 above) 117.
[54] *Bhe* (note 41 above) 125.
[55] *Bhe* (note 41 above) 45. "The positive aspects of customary law have long been neglected. The inherent flexibility of the system is one of the constructive facets."
[56] *Bhe* (note 41 above) 87. "The official rules of customary law are sometimes contrasted with what is referred to as living customary law, which is an acknowledgement of the rules that are adapted to fit in with the changed circumstances."
[57]Ibid 87.

living ACL, instead, ACL is viewed in its official, and static form and thus overlooking it's potential to develop in light of living ACL. Whereas, in *Mabena* the court was open-minded to development within living ACL, having welcomed the flexible nature.

2.4 The interpretation of African customary law

The South African courts have a key role to play in the furthering of gender equality as well as affirming the value of ACL. This study finds agreement with the thinking of Ndulo who states that:

> "The guiding principles should be that customary law is living law and cannot, therefore, be static. It must be interpreted to take into account the lived experiences of the people it serves."[58]

This being contrary to the norm where according to Rwezuara,

> "Attempts at African customary law reform have been treated as an attempt to westernize African traditions and culture."[59]

a) In *Gumede*, the court engaged in a battle to interpret ACL with regards to customary marriages. In particular, the policies in dispute included Sections 20 and 22 of the Natal Code of Zulu Law before the court which entitled the husband to full ownership of all family property and had full authority over all members of the family under his care.[60] The Court was tasked to alter the position of ACL which was left unchanged. However, efforts to alter discriminatory defects from ACL have often resulted in the replacement of ACL with common law.[61] Thus, the benefits of interpreting ACL in its own terms include:

[58] Ndulo (note 15 above) 87.
[59] Ibid 90.
[60] *Gumede* (note 35 above) 3.
[61] C Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession' 2005 https://journals.co.za/content/ju_jur/2005/1 (Accessed 31 October 2017).

1. Preventing the examination of ACL principles and values using foreign standards which have no equivalents in ACL,[62]
2. Granting ACL a fair opportunity to develop within its own context[63], and
3. Guarding against the erosion of ACL principles and values.

Primarily, confusion emerges from the fact that the design and construction of marriages concluded in community of property, caters for people with individual concepts of property. In contrast, communitarianism is in alignment with customary marriages and understandings of property.[64]

b) The *Netshituka v Netshituka*[65] case was a continuation of the issues raised in the *Gumede* case. Among other legislation, Section 7 (1) of the RCMA was said to be potentially prejudicial to parties in polygamous customary marriages. The *Gumede* decision left parliament to enact legislation to rectify the discriminatory impact of Section 7 (1). However, 10 years later there is still no amending legislation.

The *Netshituka* case concerned two children of a deceased person, Mr. Joseph Netshituka, who died intestate on 4 January 2008. The deceased had 3 customary marriages and 2 civil marriages in his life. The two applicants were born of the first and second customary marriages with Ms. Tshinakaho Netshituka and Ms. Masindi Netshituka. At the time the matter was heard by the CC, all the customary wives were deceased. The will left by deceased, Mr. Joseph Netshituka referred to the fourth respondent (Ms. Munyandziwa Joyce Netshituka), as the wife married in community of property. However, the SCA in 2011 declared the deceased's marriage to the fourth respondent void. As such, the deceased had left a shopping centre in his estate and according to the will, Joyce Netshituka was considered married in community of property and was named as the executrix of the estate. The dispute surrounded the half share of the fourth respondent. The other wives and

[62] N Ntlama '"Equality" Misplaced in The Development of The Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)' *STELL LR 2009* (2) 333-356, 342. She mentions further that, "this results in the narrow interpretation of African law values and principles." Ntlama (note 60 above) 347.
[63] Ibid 347.
[64] Definition of communitarianism- "An ideology which emphasizes the responsibility of the individual to the community and the social importance of the family Unit." https://en.oxforddictionaries.com/definition/communitarianism (Accessed 19 November 2018).
[65] (CCT194/16) [2017] ZACC 41; 2018 (2) BCLR 217 (CC); 2018 (2) SA 1 (CC) (30 November 2017).

children of the deceased would only benefit from the other half share. Thus, they approached the Court seeking to invalidate the half-share of the fourth wife, as it is prejudicial to all the other wives and children.

The Court reasoned that Section 7 (1) of Venda customary law entitled only a husband to ownership rights of property in marriage. Following from the *Gumede* case, which decided that the gender discriminatory nature of Section 7 (1), in addition, the court reasoned that there is further discrimination on grounds of race, ethnic and social origin, thus contradictory to the Constitution.

The Court ordered that in the interim, whilst awaiting the enactment of the new policy by parliament, with regards to the regimes of marital property in polygamous unions entered into prior the operation of the RCMA. Such marriages will be dealt with in the following manner;[66]

1. The husband and the wife jointly enjoy the equal rights to control and manage marital property. Madlanga specified that both the house and family property by a husband and wife will be considered joint and in the best interest of the family.
2. A party will retain rights to personal property and will remain the owner of that said property.

Among other things, the applicant sought the court to invalidate the civil marriage between the respondent and the deceased and further for the court to invalidate his last will and testament. The court, however, dismissed this application.

Madlanga J, in giving a contextual framework for constitutional invalidity of Section 7(1) of the RCMA reasons,

1. New monogamous customary marriages are considered marriages in community of property with joint assets and liabilities, excluded by an anti-nuptial contract.
2. The impact of the *Gumede* case has the same effect on monogamous customary marriages entered into prior to operation of RCMA, considered in community of property with joint assets and liabilities.

[66] *Netshituka* (note 65 above) 10.

3. The Court considered that a husband in a customary marriage needs to make a formal court application if he wishes to enter into a 2nd customary marriage that is valid, as per the *Mayelane* case.
4. According to the *Gumede* case, which gave new meaning to Section 7 (1) of the RCMA for polygamous marriages entered into prior to the operation of the RCMA, entitled on a husband to a customary marriage, entitlement to property ownership rights. Madlanga borrows substantially from the Gumede case. In light of Section 7 (4) of the RCMA, which allows a spouse to a customary marriage entered into prior to the operation of the RCMA, the right to apply to the court to change their marriage regime.

The Court concluded that Section 7 (1) of the RCMA "perpetuates inequality"[67] between spouses in customary marriages entered into prior to the RCMA. However, Section 6 levels the playing field between spouses ushering in equality for spouses in polygamous marriages entered into as per the RCMA, are already afforded equality in terms of the matrimonial property system. The court, therefore, eradicated the discrimination based on marital status.

It is crucial for South African courts to interpret ACL for the uniqueness that it brings. As such, Ndima used the *Alexkor* case, the clearly define the significance of ACL being interpreted according to its own standards as follows:

> First, subjecting African law to common law principles perverts the African ontological structure and culture by forcing its adherents to submit to a legal regime that does not resonate with their ways of speaking and acting. Second, this approach has a debilitating effect on legal transformation since its implementation by constitutional institutions appears to contribute to the further distortion of indigenous culture.[68]

[67] *Netshituka* (note 65 above) 35.
[68] Ndima (note 3 above) 41.

c) In *Shilubana*,[69] the Court embraced the autonomy of the Valoyi community by allowing them to determine the contents of their own living ACL. In this fashion, it would ensure that the best interests of its people are served. Among themselves, that Valoyi community were tasked with examining the rule of primogeniture in its current form, pertaining to the appointment of the community *hosi*, and they would have to ascertain the true purpose and nature of the rule of primogeniture in that regard. In addition, the Valoyi community was also tasked with developing the rule in a manner that would not discriminate women and thus aligning itself with the vision of the Constitution. In accordance with the flexible approach, Miss Shilubana was installed as the rightful *hosi* of the Valoyi community.[70]

2.5 The application of African customary law

The Constitution enjoins the courts in imperative terms to apply ACL through S211 (3) as follows:

> "The courts must apply customary law when that law is applicable; subject to the Constitution and any legislation that specifically deals with customary law."[71]

In asking the crucial question, of when exactly is it suitable for ACL to be applied, Himonga acknowledges that there is a lack of express instructions surrounding this subject.[72] In seeking to establish the circumstances of when ACL must apply and how to determine them, South African courts consider the choice of law principles as a point of reference for the determination of applicable law to a matter. These principles entitle a party to the case to choose a law which will be applicable. However, in the event that a party should elect an applicable law, the courts are encouraged to adopt an objective approach to determine relevant factors such as the nature of the case.

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[69] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (4 June 2008).
[70] *Shilubana* (note 69 above) 29. A strong argument was presented in favour of Shilubana's case, "The process used in appointing Ms. Shilubana as *hosi* was consistent with the rules and procedures of the community, according to the applicants…All structures of the community participated in the decision."
[71] The '1996 Constitution'.
[72] C Himonga 'Application of African customary law under the Constitution of South Africa: Problems solved or just beginning?' *Southern .African Law Journal* (2000) 117.

The case of *Dalindyebo v The State*[73] highlighted the reality with regards to ACL application. The case involved the abaThembu King who was tried and convicted of charges such as culpable homicide, assault with intent to cause grievous bodily harm and kidnapping among other crimes. He was granted leave to appeal this decision to the SCA. Although the court had rightfully convicted and sentenced King Dalindyebo, the controversy surrounded whether the correct law was used in order to decide the case. Some scholars were of the view that ACL should have been applied in this matter.[74] However, the court reasoned differently. According to the literal interpretation of the provision of Section 211 (3), the court 'may' apply ACL where it is applicable, this leaves it up to its discretion to examine whether it would be appropriate to do so or not.

There are scholars that argue that ACL, as a legal system is not being given its true value.[75] Ntlama mentions the far-reaching consequences of depriving ACL the opportunity to develop its deficient criminal law.[76] According to her ACL was deprived of the opportunity to form an integral part of the case. Similarly, the formal court of the land missed an opportunity to work together with traditional tribunals on this case.[77] Ntlama insists that there was judicial undermining and intentional exclusion of ACL, and substitution of Roman-Dutch Law for it. [78] This is because of the lack of transformation in the country's legal order dating back as far as 1652.

Ntlama deplores the use of Roman Dutch law to determine King Dalindyebos' guilt.[79] She argues that the courts could have gone further, to extend an olive branch to the traditional tribunals and invite them, at least as the friends of the court.[80] This could have been a joint effort to try and work together in developing customary law where criminal conduct is concerned. It is clear that there was not even a single consideration for the relevance of ACL in this matter. Furthermore, the court missed an opportunity to engage collaboratively with ACL in order to develop it.[81] This also extends to that aspect where both the traditional and formal court systems join forces in order to

[73] (09/2015) [2015] ZASCA 144.
[74] N Ntlama 'The Colonial and Apartheid snake is still alive: Dalindyebo v S (090/2015) [2015] ZASCA 144' *College of Law and Management Studies Newsletter* (2015) (8) (3), 15-16. https://clms.ukzn.ac.za/wp-content/uploads/2018/06/Newsletter_Oct2015.pdf (Accessed 15 November 2017).
[75] Ibid 15.
[76] Ibid 16.
[77] N Ntlama speaks at the ACL conference held at UKZN Howard College 22 April 2016.
[78] Ntlama (note 74 above) 15.
[79] Ntlama (note 74 above) 16.
[80] Ibid 16.
[81] Ibid 16.

develop the law. However, it remains obvious that the formal legal system law remains reluctant to accommodate ACL fully, even in the name of justice and development.

In consideration of the *Dalindyebo* case, the disquiet arises from automatic application of the common law (Western Law or European Customary Law) without due consideration to the plea for the application of ACL, as Section 211 (3) mandates.[82] Ntlama is of the view that this is due to a long history of the application of common law that has become normalised the non-consideration of ACL, despite its newly recognised status.[83]

Masoga emphasizes that an opportunity for legal history was lost in many respects.[84] He argues that the court missed its 'interpretation calling' in this case.[85] Although in the normal course of events the SCA is the have proceeded, nothing prevented the case from proceeding straight to the CC, in order to decide the constitutional questions raised. He cites the Supreme Court's Act[86] to argue that the scope of the CC has been extended to include adjudication of any civil and criminal matters if the constitutional question is reflected in the heads of argument.[87]

It is concerning to realise that the Court clearly disregarded the issue of the application of ACL without any reasoning whatsoever to explain the decision.[88] As a result, the Court's omission leaves plenty of room for speculation as to the actual reasoning for the deviation from the constitutional obligation expressed by Section 211 (3).[89]

2.6 The development of African customary law

Development is the ultimate experience of recognition. Formal recognition on its own is significant; however, development solidifies and manifests itself as the ultimate goal resulting from ACL recognition. The majority decision by Froneman J in *Mayelane* case lays down:

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[82] The '1996 Constitution'.
[83] Ntlama (note 74 above) 16.
[84] E Masoga 'Royal opportunity lost for law' 10 January 2016 https://www.iol.co.za/sundayindependant/royal-opportunity-lostforlaw-1968643 *Sunday Independent* (Accessed 29 November 2017).
[85] Ibid.
[86] 15 of 1959.
[87] Masoga (note 82 above) 7.
[88] *Dalindyebo* (note 71 above) 6.
[89] The '1996 Constitution'.

> "The court has accepted that the Constitution's recognition of customary law as a legal system that lives side by side with the common law and legislation requires innovation in determining its living content, as opposed to the potentially stultified version contained in past legislation and court precedent…In order to adjudicate Ms. Mayelane's claim we must determine the content of the Xitsonga customary law regarding a first wife's consent to her husband's subsequent marriage."[90]

2.6.1 Are courts doing enough to ensure African customary law development?

In the case of *Sigcau v Sigcau*[91]- The subject of development is important and worth discussing. Development comes as one of the gains of formal recognition in the new constitutional democracy. Prior to the advent of the Constitution, the judges were not mandated to develop ACL, and neither was there a guide to help interpret its provisions. However, post-democracy, Section 39 (2) sets out the mandate for judges as far as development is concerned. In terms of this provision:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[92]

Sigcau concerned a dispute pertaining to traditional leadership.[93] After the *ikumkani* Mandlonke Sigcau of amaMpondo aseQaukeni died without a son, his half-brothers Nelson and Botha were eligible to succeed him.[94] This led to a dispute before the court, which resulted in the "statutory appointment" of Botha Sigcau as the next appropriate *ikumkani*. Decades later Botha passed away and was succeeded by his son Mpondombini Sigcau in 1979.[95] In 2006 Zanozuko Sigcau lodged a claim with the Commission for Traditional Leadership Disputes and Claims.[96] In 2008 the Commission found him eligible for the position, but *ikumkani* Mpondombini Sigcau challenged his appointment by the President.[97] The Court cited that the use of the wrong statute to make the

[90] *Mayelane* (note 33 above) 43.
[91] 1944 AD 67.
[92] The '1996 Constitution'.
[93] *Sigcau* (note 91 above) 2.
[94] *Sigcau* (note 91 above) 8.
[95] Ibid 8.
[96] Ibid 8.
[97] *Sigcau* (note 91 above) 9.

appointment as the ground for setting it aside.[98] Meanwhile, Mpondombini died.[99] Consequently, the royal family met and identified his daughter Weziwe Sigcau as her father's successor.[100] The President must now issue Weziwe with a notice of recognition and a certificate of recognition. However, the President already contemplated issuing a notice of recognition and a certificate of recognition to Zanozuko. Thus, this matter had reached crisis proportions. The SCA has now held that the Act requires the President to issue a notice of recognition and a certificate of recognition to Zanozuko for immediate implementation after the Commission's determination- which renders Weziwe's identification superfluous.[101]

In the cases of *Bhe* and *Mthembu*, where development failed, courts were reluctant to entertain the option of development as they required further proof that living ACL can be ascertained and separated from official ACL.[102] Sadly, it is still inconceivable how the three cases of *Mthembu* consistently failed to consider constitutional developments based on the right to equality. Thus, the attempt at development of the official rule of ACL entrenched in legislation was less than satisfactory.

In examining the *Dalindyebo* case, if the court had considered the application of ACL, it would have been revolutionary in two aspects. The first being that the application of ACL in a criminal case would have provided a platform for the development of African criminal law. King Dalindyebo could have been dealt with accordingly to reveal that living ACL respects competent leadership, in accordance with its flexible nature.

The *Shilubana* case was groundbreaking for many reasons, but famously for being innovative in its attempts to resolve the longstanding battle between official and living ACL. The Court chose to embrace living ACL despite it being uncertain, furthermore, it showed a willingness to embrace the flexible nature of ACL. As the majority judgment puts it:

> "Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognize the existence of a customary norm would, therefore, prevent the

[98] *Sigcau* (note 91 above) 10.
[99] *Sigcau* (note 91 above) 9.
[100] *Sigcau* (note 91 above) 11.
[101] *Sigcau* (note 91 above) 13.
[102] Nhlapo (note 29 above) 12.

> recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society."[103]

The achievement of development confirms that the Constitution values ACL. The newly established legal framework was in place, regulating the working of ACL, in order to allow it to evolve along with other legal systems.[104] Overall, recognition dignified the treatment of ACL.

2.7 Conclusion

The recognition of ACL was an extremely important milestone towards legitimacy. It had constitutional implications such as interpretation, application, and development of the African legal system. Arguably, the courts greatest responsibility with regards to ACL recognition, is ensuring the realisation of the Constitution's vision. This is achieved through the enforcement of relevant constitutional provisions. Nevertheless, ACL has a place in the South African legal system. The case law has shown that post recognition, ACL has been interpreted, applied and developed in South African courts in order to redress the position of women. This work will engage in an analysis of the nature and content of ACL in the next chapter.

[103] *Shilubana* (note 69 above) 43.
[104] *Gumede* (note 35 above) 20.

Chapter 3

THE NATURE AND CONTENT OF AFRICAN CUSTOMARY LAW

3.1 Introduction

Chapter two revealed that ACL recognition has led to developments by the courts, in an effort to improve the status of African women. Moreover, South African courts have been confronted with the dilemma of developing ACL to harmonise it with human rights, without assimilation or erosion of African values.

ACL is a system comprising of cultural norms and values which regulate the lives of African people. Generally, in order for such values and norms to be considered as the ACL of a certain community, there must be proof of two requirements.[1] Firstly, that the practice must have been in existence for a long period of time, and secondly that it must be respected by many.[2] The unique nature of ACL cannot be disputed as it comprises of several stand-out characteristics. Firstly, it is dynamic. This refers to its ability stimulates change and diversity with cultural norms and practices form people to people.[3] Secondly, it is flexible, meaning that it easily adapts to the lived experiences of the African people which are also ever changing. Ideally, another essential feature of ACL is that it exists in a dual-form, which refers to the oral and written forms of ACL.[4] This solidifies the nature as one that is fluid and not static. In a country as culturally diverse as South Africa, it is possible to find countless types of ACL. However, the Constitution serves the greatest purpose in presenting universal values that seek to protect and advance the lives of all South Africans. Thus, post the recognition of ACL, its flexible feature has been identified as the most ideal for development.

The discussion in this chapter will be done under two folds. The first being official ACL, which emerged from the distortion of African rules and norms during partial codification. The second

[1] AJ Kerr 'The Nature and Future of Customary law' *The South African Law Journal* (2009) 126 (4) p. 677 – 689.
[2] Kerr (note 1 above) 682. The Court in the *Bhe* case allowed affidavits from a researcher that prove the non-observance of the official African customary rules of succession. *Bhe* (note 24 above) 84.
[3] (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004), 86.
[4] Kerr (note 1 above) 679.

will be an examination of living ACL as the only medium for development. This is done with the aim to reveal the influences of socio-economic changes on the adaptability of African customary norms especially in relation to gender equality and flexibility approach.

3.2 Official African customary law

The new constitutional dispensation regards official ACL as problematic for several reasons. One is the discriminatory impact it has on women due to its distorted form,[5] which is a product of centuries and decades of colonialism and colonial apartheid.[6] This official version lost relevance with the lived realities of African people, and as a result became dwarfed for a long period of time.[7] Thus, for purposes of this discussion, there are three factors which advanced male privilege and dominance over African women. These include: the introduction of religious belief systems, economic systems that dismantled the agrarian basis of society and the wholesale transplantation of capitalist European laws into agrarian African societies.[8]

3.2.1 Religious belief systems

There are several religious belief systems introduced into the agrarian African society that promoted male privilege and domination over women. These included Christianity and Islam, however the former will be the focal point of this discussion because of its dominance in South Africa. The cultural invasion of Christianity in African society had far-reaching effects.[9] It fostered the importation of Western norms and standards into the African way of living, as well as their standards that undermined the latter's family structure. Freire defines cultural invasion as "an instrument of domination used by the oppressor by imposing his values and outlooks into the culture of the oppressed, this invasion can either be direct or camouflaged."[10] Thus, religion was used as a sharp tool to conquer the African people, as they conflated the work of God with

[5] *Bhe* (note 3 above) 89.
[6] *Bhe* (note 3 above) 43.
[7] *Bhe* (note 3 above) 82.
[8] *Bhe* (note 3 above) 80.
[9] P Theron, 'Cultural Perspectives on Gender Equality: Preliminary Indicators for the Christian Church in Sub-Saharan Africa' in E Mouton, G Kapuma, L Hansen, T Togom (eds), 'Living With Dignity: African Perspectives on Gender Equality' 53-79, 55.
[10] P Freire 'The Pedagogy of the Oppressed' 1 September 2000 https://kinasevych.ca/2014/02/05/freire-2000-pedagogy-of-the-oppressed/ (Accessed 27 July 2017).

modernisation.[11] Christianity continues to discourage the observance of the African belief systems. Thus, when African people choose Christianity, they are required to abandon African cultures and values. Ekane accurately captures the diversity in agrarian African society with the promotion of modernity.[12] Many African people continue to get caught in limbo, and have resolved to merge both African and Western values into their lived realities.[13] Moreover, Christianity became synonymous with urbanisation as when African people move away from rural society, the more challenging it became for them to continue practicing customs.

The Bible is identified as the main point of reference for the religious belief system of Christianity. It is littered with patriarchal stories that depicted male privilege, which church pastors utilise to preach sermons to African people.[14] The church institution had a significant influence on African society, as it regulated the way in which African people led their lives and understood gender roles. The first scripture of the holy book sets the tone for gender differentiation that is rooted in Christianity. For example, in the beginning God created a man in his image and his name was Adam. He then proceeded to form a woman (Eve), from the rib of the man.[15] A seed of gender hierarchal importance was planted. This forms the basis for the apprehension of male dominance in society. However, scholars such as Matsveru and Gillham argue that this established a gender relationship based on interdependence.[16]

On a church by church basis, there are institutional standards and norms largely directed at regulating women.[17] Furthermore, Christianity is not synonymous with allowing women to

[11] D Ekane 'Contemporary Family Patterns In Sub Saharan Africa' 2013 http://www.diva-portal.org/smash/get/diva2:602444/FULLTEXT01.pdf (Accessed 5 November 2018).
[12] Ekane (note 11 above) 2.
[13] Ibid 2.
[14] Men are largely depicted as leaders in families and in society. Most of the miracles in the Bible came through men. As such, the twelve disciples were all males who were hand-picked by Jesus Christ to walk alongside him for the salvation mission. Luke 6: 12-16. The greatest miracle performed by Jesus Christ occurred in the presence of 5000 men (but the women and children were not counted), however they were present. After a long winded sermon by the messiah, the masses became restless from hunger. Jesus used the lunch of a young boy that was packed by his mother, to multiply the food for all the people to eat. The lunch consisted of five loaves of bread and two fish. Interestingly, the miracle that day came from those who were not counted. Mathew 14: 13-21 NIV.
[15] F Matsveru & S Gillham, 'In God's image A Biblical Theological Survey of the Dignity of Women and Men' in E Mouton, G Kapuma, L Hansen, T Togom (eds), 'Living With Dignity: African Perspectives on Gender Equality'33-49, 36.
[16] Ibid 37.
[17] Theron (note 9 above) 55.

exercise their agency.[18] As such, women experienced pressure to display to the desired conduct of a 'woman of God'.[19] Moreover, regulation within the church started with the dress code. It required women to be conservative, forbidding them from wearing pants, earrings, dresses above knee length and any other revealing items that expose the arms or the chest area. Christian values extended beyond church fields by advancing the submission of women to men.[20] African traditions such as dance were equally forbidden.

3.2.2 The economic system that dismantled the agrarian basis of society

Modernisation has altered African family structures.[21] The shift occurred through diminished family ties, acculturation and urbanization which resulted in the distortion of African values and norms.[22] The African society experienced a cultural drift as the lived experiences of African people transformed and were dominated by Western values. As such, official ACL has become redundant.

a) Diminished family ties

Currently, the organic cultural evolution of African values is impeded by the fact that modern (Western) values are replacing African values.[23] Despite the on-going natural selection (where the environment dictates which values adapt and survive, and which values erode), African family structures continue to be the focal point of the African society.[24] The size of African families has reduced as a result of education, health, ameliorated economic constraints and modernity.[25] The contemporary society dictates that it is no longer financially viable to care for large family units.[26] According to Ekrane, this shift calls for the "reorientation of African values from extended families to smaller family sizes."[27] The current socio-economic climate altered the male heir's ability to

[18] Ibid 55.
[19] Proverbs 31, the New King James Version.
[20] Ephesians 5: 22-33, the New King James Version.
[21] Ekane (note 11 above) 1.
[22] Ibid 1.
[23] Ibid 1.
[24] PA Twumasi *The Changing Family in the Ghanaian Context* (1983) 7.
[25] Ekane (note 11 above) 2.
[26] Ekane (note 11 above) 4.
[27] Ibid 4.

care for the family, unlike in the past where deceased persons' estates were used to maintain the women and children.[28]

In the context of African societies, marriage is extremely valued.[29] Modern society has transformed African customary marriages which are potentially polygamous. The polygamous institution was primarily aimed at expanding African families but it served the practical issues of "husband shortage."[30] Although polygamous African customary marriages are still in existence, they are less prominent due to the ushering in of monogamous nature of Western marriages.[31] The effect of modernisation has been to transform the African concept of marriage from its communal based focus on expanding families, to a romanticised and love centred institution.[32] Consequently, fewer women were willing to practice *ukukotiza.*[33] Which entails a practice where a newly wedded woman has to stay at her marital homestead for some time, to show off her domestic capabilities to her in-laws.

b) Urbanization

Due to the competing belief systems, there has been constant change with regards to African values. Urbanization led to the scattering of the extended family structure, where the male heir no longer resides with family dependents thereby limiting his ability to support and maintain them.[34] Thus, the agrarian societies increasingly faced challenges in applying their values in their original context.[35] Ekane provides a diagnosis for the erosion of African values:

> "African societies have experienced slight distortion in the patriarchal tradition, following the advent of urbanization, as well as due to the drop in the importance attached to land and cattle in the economy."[36]

[28] *Bhe* (note 3 above) 80.
[29] Ekane (note 11 above) 3.
[30] Ekane (note 11 above) 4.
[31] Ekane (note 11 above) 4.
[32] Ibid 4.
[33] This entails a practice where a newly wedded woman has to stay at her marital homestead for some time, to show off her domestic capabilities to her in-laws.
[34] *Bhe* (note 3 above) 80.
[35] Ekane (note 11 above) 4.
[36] Ekane (note 10 above) 2.

The significance of the male primogeniture diminished due to the change in the political and economic climate. Families are scattered because more young people have moved to cities and are accruing their own income, independent from the extended family.[37] As a result, they accumulate assets and property of their very own. This means that the society has moved from a communitarian to an individualistic ethos. Ekane noted that:

> "There is a rise in pace towards the abandonment of traditional practices for modern ones (western). However, the most popular trend is that of the prevalence of family patterns that are increasing merging traditional and modern marriage norms, values or practices."[38]

The cultural merger appears to be an amicable resolution to the dispute between two belief systems. However, such efforts perpetuate the use and dominance of Western values at the expense of African values. A critical example is that of modern day weddings by African people, wear a white wedding dress first, and thereafter proceed to a traditional wedding garb, if the latter is done at all.

In the past the negotiation followed by delivery of *lobola* goods and a traditional celebration, sufficed to constitute a marriage in the agrarian society. Moreover, *lobola* delivery has been transformed from its original shape when it was in the form of cows, and is substituted by monetary payment.[39] This is undesirable as it has brought the custom too close to resembling a contract of sale. Thus, present-day instances reveal that when a traditional wedding is conducted, it resembles a 'pick and choose' exercise, where key components are willfully excluded, while others are preferred. Thus, a key research opportunity would be to investigate why traditional weddings are no longer sufficient to solemnise a marriage. Even though African weddings are changing into white marriages, one thing has not changed; the marginalisation of women and sometimes being used for profit by their families to *lobola* negotiations.

[37] Twumasi (note 24 above) 4.
[38] Ekane (note 11 above) 2.
[39] *Bhe* (note 3 above) 221.

c) Acculturation

Acculturation refers to individual and group changes that occur both culturally and psychologically.[40] The point of departure is that values, norms and beliefs are transferable from one group to another.[41] Colonial rule led to the transfer of Western values, norms and beliefs onto the African society.[42] Thus, the alterations in language, values, beliefs, and norms, religious and traditional practices were indicative of acculturative influence. As such, the impact of both urbanisation and acculturation resulted in a shift for example in child-rearing, as when family individuals move to cities for job opportunities, grandmothers left behind have increasingly taken over parenting duties.[43] In other instances, hired helpers who cannot inculcate family values are now tasked with raising the children.[44]

Thus, the agrarian African society is experiencing a transition that causes African people to revise their identity and their societal roles.[45] Identity was regarded as the most common measure of acculturation as individuals utilised it to determine their differences and similarities.[46] Christianity has been a key catalyst in advancing modern values such as the monogamous marriage which leads to the concept of a nuclear family.[47] In line with this argument, more and more women seek to enforce this new identity through the judicial system. This is because the distorted official African customary law had developed patriarchal features which alienated women from their culture. The opportunities introduced by the Constitution for establishing a national identity for all citizens through standardised values and principles have attracted African women to seek greater protection provided by constitutional rights. [48]Thus, the liberal nature of the South African Constitution has also added to the impetus towards modernisation.

[40] Byron G. Adams & Fons J. R. van de Vijver, "Identity and Acculturation: The Case for Africa*" Journal of Psychology in Africa* (2017) 27 (2) 115–121.
[41] Ibid 116.
[42] Ibid 118.
[43] Twumasi (note 24 above) 5.
[44] Ekane (note 11 above) 8.
[45] Byron G. Adams & Fons J. R. van de Vijver (note 40 above) 118.
[46] Ibid 115.
[47] Ekane (note 11 above) 4.
[48] Byron G. Adams & Fons J. R. van de Vijver (note 40 above) 118.

3.2.3 Wholesale transplantation of capitalist laws into the African society

The introduction of foreign value systems into African societies has promoted individualism[49] rather than communitarian values. As a result, the care-value that informed the male primogeniture custom has thereby become eroded.[50] African customary law has since evolved in an individualistic environment, which dictates that land ownership and property rights are exclusively for men. Colonial legislation like the Black Administration Act and the Codes of Zulu Law show a clear intention to exclude and prevent women from acquiring any land ownership rights.[51] Hence, the trend towards judicial adjudication of women's rights.

a) Family Property

The general understanding of family property in African societies was synonymous with communitarianism and the rule of male primogeniture. When a woman married into a family, the property that she acquired jointly with her husband formed part of the family property. In the past, the family property consisted of land, huts, livestock, fish nets and farming tools. The close-knit nature of the agrarian African society was not only conducive for male heirs to exercise their duty of care, but it also left them with no choice.[52] However, present-day concepts of family property have drastically transformed. As such, male heirs are no longer able to care and maintain women and children with deceased persons 'estates.[53]

An example of the operation of the law of communitarianism[54] is evident in the principle of *ubukhelwane*. In the Zulu culture, the principle of *ubukhelwane*, which comes from *makhelwane* meaning neighbour, is quite prevalent in African societies.[55] This was not just a passion of the people in the community, it was a lifestyle as each knows the other by name and family history. It

[49] *Bhe* (note 3 above) 162.
[50] *Bhe* (note 3 above) 80.
[51] (CCT 50/08) [2008] ZACC 23, 3.
[52] *Gumede* (note 51 above) 75.
[53] *Bhe* (note 3 above) 173.
[54] D Johnson, S Pete, M Du Plessis Jurisprudence*: A South African Perspective* (2001) 203-230. Discusses further that all groups were family based, linked together in wider networks and presided over by a leader. Communitarianism was more than a value, it became informal ACL as it had existed for a long period of time and it was respected and practiced by number of people in the agrarian African society.
[55] *Bhe* (note 3 above) 163.

also meant solidarity during both celebrations and mournings.[56] To illustrate this, even in modern day society, when a family member has died, the first people to provide support and comfort are the neighbours. Lastly, and most relevant was that in the agrarian African society a major part of the communal interest involved division of labour, farming and cultivating land together. Childrearing was very much a communal duty where every male and female old enough to be your parent, is 'mom' and 'dad' when addressed. This was because it was prior to the organization and grouping of people into colonies.

The term 'ownership' was not the language of the African people, it would be inaccurate to say that women owned land. This is not to say that they had no rights in the land, but they enjoyed their rights together with the rest of the community. In such a society, women had the most use for land and were the "caregivers" of it, nurturing it in order to farm, grow crops and sell them to feed their families and sustain the economy of the greater society. [57]

The Native Land Act 27 of 1913[58] was very clear in its exclusion of women[59]. Section 10 reads as follows:

> "A person shall be deemed for the purpose of this Act to hire land if, in consideration of his being permitted to occupy that land or any portion thereof-
>
> a) *He* pays or promises to pay to any person in money; or
> b) *He* renders or promises to render to any person a share of the produce of that land, or any valuable consideration of any kind whatever other

[56] Ibid 163.

[57] C Flood 'African Women's Role in Resistance against Colonization' 23 March 2016 theclassicjournal.uga.edu/.../african-womens-role-in-resistance-against-colonization/ (Accessed 16 September 2017). Cassidy reinforces this by mentioning that the colonial gendered government fundamentally misunderstood the extent of women's role and their participation in society and the economy served as the impetus for women's participation in resistance movements". This would also include the position of women in land. See E Scalise 'Indigenous Women's Land Rights: Case Studies from Africa' (2012) http://minorityrights.org/wp-content/uploads/old-site-downloads/download-1117-Indigenous-womens-land-rights-case-studies-from-Africa.pdf (Accessed 15 March 2017). Mentions, "When communities are dispossessed of their land, women are often disproportionately affected because of their traditional role in procuring water, fuel or trading goods for their families."

[58] S 10 of the Native land Act 27 of 1913. This is evidence of the use of formal law to legislate and legalize the suppression of women. Ibid. Discusses the discriminatory nature of formal law against women, furthermore, an example is made with "Acholi land where a women's right to property is determined by the relationship with a man while a man's right to property is determined by his membership by his membership in the clan."

[59] Ibid. emphasises that the status of women in the indigenous society had a direct bearing on the exclusion of women from ownership of land through formal law. Based on the historic treatment of women as property, who were constantly under the guardianship of men. She simply puts it, as "property cannot own property".

> than his own labour or services or the labour or services of his family."[60]

This was the beginning of inequality, where men were encouraged to consider getting a 'secure' title for the ownership of land. Thus, obtaining a secure title would disadvantage women greatly, resulting in the shift from informal law, which was oral in nature, to formal law that was transcribed, and thus undermined the value of African land law.

As alluded to earlier, the agrarian society experienced the greatest transformation when their land system shifted from the communal interest, to that of the individual. This issue would go on to perpetuate gender dimensions, thereby completely alienating women from land ownership.[61] As such, it can be inferred that the law that regulated property was individualistic and privileged men. This patriarchal version was later religiously applied by the judiciary as the official ACL.[62]

It is worth engaging with the concept of individualism as a fundamental value of the Western legal systems. This term emerges from the need to preserve the interests of the individual, its self-serving characteristic that encourages the overall concern and the well-being of one person.[63] This feature from the Western culture aligned with the preference of one individual, the man, and removing him from 'the rest', reinforcing the ideas of separation and difference.

The interpretation of land as property, where the 'owner' has a title deed as a form of secure ownership is an individualistic feature. It did not only undermine the methods of guardianship of land that existed in the agrarian African society, but it also created a hierarchy in the relationship between men and women.[64] This imposition by the colonial administration was alien to the African value and legal system, which aimed to preserve the communal interest. The latter only spoke of terms such as *possession, guardianship* or *custodianship*[65] with respect to land. In contrast, the

[60] Ibid. (Emphasis added).
[61] Land was the most valuable assert that the agrarian African society had. Thus, any rules regarding the management, distribution and possession of land, would be the law of the land (informal law).
[62] See *Gumede* and *Netshituka*, where The Black Administration Act 38 of 1927 as the Natal Code of Law (Proc R151 of 1987) and the KwaZulu-Act 16 of 1985 (Code of Zulu Law), were enforced as official ACL.
[63] The Constitution of South Africa for example, is a formal law, because it influenced and reflects the Western social and legal order.
[64] It is important to note that the law of individualism and the law of the land (now the law of property), because of its cultural adaptation to western culture, work hand in hand as a tool to further subjugate women.
[65] The terms possession, custodianship and guardianship all mean to hold in trust. A feature of communitarianism, compromised by the introduction of property law through secure titles.

imposition of the Western concept of ownership is concerned with perpetuating the interests of the individual, with terms such as *titles* and *ownership*.[66]

The Court has recently restored hope in the *Alexkor* case, when it highlighted that the indigenous value of possession of land rights was different to the Western concept of 'ownership'.[67] Thus, the practice of the particular community leads to the determination of indigenous title with regards to land.[68] It took into consideration how the Richtersveld Community exercised control over the land, and that any decisions concerning the land were taken by the collective. Therefore, the community held real land rights in the indigenous sense.[69]

The position of women becomes concerning as the impact of alienation of land is evaluated. Although women were not the only people to suffer from the diminishing access to land, their denial from accessing a secure title, stripped them of any entitlement to the use of land.[70] This is why financial dependence is still one of the domains through which women are subjected to male dominance. Its earliest manifestation presented itself in the form of alienation of land rights, the product of which reinforced domestic patriarchy through social institutions organized by the colonial government.[71]

The abovementioned discussion has shown the instances that have contributed to the distortion of official ACL. As a result, African values such as patriarchy (the male primogeniture rule), preservation of the family unity, Ubuntu and the significance of lineage were embedded as essential pillars of official ACL. In its current distorted form, the official version is therefore not compatible with modern lived experiences of the African people and the Constitution caters for this official version to be developed. Thus, when developing ACL, its living version must be taken into account. However, courts must guard against eroding these values altogether.

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[66] *Bhe* (note 3 above) 168. The Court referred to the family head as one who is the "caretaker and manager of the common property."
[67] *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC), 47.
[68] *Alexkor* (note 67 above) 57.
[69] *Alexkor* (note 67 above) 49.
[70] 'The effect of colonialism on Africa women' 8 March 2007 https://afrikaneye.wordpress.com/2007/.../the-effect-of-colonlialism-on-african-women (Accessed 25 May 2017).
[71] Note 58 above.

3.3 Living African customary law

In a society that experienced a value-system metamorphosis, living ACL has re-ignited the significance of the communal ethos.[72] As such, ACL claims back its identity from the clutches of individualism. This enables the courts to hold the ultimate role in ensuring that such a departure materializes through development. Moreover, living ACL is embraced for its ability to preserve African values. The process of developing ACL is potentially daunting, hence by merely acknowledging its dynamic and flexible nature, courts would have already completed a portion of their work.[73] Therefore, it is worth noting that although customs are dynamic in their nature, values are the most reluctant to change because they influence identity. This gives rise to the question, which values must change along with culture, as it transforms. Thankfully, courts cannot unilaterally resolve such complexities without community involvement. The following is an examination of patriarchy as a value;

It is trite to mention that the African cultural society, particularly Southern African cultural society is patriarchal in nature, because of colonial influence. This comes from the genetic make-up of ACL development under the colonial project where women were excluded from any involvement in the codification, manipulation and fine toning of ACL principles. It is unlikely to come across a patrilineal cultural society, where patriarchy isn't a value.

There is patriarchy as a value which upholds the dominance of men, and then there is patriarchy as a social institution which influences a school of thought.[74] The value says that men lead, and women do not. The latter institutionalises male dominance in social structures such as the family unit where a father or a senior male is the head of the home, and also leads cultural practices.[75]

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[72] DD Ndima 'The Resurrection of the Indigenous Values System in Post-Apartheid African Law: South Africa's Constitutional And Legislative Framework Revisited' *SAPL* (2014) 29 (2), 312.

[73] Ndima (note 72 above) 310. He explains that, "this was because African law's nature was such that it would continue to evolve within its normative context consistently with the Constitution, and that inherent in its features of flexibility and adaptability were its consensus-seeking qualities that facilitate dispute resolution and prevent disagreements in family and clan meetings."

[74] A Sultana 'Patriarchy and Women's Subordination: A Theoretical Analysis' July 2010-June 2011 https://pdfs.semanticscholar.org/a1a1/956fe39a514e5128ec48b29fab7f45b1848e.pdf (Accessed 5 November 2018).

[75] Ibid.

Therefore, it becomes important to establish a standard which will determine the change of African values. This is because when culture changes to meet the needs of its people, certain values within the custom also change. The concern is that when some customs change, it changes the very essence of the identity of a particular cultural group or community.

The tension arises when determining which values change and which values remain intact because they are intrinsic to the to the framework of the cultural practices. This tension was prominent in the case of *Shilubana* where arguably, the court was correct in granting Shilubana the chieftaincy title. [76] The Court took into consideration her gendered position within the institution of traditional leadership and, as the only surviving heir in terms of the Intestate Succession Act. Regardless of Shilubana's entitlement to succeed the throne, it is accurate to say that if she did in fact have a brother, she would not be entitled to inherit, since the rule of primogeniture is most prominently known to inherit the firstborn son[77]. Shilubana would have still been disinherited on the basis of gender.

It is patriarchy as a value that plays out in the above facts. In consideration of who is next in line to inherit the throne, Ms. Shilubana did not fit the criteria as she offended the value, so it had to flow to the next bloodline, to Mr. Nwamitwa. Thus the appropriate position for the court to take is to redress and alleviate the injustice but at what cost? Section 2 of the Constitution instructs the courts to strike out any rule that contradicts the Bill of Rights, and the male primogeniture rule was appropriately subjected to the same sanction.[78] Therefore, the development of that principle or practice then becomes secondary, if not even a priority. What the court in this regard was trying to change was the patriarchal value. Being the most literal and obvious value of ACL, this however does not suggest that it is the only principle or value found within the confines of the cultural practice.

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[76] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (4 June 2008), 87.

[77] *SA Law Reform Commission Project 90: Report Customary Law of Succession* (2004) 1 (4). Bekker JC makes mention of the shift in the male primogeniture rule prior to *Bhe* where the last-born son is considered a more competent heir. This area of customary law has sparked the most debate, mostly from a gendered aspect, which I can concede to; however, where I disagree is where there seems to be double standards. African customary law clearly sets out that the benefit comes with the duty to care for the family, whereas the modern law offers people the benefit without any duty. This choice though valid encourages a condescending attitude to the value behind the principle. The court attacks this notion in the case of *Mthembu v Letsela and Another* 1998(2) SA 675 (T).

[78] The '1996 Constitution'.

Patriarchy affects leadership within the African context. The three main aspects of African life being marriage, inheritance and succession are infused with leadership. Arguably, patriarchy has dictated leadership in the African context. The judiciary has engaged in attempts to define leadership within the African context, while altering the disempowering effect that the practice of patriarchy has had on women.[79] Thus, the primary objective for courts is to ensure that is all aspects of ACL exude equality and human dignity. This mandate is in contrast with the official version that was inherently patriarchal in nature and therefore fails to meet constitutional standards. The Court in the majority decision of *Bhe* praised the fluid nature of ACL, and how it alters along with the needs of its people.[80] And that its rules of inheritance have been denied transformation alongside the values, norms and practices of the community.[81]Therefore, courts are out in a precarious position as they cannot apply rules which are no longer relevant to the lived experiences of its people. Thus, courts must establish new rules which will adapt to the societal needs and changes.[82]

The discussion in *Bhe* provides an example where the patriarchal value of primogeniture is moot. The court acted remarkably to make sure that that genders are equal, and that the discrimination that came with the rule of primogeniture is overcome. However, it is worth noting that when the Court is in the attitude of transformation, it tends to neglect the fact that it also has a duty to uphold African values. For example, the father of the deceased should according to ACL, claim his right as the head of the family, to raise his son's children. He has the responsibility to bring them up, and this should have been the basis of his claim for seeking to protect the assets of the children. African values do not permit him to bring forward a claim for himself and against the mother of the children. On the basis, the Court was meant to reprimand the father of the deceased, in that regard as to what being a family head is all about.

Ngcobo DCJ considers the majority decision regarding living ACL as a 'cop-out'. He insists a large number of African's have not done away with their traditions and cultures, the law must consider this evolving nature of the lived experiences of its people from rural to urban lifestyle,

[79] *Shilubana* (note 76 above) 77.
[80] *Bhe* (note 3 above) 81.
[81] *Bhe* (note 3 above) 82.
[82] *Bhe* (note 3 above) 84.

courts are required to take note of these changes in order to adapt to them.[83] Ngcobo made reference to the *Mabena* case[84] in seeking to ascertain living ACL, it meant that the court should look at what the community is doing and then tailoring the law to fit their needs.[85]

The contentious subject of African customary marriages has led to the confrontation of two equally measured constitutional rights. Prior to the ushering in of the constitutional democracy, customary marriages were regulated by a host of legislation like the Zulu Code and the Black Administration Act, these policies were not in line with the living law of the people and certainly did not reflect African values as the following case law would detail. At a later stage, the Recognition of Customary Marriages Act[86] was established in order to correct the errors of its predecessors.

According to the *Gumede* case, old customary marriages maintained women's minority status which manifested in marital property rights. The court was tasked to alter the position of official African customary law which was left unchanged. The court emphasized the importance of s39 (2) in that it allows for ACL to be brought in line with constitutional values, it liberates ACL from its prejudicial past and it embraces a legally pluralistic society.[87] In this matter, the question of development does not particularly arise; however the court does assert that the CC is under an obligation to develop ACL to bring it in line with its principles.[88]

In the case before the court the inquiry is not related to developing the impugned policies in its living form, because the impugned policies in question are not based on living ACL. Hence it will not be beneficial for the court to engage in a dispute regarding the development of ACL in its official or living form.[89] Furthermore, even if there were a good for developing living ACL, it would be ill-advised to do so because parliament appears to have made a conscious election that all new customary marriages should be marriages in community of property.[90]

[83] *Bhe* (note 3 above) 228.
[84] *Mabena v Letsela* 1998 (2) SA 1068 (T).
[85] *Bhe* (note 3 above) 217.
[86] 120 of 1998.
[87] *Gumede* (note 51 above) 22.
[88] *Gumede* (note 51 above) 29.
[89] Ibid 29.
[90] *Gumede* (note 51 above) 30.

The *Gumede* case was instrumental in revealing how complex the African family system can be. Since the Zulu code previously discriminated against women, the RCMA was established in order to include women with regards to ownership of marital property. This case birthed the idea of introducing marriages that are in community of property. The court in this case initiates the western version of marital legislation, as if African customary marriages are in line with it.

Primarily, the concept of marriages concluded in community of property brought confusion, as by design it was constructed for people with individual concepts of property. In contrast, communitarianism is in alignment with customary marriages and understandings of property.

For example, if the head of the family got married in community of property, and the property that he was in custodianship is not entirely his, but belongs to the family, this would be extremely problematic. The greatest concern is that parties may pass off communal property as individual property, when the former is considered part of the marital property. Upon dissolution of the marriage, that property would then be equally divided with the spouse. The question that follows is then what would happen to the family and its interest in the property? The concept of in community of property is arguably then incompatible to African marriages.

It seems that the solution implemented through the Court amounted to an importation as the marital regime of in community of property is designed for Western marriages, and therefore is not suitable for an unsuspecting culture.[91]

The Court in the *Mabuza* case must be commended for deciding that the African customary marriage cannot be invalidated on the basis that *ukumekeza* was not completed. The Court could have further cemented its argument on the basis of African values. It must be noted that *ukumekeza* requires a cattle kraal in order for the practice to be done, and developments in the way of living of the people which would include urbanization would not allow for this practice to be carried out in the same fashion. Although unnecessary, there was evidence that an agreement was made by both parties for the practice to not be completed. Based on that, the other party acted mala fide by contesting. As in the *Maluleke* case, the practice of *imvume* was not done. The date for the practice to be carried out was set, however the other party died prior to the fulfillment of this agreement. The court in this instance was accurate in ruling that the two parties already acted like married

[91] *Gumede* (note 51 above) 51.

people and therefore were married, and that the fact the *imvume* was not done did not alter that. These cases demonstrate how living law adapts to the lived reality of its people.

Justice Ngcobo in the minority decision of the *Bhe* case extensively interpreted leadership within the context of inheritance. In this matter, the male primogeniture rule referred to the head of the family as the one having the competency to lead and manage the family's estate. The *Shilubana* case highlighted the complexities of succession within the African context. What emerged was that courts need to understand the significance of individual roles within the family structure first, and then the royal family. The task of development requires that courts master contextual the understanding of ACL first, before continuing with actual development.

> "There was the cultural belief that a girl child did not stand to benefit the family inheritance on the belief that they get married and start new lives elsewhere. Therefore, taking up of effective leadership positions was a challenge as they would be regarded as semi-permanent and unoriginal in both families (birth and marriage families). However, some women ascended into leadership positions by default."[92]

Scholars detail how Shona women came into positions of leadership, which has its similarity with the ascension of Zulu women.[93] These include:

1. The position of *mafungwase* referred to the first-born daughter in the birth family, and would be guaranteed a voice in her father's house.
2. The senior wife, especially in the polygamous institutions of marriage had a key significance. Occasionally, when women were consulted to participate in the decision-making of family matters, the senior wife's views carried the most amount of weight.
3. The wife who marries the eldest son gained importance by virtue of who she married within the family hierarchy.
4. The king's sister was also influential, as no ritual, event or cultural practice can be done in her absence. I.e. Mkabayi kaJama, the aunt of King Shaka was King

[92] O Dodo, G Dodo and M Zihanzu, 'African Women in Traditional Leadership Role in Zimbabwe: The Case of Shona' *African Journal of Democracy and Governance* (2017) 4 (1 and 2) 52.
[93] O Dodo, G Dodo and M Zihanzu (note 80 above) 55.

Senzangakhona's sister who sat as a regent when her brother dies. She was directly responsible for the appointment of Shaka Zulu as the King.

5. The king's mother is considered to also be in a position of leadership.

The above were illustrations through which African women came to be in positions of leadership within the African Society. It is worth noting that the highest forms of leadership in the community are influenced by the royal family through traditional leadership. Thus, living ACL fosters the agency of African communities through development. However, this shift calls for an introspective exercise into the determination of African values that remain relevant and significant to the lived realities of African people.

3.4 Conclusion

The discussion of official ACL concluded that African values have undergone immense transformation through the introduction of the social, economic and political factors under colonial rule, into the African society. This enhanced patriarchy within the official ACL. However, several African values remained intact during that tumultuous period. These include for the purposes of this study, patriarchy which seeks or underpins the preservation of the family unit for the next generation as well as the significance of lineage. As such, a challenge is posed to courts regarding the ascertainment of living ACL, since not all African people are in favour of eroding their values. Hence, development is regarded as a need for the judicial reform of ACL. This work delves into judicial development through a discussion of the *Bhe* case in the following chapter.

Chapter 4

THE LEGAL THEORY THAT UNDERPINNED THE ADJUDICATION IN THE BHE DECISION

4.1 Introduction

The previous chapter concluded that ACL is a unique system, that when dissected reveals the living version existing alongside the distorted official form. In most instances requiring development, it is this distorted form that needs to be brought in line with the objectives of the Bill of Rights. Thus, the process of judicial development cannot proceed without due consideration of the history and the nature of ACL. Thus, this chapter will continue the discussion of development by examining the *Bhe* case. It will be done with the aim of highlighting the limitations that threaten ACL development, post recognition.

4.2 The obligation to develop African Customary Law

The mandate given by the Constitution in Section 39 (2) is very instructive; it states that:

> "When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[1]

It envisions the preservation of ACL as a recognised legal system, equal in status with common law. However, the general obligation does not necessarily mean that the court is compelled to develop every common law case brought before it.[2] This obligation was further emphasised by the court in *Carmichele v Minister of Safety and Security and Another*, stating that if the common law strays from the objectives of the Bill of Rights, then the court must remove departure through development.[3] Considering that ACL is given the same status as common law, thus this obligation

[1] The '1996 Constitution'.
[2] (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) 214.
[3] *Bhe* (note 2 above) 33.

is equally applicable to it.[4] Hence, the validity of any ACL rule is tested against the Bill of Rights and where the rule does not reflect the objectives of Section 39 (2), the courts are obliged to develop it.

4.3 Types of development

Development in the legal context has an end goal of advancement of ACL. There are two instances which warrant ACL development by the superior courts of South African courts.[5] The first instance is where ACL needs to be modified to fit the altered conditions in the community where the law operates.[6]As such, this form of development is community-reliant and therefore is rooted in the living version of the law.[7] In the second occasion, ACL contravenes the Bill of Rights and must be brought into alignment with it.[8] Generally, it is the official distorted version of the law that is inconsistent with the Bill of Rights. Lehnert offers his own classification for the above instances, he refers to the former as 'passive development' and the latter as 'active development'.[9] Moreover, the advantage of passive development is that communities are more inclined to accept a development emerging from an existing rule, rather than a new rule altogether.[10]

Against this backdrop, it is argued that 'passive development' would provide the greatest potential for ACL to comply with the Bill of Rights. Its advantages include the re-indigenisation and resuscitation of African values by restoring the significance of the community in ACL.[11] Furthermore, 'passive development' provides a medium for an amicable compromise to be reached, in the absence of a resolution for the on-going conflict between ACL and human rights. Thus, considering that 'passive development' is built on living law, its flexible feature would support the flexible approach.

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[4] *Bhe* (note 2 above) 215.
[5] S 173 of the '1996 Constitution'.
[6] *Bhe* (note 2 above) 216.
[7] *Bhe* (note 2 above) 219.
[8] *Bhe* (note 2 above) 218
[9] W Lehnert 'The Role of the Courts in the Conflict between African Customary Law and Human Rights' *SAJHR* (2005) 21, 251.
[10] Lehnert (note 9 above) 254.
[11] DD Ndima 'The Resurrection of the Indigenous Values System in Post-Apartheid African Law: South Africa's Constitutional And Legislative Framework Revisited' *SAPL* (2014) 29 (2), 297.

4.4 Ascertainment of the content for the development

The ability to clearly determine the content of living ACL remains a primary concern when courts engage in 'passive development'.[12] The key to determining the content of living ACL lies in the community's evolving lived experiences. These are on-going developments occurring within the community which must be observed as they present themselves informally. They are commonly referred to as spontaneous developments.[13] This means that the courts simply apply these developments without subjecting them to strict rules of ACL.[14] However, the challenging task is that of identifying living African law and separating it from its official distorted version. Thus, there are three ways that courts can utilise to ascertain official ACL. Firstly, judicial notice of the said law suffices as a method of ascertainment, provided it is readily ascertainable with certainty.[15] Secondly, is the said law is not readily ascertainable with certainty, expert evidence is acceptable as proof thereof.[16] Lastly, courts can simply make reference to case and textbooks as well.[17]

4.5 The courts' capacity to develop

South African courts are more than capable to perform the development mandate using the flexible feature of living ACL.[18] The law that is practiced by African people in their communities, is far removed from the law of the judiciary. The two opposing decisions in *Bhe* are indicative of this difference.[19] Himonga notes that retrospective court decisions regarding ACL which reveal 'the

[12] *Bhe* (note 2 above) 9.
[13] *Bhe* (note 2 above) 207. Spontaneous developments comprise of the views of the community, hence it is oral informal law.
[14] Ibid 207.
[15] *Bhe* (note 2 above) 150.
[16] Ibid 150.
[17] Ibid 150.
[18] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (4 June 2008), 94.
[19] SM Weeks 'Customary succession and the development of customary law: The Bhe legacy: part III: reflections on themes in Justice Langa's judgments' *Acta Juridica* 2015 (1) 215 – 255, 218.

difference' should easily be able to concur with Ngcobo J.[20] Furthermore, the courts capacity to develop can be an interim measure, until parliament enacts legislation.[21]

Superior courts have been given this power to develop ACL[22] and thus particular positive aspects of ACL must be preserved and incorporated into the law.[23] The court has access to the community concerned in the matter, which becomes the primary source of ACL. The information at the courts disposable includes;

1. The particular community concerned in the matter – to assess current practices and any spontaneous developments that have occurred
2. The history and context of the African customary rule
3. The purpose for which the rule was intended to serve

Moreover, the court has the ability to receive empirical research as a testament to the changed circumstances in the community. However, the discrepancy lies with the fact that the court cannot be compelled to act on the empirical research presented. It has the discretion to either accept the finding of the research or reject it with reasons.[24] Mbatha notes that, "the high standard which customary practices have to meet to be incorporated in the law has widened the gap between theory and practice, thus negatively impacting upon people's development opportunities."[25]

Mbatha suggests a three-legged approach to incorporating living African practices into living ACL.[26] His approach is subconsciously based on the flexible nature of ACL. Therefore, this work aims to extend his thinking through the recommendation of the flexibility approach as an ideal interpretation tool for courts to utilise for the interpretation and development of ACL.

[20] C Himonga, "Reflection on Bhe v Magistrate Khayelitsha: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa" *Southern African Public Law* (2017) 32 (1 and 2) 1-18 9.
[21] *Bhe* (note 2 above) 116.
[22] S 173 of the '1996 Constitution'.
[23] L Mbatha 'Reforming The Customary Law Of Succession' *SAJHR* (2002) 18 259- 286, 283.
[24] The majority decision refused to rely on the empirical research supplied by Mbatha in the form of an affidavit. *Bhe* (note 2 above) 84.
[25] Mbatha (note 23 above) 284.
[26] Ibid 284. The approach to incorporating practices:
(1) identify the cultural value to be protected;
(2) ascertain the different ways in which community members protect that cultural value; and
(3) Look into the constitutionality of these practices.

4.6 The Bhe discussion

The line was drawn clear in the sand when the Constitutional Court offered two opposing decisions, in what was nothing short of a defining moment in ACL history. As previously alluded to, this matter involved Nontupheko Bhe who approached the Court on behalf of her minor daughters, who were seeking to inherit from their deceased father Mr Vuyo Mgolombane.[27] According to certain provisions under Section 23 of the Black Administration Act, Miss Bhe's children were precluded by the male primogeniture rule from inheriting because they were junior and female.[28]

The ACL position regarding this rule remains unclear. The Court in the majority decision struggles with balancing ACL principles with the common law principles in order to provide relief for African women. The majority decision by Langa DCJ, found that the societal transformation was proof of the irrelevance of this rule in its official form. It paid due consideration to the history, nature and significance of the rule, and whether or not it amounted to discrimination. Langa DCJ further clarified that the official rules of succession had no place for extra-marital children.[29] The requirements for eligibility to inherit were even more strenuous to meet. Inheritance was primarily reserved for marital children. This meant the immediate disqualification from inheriting from the paternal side, because for all intents and purposes, such a child is regarded as (*ingane ezalelwe ekhaya eyako ninalume)* belonging to the mother's family.[30] Accordingly, the child would take the mothers surname. Likewise with the maternal family, succession is a governed by the male primogeniture rule, meaning that extra-marital children are unlikely to inherit within that family as well.[31] Thus, the Court had to address the position of such children.

On the subject of the position of female children under succession rules of ACL, both the majority and the minority decisions were in consensus that gender discrimination was apparent and unconstitutional. The Court considered the position of women and children which was safeguarded

[27] *Bhe* (note 2 above) 10.
[28] *Bhe* (note 2 above) 16.
[29] *Bhe* (note 2 above) 79.
[30] Ibid 79.
[31] Ibid 79.

by the constitutional protection of equality and human dignity. The minority by Ngcobo J acknowledged the unconstitutionality of the rule of primogeniture in its existing official and discriminatory form.[32] Sadly, this was the only subject where the Constitutional Court judges were in agreement, as the reform of the male primogeniture became the point of departure. The majority elected to not develop the official rule of succession and proceeded to replace it with common law. This meant that to take a few steps backward for the recognition of ACL. Mnisi- weeks refers to this as "a failure by the courts to live up to its equal recognition vision."[33]

Ngcobo J, in his minority decision took a firm position against the total abolition of the official rule of succession. He presented a compelling argument as to why 'passive development' is to be given priority over any other option.[34] He addresses the courts conflation of the terms succession and inheritance, arguing that the two are different and the heir and *indlalifa* cannot be compared. The roles and responsibilities of the two are fundamentally different, therefore the two terms are not interchangeable.[35] Ngcobo mentions that evidence of the distortion of this rule comes to the surface, as *indlalifa* succeeds the status of the deceased, and does not 'inherit' family property but is the custodian of but has the right to control family property.[36] He continues to say that such a system had safeguards in its original context, which ensured widows participated and has a say in the use of family resources.[37] Moreover, any shortfalls regarding the maintenance of family were personally funded by the *indlalifa*.[38]

As argued in the previous chapter, the African society has undergone a transformation. Ngcobo J reiterates that communities are now modern and urban, family structures are smaller and nuclear.[39] The communal ethos has been replaced with individualism, meaning that extended families no longer live together and this has compromised the ability of the *indlalifa* to fulfill his care duties.[40]

[32] *Bhe* (note 2 above) 143.
[33] Mnisi-weeks (note 19 above) 216.
[34] *Bhe* (note 2 above) 212. Ngcobo J argues that when such a rule shows a 'deviation', the court must act to remove it through development. He expressed a concern for the finality of striking out a rule and what it implies for the recognition of ACL and the vision of the Constitution. *Bhe* (note 24 above) 215.
[35] *Bhe* (note 2 above) 169.
[36] Ibid 169.
[37] *Bhe* (note 2 above) 173.
[38] *Bhe* (note 2 above) 172.
[39] *Bhe* (note 2 above) 80.
[40] Ibid 80.

Thus, the change in succession patterns must be reflected in legislation in order the discriminatory effect to be removed. Mbatha concurs with Ngcobo J saying that,

> "Advancing the position of women in society requires a decision which considers the difference between inheritance and succession."[41]

It is against this background that development was the most ideal solution to reform the official rule of succession and bring it in line with the Bill of Rights. In accordance with the abovementioned discussion, Ngcobo J insists that the Court had the general obligation to develop the official rule of succession. His first point was that this development would give the rule an opportunity to adapt to the circumstances of the community which indicated a change in the context. Ngcobo J criticised the Court for not having this desire, especially since it implied that the Court was not concerned about the people who actually practice this rule.[42] Thus, the Court's decision denied the community an opportunity to revise their own law, and it also denied legislation the chance to reflect this change.[43]

Secondly, Ngcobo J argues that it would be far easier with less detrimental effects, for the Court to remove the defect in the official rule of succession as opposed to striking the rule out altogether.[44] The Court abolishing the male primogeniture rule was harsh, and did not exude the constitutional aspiration to preserve the ACL legal system,[45] especially because the option to develop was readily available. Furthermore, Ngcobo's recommendation required no strenuous activity by the courts to introduce a new development. However, Ngcobo J explained that the only problem with the rule of primogeniture is that it discriminates on the basis of gender, and development would be likely to resolve that by removing the word "male".[46] The effect of this would be to appoint the deceased's daughter as the successor in an appropriate case. Furthermore, on the subject of development, the majority decision declined the invitation to develop the rule of primogeniture, saying that it would be extremely challenging and time-consuming to attempt to develop the male primogeniture rule under living ACL which in itself is not easily determined.

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[41] Mbatha (note 23 above) 281.
[42] *Bhe* (note 2 above) 218.
[43] *Bhe* (note 2 above) 221. He explained that cases such as *Mabena* reveal that women are now recognised as heads of families and their roles have drastically changed.
[44] *Bhe* (note 2 above) 222.
[45] *Bhe* (note 2 above) 223.
[46] *Bhe* (note 2 above) 222.

Rather, the court opted for the substitution with the ISA, which would provide immediate, equal relief to all South Africans who die intestate.[47]

4.7 Limitations to development

In accordance with the abovementioned discussion, there are judicial limitations that threaten the 'passive development' of official ACL post recognition. There is one technical limitation which must be mentioned, this is where the need for development only arises on a case by case basis.[48] Therefore, courts cannot unilaterally embark on a journey to develop a law unless it is triggered by a need. However, it is worth noting that such a limitation has no bearing on the whether the judiciary is willing, or reluctant to develop ACL. Other limitations include inflexible judicial attitudes, a shortage in judicial understanding with regards to ACL and the replacement of it with common law.

a) Inflexible judicial attitudes

The Constitution's normative vision is that both Section 8 (3) and Section 39 (2) should cater for the development of ACL, however, the former remains silent and only refers to common law development. Rita infers that this unilateral reference to common law makes its supremacy official.[49] Likewise, the judiciary needs to be cleansed of such judicial attitudes so that the vision of the Constitution is fulfilled.

In the past, the official ACL was partially codified in order to ensure that it would be 'readily ascertainable'.[50] Arguably, this process triggered the distortion of this official version. In the matter at hand, the Court in the majority decision reasoned against development by stating the following;

[47] *Bhe* (note 2 above) 131.
[48] *Carmichele v. Minister of Safety & Sec.* 2001 (4) SA 938 (CC) 33.33.
[49] R Ozoemena 'Living customary law: A truly transformative tool?' (2016) http://www.saflii.org/za/journals/CCR/2016/8.pdf (Accessed 28 November 2017).
[50] Mbatha (note 23 above) 263.

> "There is however insufficient evidence and material to enable the Court to do this. The difficulty lies not so much in the acceptance of the notion of "living" customary law, as distinct from official customary law, but in **determining its content and testing it**, as the Court should, against the provisions of the Bill of Rights."[51]

The Court failed to come to terms with the fact that the living ACL did not have the 'readily ascertainable' feature that the official version possessed. Rather, the living version was dynamic and flexible in nature. The courts had been conditioned to accept formal law (especially western oriented lenses) that could be easily tested. Despite their warm embrace for living ACL, their reluctance to accept the invitation to develop meant that they were unable to trust the spontaneous developments that had occurred in the community.[52] The judges in the majority revealed that without the 'readily ascertainable' feature which served as a crutch, the default reaction was to keep to the procedure they were accustomed to. As such, the legal conservativism of the judiciary was evident in this case, as the majority decision was consumed by the traditional ideas and attitudes regarding the treatment of ACL. In fact, to a certain extent, it seems like the recognition of ACL was temporarily revoked.

b) Inadequate judicial understanding

The judges of the CC in the majority decision seemed to be suffering from a lack of sufficient understanding with regards to ACL. Himonga asserts that the efforts of the majority in *Bhe* did not amount to an interpretation of the issues before the court, rather the Intestate Succession Act (ISA) was brought in as a solution without due consideration of the "grounded reality".[53] To begin with, the Court was not on the same page in terms of classifying whether the law in dispute was rooted in inheritance or succession. Mnisi-Weeks notes in agreement as follows:

> "Likewise, it shows the need for improved tools for state courts to understand and give expression to what is happening in terms of living

[51] *Bhe* (note 2 above) 9. (Emphasis added).
[52] *Bhe* (note 2 above) 84.
[53] Himonga (note 20 above) 8.

> customary law so that they can develop official customary law with reasonable understanding."[54]

The majority decision conflated inheritance with succession, which was not only an error, but it further indicated the judges had insufficient clarity on this subject matter. In the early stages of his argument, Ngcobo J took the opportunity to dispel the belief. He explains that contrary to the Western concept of the 'heir', the *indalifa* cannot elect to claim the right to inherit property, separate of all other responsibilities.[55] Thus, it is greatly concerning how the fate of ACL development, rests in the hands of a judiciary that still interprets ACL with a common law lens.

C) The replacement of ACL with common law

The replacement of ACL with common law by the Court in *Bhe* was narrow and regrettable.[56] The majority judgement failed to consider that ACL is still being nursed back to health, following the lengthy period of judicial marginalisation. This action is in contrast with transformation and it casts a serious doubt on the equal status of ACL and common law, which was given by the Constitution.[57]

The ISA, was simply not an ideal solution in this matter for the following reasons. The courts justified the substitution of ACL with common law on the basis of its constitutional compliance, was unsatisfactory.[58]The ISA by design is a Western policy, which was imposed on an unsuspecting culture.[59] Interestingly, it was originally crafted to suit 'all' intestate estates, excluding those of Black Africans, however such legislation had to be modified to now include African estates.[60] Arguably, the Court should have rather invested in developing the official rules of succession that were already adapted to the lived realities of the African people. Furthermore,

[54] Mnisi-Weeks (note 19 above) 218.
[55] *Bhe* (note 2 above) 160.
[56] Mnisi-Weeks (note 19 above) 248. The legal transplant was done under the guise that the male primogeniture rule still existed in patriarchal and untransformed manner. However, the results on the ground reveal its flexible application allowing women to assume significant roles with regards to inheritance and also becoming heirs in their own right. As a result, some families have elected to consolidate both customary and civil aspects of inheritance. Mnisi-Weeks (note 19 above) 249.
[57] N Ntlama '"Equality" Misplaced in The Development of The Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)' STELL LR 2009 (2) 333-356,352. Ntlama argues that ACL is portrayed as incapable of independent development, as its ranking is diminished to that of a 'useful accessory'.
[58] *Bhe* (note 2 above) 42.
[59] *Bhe* (note 2 above) 229.
[60] *Bhe* (note 2 above) 40.

the ISA seeks to protect individual rights while group rights are neglected.[61] As such, the replacement policy has only but scratched the surface with regards to the protection of women and other surrounding issues of succession at the grass root level.[62] Mbatha has this to say about the importation:

> "Although the amendment will play an important role in improving the property rights of individuals under customary law, it will not address all succession problems under customary law. Its enforcement will interfere with working practices on the ground, which cannot translate easily into legislation, but which reflect positive cultural values."[63]

Himonga relied heavily on the empirical research of Mnisi-Weeks which revealed the workings of the ISA on the ground. She adds that at the grassroots level, succession patterns show uniformity in impact on the lived experiences of people.[64] These findings vindicate the superiority of Ngcobo J's decision as reasonable and beneficial for a plural legal society. The dilemma of the transplantation of the ISA is difficult to overcome. However, Mnisi-Weeks recommends that ideally the courts should support the agency of the community in their endeavor to achieve their

[61] Mnisi-Weeks (note 19 above) 249. She records that, "the court's decision had the effect of excluding parents and siblings (including female ones) from benefiting from sons and brothers who, in their lifetimes, maintained them."

[62] The impact of the ISA on the ground revealed a host of challenges. Under the ISA, the procedure for winding up an intestate estate was rather impractical. It does not take into account the logistics of going to the Master of High Courts, which is generally a good distance away from the rural communities. In addition, since people in the rural communities are not educated about this process, they have to make several trips back and forth before the estate is successful wound up. Furthermore, the ISA does not include extended family members as beneficiaries, as these family patterns still exist in rural communities. Most importantly, the ISA is insensitive to the polygamous family structure. Mnisi-Weeks (note above) 227.

[63] Mbatha (note 23 above) 285.

[64] Himonga (note 20 above) 4. Mnisi-Weeks embarked on an empirical study in the areas of Mbuzini and Mantjolo. The objective was to discover the gap between the law of the state (ISA) and the living law of the people, practiced on the ground post the Bhe decision. The results of this study agree with the minority judgement by Ngcobo J. She details an encounter with a polygamous family where the husband is deceased. When she enquired who owns the deceased's property, the widows positively replied that it was them. They also added that the male primogeniture (the eldest son) still existed in his oversight role, without diminishing their ownership. The wives admitted that this right to property did not exist in isolation, that rather it was coupled with the responsibility to care for all the children, in the absence of their father. The safeguard was that should the wives wish to leave their marital home at any point, they were free to do so provided that the inheritance is left behind, as the children would also remain. (Note 19 above) 235. In contrast, the impact of the importation of the ISA showed varying results. The rule related to distributing the inheritance to intestate beneficiaries proved problematic. It insisted that for estates smaller than R125 000, all beneficiaries including the spouse and the children will receive equivalent child portions. Mnisi-Weeks notes how this rule is applied blindly, regardless of the uniqueness of the polygamous family, since most of the estates in the rural communities is less than R125 OOO. She explains how a wife with one child, receives the same amount as a wife with several children, and depending on the number of wives and children altogether, the child portions received by everyone are undignified. Ibid 228.

objectives provided it is within constitutional limits.[65] Mbatha advocates for the inclusion of all family members because despite the changing circumstances of the family unit, the broad understanding of family in terms of African values has not been altered.[66] Thus, such appreciation was not reflected in the majority decision of the Court.

In assessing the possible resolution available to the Court, a purely traditional alternative might have been better suited to the unique case of ACL, but would have also been confronted with challenges considering the hybrid modern society. Ngcobo J had indicated the general dispute resolution process that existed within the family structure which could be explored, and noted that only once that process has been exhausted or proven futile, then only can parties approach the courts.[67] He admits that such a route is not without its own disadvantages.

Furthermore, Ngcobo J explains his disapproval for the implementation of the ISA only in the following:

> "I do not agree. In my view, the rule of male primogeniture should be developed in order to bring it in line with the rights in the Bill of Rights. Pending the enactment of the legislation to determine when indigenous law is applicable, both indigenous law of succession and the Intestate Succession Act should apply subject to the Constitution and the requirements of fairness, justice and equity, bearing in mind the interests of minor children and other dependents of the deceased family head."[68]

The premise of Ngcobo J's strongest argument stems from the implementation of the ISA 'only', after electing that the development of the male primogeniture rule is not ideal. With the word 'only' being the operative word, it seems to suggest a hierarchy of importance, where the ISA is privileged to a superior position and therefore the only suitable solution to the matter at hand. Furthermore, if ACL and common law are truly on equal footing following the formal recognition of ACL by the Constitution, then the simple replacement of one with the other should be not possible especially considering the distinct and uniqueness in both legal systems. Ngcobo J's

[65] Ibid 249.
[66] Mbatha (note 23 above) 285.
[67] *Bhe* (note 2 above) 239.
[68] *Bhe* (note 2 above) 139.

opinion takes into consideration that the substitution ordered by the majority decision undermines the recognition of ACL.

The minority decision was the most appropriate for ACL reform in the interim, while awaiting legislative intervention. His solution seems to merely remove the defect in the male primogeniture rule is reasonable, without advocating for assimilation or erosion of ACL. It considered the useful feature of flexibility that is inherent in living ACL and showed consideration for South Africa's plural legal system.

4.8 Conclusion

Against this background, this chapter concludes that South African courts are aware of the general obligation to develop ACL post recognition. Moreover, they are presented with two types of development which they can select from. However, development in the passive sense has caused unrest in the judiciary. This is because, development according to the living ACL of the people requires an investigation of the community concerned in order to ascertain the content for the development. The *Bhe* case was instrumental in highlighting the gap that exists between the law of the courts in statutes, and the living law of the people on the ground. Ngcobo J provides reassurance that courts are more than capable to develop living ACL. On closer inspection, there are however internal limitations within the judiciary that pose a threat to ACL development, and these should be addressed. The following chapter will discuss what happens in the CC when ACL development is finally achieved, through a critique of the *Shilubana* case.

Chapter 5

A CRITICAL ANALYSIS OF THE DEVELOPMENT OF AFRICAN CUSTOMARY LAW WITHIN THE SHILUBANA CASE

5.1 Introduction

> "In view of the conclusion reached later in this judgment, that it is not possible to develop the rule of primogeniture as it applies within the customary law rules governing the inheritance of property…Nor, I emphasise again, does this judgment consider at all the constitutionality of the rule of male primogeniture in other contexts within customary law, such as the rules which govern status and traditional leaders."[1]

The previous chapter delved into the discussion of development with regards to the *Bhe* case. It revealed the existence of inflexible judicial attitudes, a lack of adequate understanding and the importation of foreign values and norms, in judicial adjudication that inhibits the development of ACL. The *Bhe* case elected to do away with the male primogeniture rule only with regards to inheritance, despite there being a general obligation for courts to develop ACL. This initiative would bring the official version of the law in line with the objectives of the Bill of Rights, without eroding the rule altogether. Similarly, this chapter addresses the position of the male primogeniture rule only in terms of succession to traditional leadership, which was shelved in *Bhe*. The aim is to assess the manner in which the court fulfilled the development mandate.

[1] *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC), 94.

5.2 The Shilubana discussion

The *Shilubana v Nwamitwa* case[2] involved the male primogeniture rule where the only child of the deceased chief Fofoza was a female, Philia Shilubana.[3] The official ACL dictated a male heir, and her uncle Mr. Sidwell Nwamitwa would be the most qualified.[4] Ms. Shilubana brought this application under the equality clause, because according to this rule of primogeniture, she was not eligible to succeed to traditional leadership.[5]

Ms. Shilubana's CC appearance was based purely on her gender following the prevention of assuming her birthright, as *hosi*.[6] The Court was tasked with resolving whether Mr. Nwamitwa had a legitimate claim to the title of chieftaincy,[7] and whether the decision of the Valoyi traditional authorities was in fact lawful. The Court mentions the three important factors to be considered when determining the content of ACL, for purposes of development. It placed emphasis on the community's customs and traditions, the history of the rule in question and how it has been practiced in the past, and lastly the context surrounding the usage of the rule.[8] In the case of Mr. Nwamitwa, the Court was clear that although the past practice of the community was important to prove the usage of the male primogeniture rule, but it was not the only deciding factor.[9]

In deciding on the lawfulness of the development by the Valoyi traditional community, to appoint Ms. Shilubana as *hosi*, the Court observed the legal changes in the community.[10] It also considered that the institution of traditional leadership is constitutionally recognised.[11] Furthermore,

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[2] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (4 June 2008). The High Court ruled in favour of Mr. Nwamitwa primarily because the Valoyi tribe did not adhere to African customary law in appointing Shilubana. The SCA decided differently stating that the rule should stand as is and a resolution should be found within the rule. The CC found in Shilubana's favour citing the reasons "official customary law is not fossilized to the point that it is unchangeable and it is not immune to the equality claim." Van der Westhuizen J reiterates. He goes on to mention that South Africa is a signatory of international human rights, this created an obligation to protect the rights of women. Among other reasons he mentions that culture is hostile towards woman's equality, and therefore one must be sacrificed in favour of the other. The practice of culture is subject to the Constitution. Of all the critiques of the case, the most significant was that of the protection of culture by the constitution, should not be done at all costs. It is not absolute.

[3] *Shilubana* (note 2 above) 3.

[4] Ibid 3.

[5] *Shilubana* (note 2 above) 1.

[6] Ibid 1.

[7] *Shilubana* (note 2 above) 50.

[8] *Shilubana* (note 2 above) 44.

[9] *Shilubana* (note 2 above) 57.

[10] *Shilubana* (note 2 above) 86.

[11] S 211 of the '1996 Constitution'.

traditional authorities have a right to amend and develop their own law.[12] The Royal family initiated this development when they decided to reinstate the chieftaincy title to the original house.[13] Thus, the Court concluded that the actions of the Valoyi traditional authorities were not only justified, yet they gave effect to the objectives of the Constitution, through development.[14]

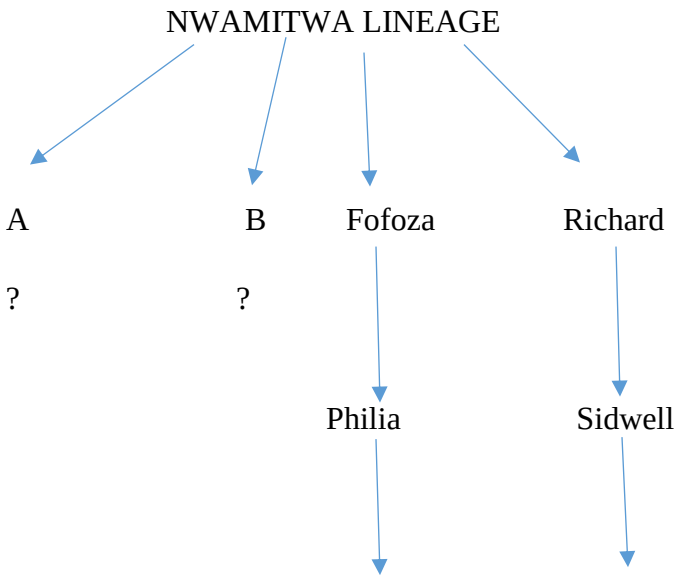
The CC's achievement for women must be appreciated.[15] It showed boldness when it stepped outside of shadows of the judicial adjudication in *Bhe*, and ventured into the 'passive development' of ACL using the flexibility feature.[16] Moreover, the Court was not conservative in its use of flexibility, it extended the operation of development via flexibility, beyond its abstract sense, known to scholars of ACL.[17] And well into the practical application, stretching the boundaries of ACL. Such efforts have furthered the evolution of ACL as envisioned by the Constitution, for the first time post its recognition.

As such, gender will no longer be an impediment to succession to a position of traditional leadership. The Valoyi traditional authorities were permitted to use their agency to determine their own law.[18] It is this agency that ushered in legal transformation, and altered the manner in which development was dealt with by the court. Furthermore, it encouraged creativity in order to transform the image of ACL to truly reflect the lived experiences of the people it governs, whereas in the past, it was simply the law of the judiciary.[19] Thus, the *Shilubana* case achieved praiseworthy developments under the Constitution.[20]

[12] S211 (2) of the '1996 Constitution'.
[13] *Shilubana* (note 2 above) 4.
[14] *Shilubana* (note 2 above) 60.
[15] *Shilubana* (note 2 above) 82.
[16] *Shilubana* (note 2 above) 73.
[17] *Shilubana* (note 2 above) 35.
[18] *Shilubana* (note 2 above) 70.
[19] B Mmusinyane 'The role of Traditional Authorities in Developing Customary Laws In Accordance With the Constitution: Shilubana and Others v Nwamitwa 2008 (9) BCLR 914 (CC)' PER/*PELJ* 2009 (12) 3.
[20] The Traditional Leadership and Governance Framework Amendment Act 23 of 2009 went on to be amended to recognise women as traditional leaders in S 2 (3).

5.2.1 The difficulties of succession in Shilubana

In contrast, the Court failed to show the equal treatment of rights in the case of *Shilubana*. Under the Constitution, Section 9, Section 30 and Section 31, are all equal, since there is no hierarchy of rights.[21] The task of development primarily belongs to the courts according to Section 39 (2).[22] This provision insists that ACL development must consider the objectives of the Bill of Rights, and such objectives include both cultural rights and the right to equality. Moreover, Section 39 (1) obliges the Court to make value judgements that are transparent and understandable.[23]



The Royal family has a vital role to play during succession proceedings. It convenes as soon as a vacancy appears in order to identify the next eligible candidate to fill the vacancy.[24] This is because the Royal family has an in-depth understanding of the family tree, as far as lineage is concerned, which might extend beyond the parties involved in the dispute. Following the death of *Hosi*

[21] The '1996 Constitution'.
[22] The '1996 Constitution'.
[23] The '1996 Constitution'.
[24] *Shilubana* (note 2 above) 4.

Richard, the Royal family convened and determined that Philia should be the next traditional leader.[25] This was in line with the following:

> "Principles governing the appointment of a Chief in Tsonga-Shangaan Nation
>
> 6.1 With the Tsonga-Shangaan Nation a *hosi* is not democratically elected but is born as a *hosi*,
>
> 6.2 The institutions which are responsible for the appointment of a *hosi* are-
>
> 6.2.1 The royal family which is composed of all members of the royal family irrespective of gender. The members are introduced into the institution of the Royal family gradually as they develop to majority in age. It is a Royal family, which is a meeting called for that purpose, chooses the *hosi* or acting hosi. It then sends the name of the chosen person to the Royal Council."[26]

The *Shilubana* decision has altered the possibilities for the achievement of ACL development. As such, the role of the courts has become complex since the addition of another institution during development proceedings.[27] Nevertheless, there are two ways to achieve 'passive development'. The first is through the court as witnessed in *Bhe*, and secondly, the community concerned is empowered to develop their own laws as in the case of *Shilubana*.[28] Ntlama insists that the role of the court remains distinct, despite the fact that development can also be performed in the community.[29] Arguably, the role of the court post the traditional authority's development was the most critical, as this is where it gave meaning to the development, in light of the mandate in Section 39 (2).[30] This is based on the understanding that although the community has a right to develop its own law, but only the court can bring the development in line with the Bill of Rights.

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[25] *Shilubana* (note 2 above) 6.
[26] Ibid 6.
[27] N Ntlama '"Equality" Misplaced in The Development of The Customary Law of Succession: Lessons From *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)' STELL LR 2009 (2) 333-356, 334.
[28] *Shilubana* (note 2 above) 67.
[29] Ntlama (note 27 above) 347.
[30] The '1996 Constitution'.

The development by the traditional authorities was therefore subjected to an inquiry, assessing whether it can be accepted as law.[31] As previously alluded, the dispute emerged from the fact that all parties were not in consensus with regards to the Royal family's nomination of Miss Shilubana. Thus, the decision of the Valoyi traditional authorities, which was concluded in terms of Section 211(2), vindicated those who were in favour of the development.[32] The Court's role post development was significant. This is because the development mandate envisioned that the right to equality would be reflected "equally alongside African values. The balancing act included that when modernising ACL in terms of equality (Section 9), the African value system (Section 30 and 31) should not be ignored. In this instance, the African values system puts forward the significance of lineage.

ACL occupies the center stage of the on-going debate between the group and individual rights. Sachs J in *Christian Education SA v Minister of Education of the Government of SA* explains;

> "The rights protected by Section 31 are significant both for individuals and for the communities they constitute. If the community as community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights. Moreover, if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism… the protection of diversity is not effected through giving legal personality to groups as such. It is achieved indirectly through the double mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the state not to deny them the rights collectively to profess and practice their own religion (as well as enjoy their culture and use their language)."[33]

The Court must be commended for recognising Ms. Shilubana's individual right to succeed to a position of leadership, free from gender discrimination. However, it was equally required to give due attention to the protection of groups rights, in an effort to guard against the erosion of lineage. This is due to the fact that lineage is essential to the continued existence of the institution of

[31] *Shilubana* (note 2 above) 75.
[32] The '1996 Constitution'.
[33] 1999 2 SA 83 (CC), 23.

traditional leadership. As such, a brief mention is made to lineage in the context of the chieftaincy title being restored to the rightful line, through Ms. Shilubana.[34] However, the importance of lineage to the Royal family and the chieftaincy title has a far greater significance. When the Court recognised traditional leadership as a unique institution, it also undertook to preserve this institution, which is anchored by lineage.[35] This is important as there are no elections held for the community to appoint a *hosi*, which emerges from the rule that kings are born and not elected. Thus, the introduction of a woman as *hosi* must be done responsibly.[36] Ms. Shilubana is a *hosi* of a different kind, and so her role must be clearly defined for the uniqueness that it brings.[37]

An argument for the preservation of the title of chieftaincy was not clearly stated. Ntlama argues that the male primogeniture rule in succession to traditional leadership should not remain as is, in order to preserve the significance of the chieftaincy. Rather, the rule must be transformed in order to recognize and accommodate women through giving meaning to the rule of primogeniture. Mmusinyane is in opposition to Ntlama's position, he believes that the Shilubana judgement to be about restorative measures for the eligibility of women to sit as *hosi*.[38] Mmusinyane's opinion misses the point altogether because the evolution of ACL in order to include women in inheritance is undisputed, however in terms of succession the appointment of women as *hosi* creates uncertainty as far as the future of leadership is concerned and makes it complex especially with the additional consideration of a marriage situation, which the court struggled to resolve as well.[39]

[34] *Shilubana* (note 2 above) 70. "…As far as lineage is relevant, the chieftainship was also restored to the line of Hosi Fofoza from which it was taken away on the basis that he only had a female and not a male heir."
[35] *Shilubana* (note 2 above) 42.
[36] *Shilubana* (note 2 above) 74.
[37] Ntlama (note 25 above) 351. Ntlama insists that the Court in *Shilubana* should not have left such a void in the development, unfulfilled.
[38] Mmusinyane (note 19 above) 150.
[39] *Shilubana* (note 2 above) 90. The court is faced with the challenge of determining the future of leadership after the end of Shilubana's term.

5.2.3 The contextual understanding of the male primogeniture rule

The past practice of the Valoyi community positioned the male primogeniture rule at the centre of the succession system. It was this past practice that played a key role in establishing an understanding of the nature and operation of the rule within its original context. Thus, the patrilineal succession system served several purposes. These include:

1. The preservation and the protection of the chieftaincy title- the male successor ensured that the royal bloodline (which informed their identity), remained intact.[40]
2. It advanced marital values- female children were encouraged to get married and bear children for their marital family, who would carry that surname.[41]
3. At all times, the future of succession would be determinable- there was certainty of the continuation of lineage.[42]

The dilemma of determining future lineage did not exist in the past, because of the male primogeniture rule. The male heir guaranteed the progressive existence of a *hosi*. Eligibility was established by 'the next qualifying male' rule. However, the legal changes in the communities allowed a woman to be appointed as *hosi*.[43] The introduction of a woman as *hosi* introduced uncertainty for the future of succession.[44] The Court's endorsement of the development by the Valoyi traditional authorities destabilised the norm for succession to a position of traditional leadership. In keeping with the African value system, which is centered on lineage, the Court

[40] Ntlama (note 25 above) 349.
[41] Ibid 349.
[42] *Shilubana* (note 2 above) 90. "The second point is that Ms. Shilubana does not apparently intend that her own daughter shall succeed her. It has been indicated that a "sociological" child, born of the male Nwamitwa bloodline, will succeed her instead. If this will be the position, however, it does not amount to gender discrimination. For one thing, it would follow equally from this decision that the sons of Ms. Shilubana would not succeed her either. For another, there is nothing to show that Ms. Shilubana could not be succeeded by a woman, albeit not her own daughter. That a decision might have been made to keep the chieftainship in a certain family line reflects, not gender discrimination, but an attempt to combine the preservation of royal bloodlines with measures designed to oppose gender discrimination." This decision by the Court resulted in uncertainty regarding the future of succession, post the end of Miss Shilubana's reign.
[43] *Shilubana* (note 2 above) 87.
[44] *Shilubana* (note 2 above) 81.

could have been clearer, and provided a better solution than the vague and undefined notion of a sociological child.[45] Thus, the Court was aware that it had created a problem.[46]

Despite the changes in the community to recognise women as equal successors, the significance of lineage was not altered. Ntlama argues that the manner in which the development occurred, which left the future of succession undefined, eroded the African value of lineage.[47] Hence, the Court did not act in a manner that revealed the desire to preserve this institution. Ngcobo J advised in *Bhe*, that when developing ACL, courts must consider the positive aspects of the official rule.[48] In accordance with that spirit, the Court needed to identify a positive feature that can be adapted or modified to resolve the uncertainty of future succession, which was brought by the introduction of a female *hosi*. Therefore, the past practice on its own was insufficient to prove the Mr. Nwamitwa had a legitimate claim to the chieftaincy, but it would have served as a good reference point for establishing the future succession for the Valoyi community.

The Court had the opportunity to define what gender-neutral traditional leadership entails. For all intents and purposes, *Hosi* Philia Shilubana has all the functions, powers and roles, as would a male *hosi*. Therefore, in line with the development, the standard for the determination of lineage, with regards to a female *hosi* is 'the next qualifying Nwamitwa'. Such a standard is not only gender neutral, but it also considers the African value system which has high regard for lineage. Furthermore, it is in line with the rule stating that kings are born and not elected. Thus, in accordance with the 'next qualifying Nwamitwa' as a standard, at the end of Miss Shilubana's term (either by death or resignation), the title would have to go to the next qualifying Nwamitwa. The Royal family determines this candidate. The next *hosi* could be Mr. Nwamitwa, or any other family member who was not even involved in the initial dispute, but who is equally eligible. This is also coherent with the understanding that Miss Shilubana's children cannot succeed her.[49]

[45] *Shilubana* (note 2 above) 74. These efforts would be in line with responsible development by the Court.
[46] *Shilubana* (note 2 above) 83.
[47] Ntlama (note 21 above) 347.
[48] *Bhe* (note 1 above) 222.
[49] *Shilubana* (note 2 above) 90. Miss Shilubana's children cannot succeed her because they are born into another surname and bloodline. Therefore, they are not eligible to further the Nwamitwa lineage.

5.3 Conclusion

The achievements of the Court in *Shilubana* cannot be celebrated enough, as it was for the first time that the most essential right-of–membership (being development), finally materialized. This realisation is proof of the recognition of ACL, and it would ensure the continued existence of the legal system in a plural society. Furthermore, development allowed for the advancement and relevance of ACL to the people it serves. Thus, the performance of the Court in *Shilubana* was filled with warm embrace, considering that the *Bhe* decision resulted in disappointment after its failure to development of ACL. However, the development by the Valoyi traditional authorities that received the Court's endorsement was short-sighted. It only considered Section 9 while the Court underplayed the importance of Section 30 and Section 31, when it did not clearly define what gender-neutral traditional leadership entails. As such, the future of succession was left uncertain.

Chapter 6

CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

> "Wherever something stands, something else will stand beside it. Nothing is absolute."[1]

The previous chapters concluded that ACL is formerly recognised as a valid legal system in South Africa, which is equal to common law. As such, the recognition ensured that ACL is entitled to full the rights-of-membership being interpretation, application and development in accordance with the Constitution. Thus, the duty to develop ACL requires the courts separate living ACL from its distorted official version. Besides, when developing ACL courts need to consider the history, purpose and context which the rule operated in. South Africa courts are required to use the living version to develop official ACL as a first resort and discouraged from assimilating or substituting it with common law. Moreover, where passive development is conducted through living ACL's flexible nature that courts have a duty under Section 39 (2) to ensure that both the Section 9 and Section 30 and 31, are given equal attention, as there is no hierarchy of rights. This chapter recommends that the flexible approach should be mainstreamed into ACL development to assist the court in achieving judicial interpretation and development through a uniform standard.

6.2 The flexibility approach

The flexible approach states that values, principles, policies and customs must be deconstructed to look at the best interest of those it serves. The task to develop ACL primarily belongs to the courts, likewise the design of the flexible approach is in line with the courts duty. This approach comprises of 3 phases to be conducted by the courts which will be discussed below.

[1] Chinua Achebe 'Things Fall Apart' page 94.

Stage 1: A brief assessment must be conducted to see whether the proposed development of policy or custom is in contravention of the Constitution or any ACL rules.

Stage 2: The court is required to deconstruct the policy or custom to reveal the value/principle that is an integral part of people's lives, which needs to be kept intact. Other aspects such as how it is performed can then be altered to remove the contravention due to this flexible feature. This is the sifting phase, to show how while people have become less rigid and strict when it comes to cultural practices, they have however become more practical about performing customs and practices. It speaks to relevance and requires feedback or interaction with the people it serves. The court in this stage is permitted to invite *amicus curie* and consult empirical research, to clearly ascertain African values that are integral to the community. Essentially, the flexible approach requires innovation from the courts.

I.e. lobola payment, how overtime the principle of delivery of lobola has remained despite how the performance has shifted from cattle delivery to monetary payment.[2]

The court's role is crucial in the realisation of constitutional dreams for ACL, and development[3] has allowed for the establishment of jurisprudence aimed at aimed at upholding African values.[4] The flexible approach is community centered. This is essential because it would be challenging to ascertain the living version of the law without making reference to the community concerned for a contextual background. Himonga[5] noted in agreement that to ensure appropriate judicial interpretation, judges need to gain a proper understanding for the living ACL of that specific community. Particularly, for purposes of development, this understanding must be rooted in the lived reality of that specific community.[6] Furthermore, the community's past practices become the

[2] *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC).
[3] The '1996 Constitution'.
[4]B Mmusinyane, The role of Traditional Authorities in Developing Customary Laws In Accordance With the Constitution: Shilubana and Others V Nwamitwa 2008 (9) BCLR 914 (CC) PER/PELJ 2009 (12) 3. Previously this was not a concern for the judiciary, as African customary law was not the law of the people but that of the judiciary. *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC), 53. In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practiced and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.
[5]C Himonga, "Reflection on Bhe v Magistrate Khayelitsha: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa" *Southern African Public Law* (2017) 32 (1 and 2) 1-18.
[6] Himonga (note 5 above) 3.

primary source for the harvesting of development. Hence in the *Bh*e case, the court's resolution did not amount to a development because it was completely far removed from the practices of the people and deeply rooted in Western patterns of inheritance.[7]

Stage 3: The element of cultural feasibility is extremely important.[8] The court would be required to engage in a feasibility study of the proposed development on the community that is concerned. This should occur prior to the development being legitimized. As such, the feasibility study will be directed at assessing whether the proposed development will encounter any resistance or rejection from the specific community concerned. Such an assessment is vital to the determination of the viability of the proposed development, its limitations and whether or not there are aspects which need to be revised in order to be aligned with the Constitution and the law of the living ACL of the people. This would enable the courts to test the development for compatibility against the cultural system and its practice by the community concerned. It is important to establish whether the proposed development will allow for the continuation of the custom, principle or the value in question. Furthermore, if the proposed development results in the termination of the existing custom, principle or value, then the court should revise it. For example the *Shilubana* decision which resulted in uncertainty, with regards to the future of succession.

6.2.1 When is it applicable?

The flexibility approach is mainly applicable when 'passive development' is conducted by the court,[9] or when passive development is performed by the community concerned.[10] This approach is not restricted to matters based on the male primogeniture rule, although the current case developments have been centred on this subject.

As previously alluded, the flexibility approach is born of the flexible nature of living ACL. Ngcobo J in *Bhe* clearly indicated where the development of official ACL can be effected by removing a deviation, the court can simply do so in order to bring it in line with the Bill of Rights.[11] As such,

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[7] *Bhe* (note 2 above) 229.
[8] P Atwell 'The Feasibility Study of a Culture' https://smallbusiness.chron.com/feasibility-study-culture-73479.html (Accessed 23 October 2018).
[9] *Bhe* (note 2 above) 222.
[10] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (4 June 2008), 60.
[11] *Bhe* (note 2 above) 222.

the flexibility approach could have been utilised to accommodate the changes in society which recognise a woman as the head of the family. In contrast, the *Shilubana* case demonstrates that the court can 'delegate' the task of development to the community concerned.[12] This is part of their autonomy as envisioned by Section 211 (2).[13] The Valoyi traditional authorities illustrated this when they developed the male primogeniture rule to recognise a woman as a traditional leader.[14] Their decision was coherent with the changing lived experiences of the community that was initially reflected in the endorsement of the Royal family.[15] Most importantly, this development was in line with the objectives of the Bill of Rights.[16]

6.2.2 The benefits of the flexibility approach

The flexible approach is crafted with the uniqueness of the African legal system in mind. It caters for monogamous and polygamous marriages, as well as matters of inheritance and succession. Furthermore, it offers South African courts the opportunity to resuscitate African values, through decisions that have a direct bearing on the lived realities of people.[17] This is reliant on appropriate judicial interpretation. Himonga discusses the importance of the *Bhe* case as an interpretative tool in ACL.[18] She mentions that had the Court entertained the use of the flexible approach, the rule of primogeniture could have been developed.[19] However, Himonga does note that there are elements in the majority judgement of *Bhe* that reveal an understanding of living ACL, which could have been advanced to promote interpretation and development that is not far removed from the lived reality of the people.[20]

Arguably, the flexible approach is most beneficial to South African courts. When courts facilitate the passive development of ACL, they can also respond with flexibility in procedures.[21] The

[12] *Shilubana* (note 10 above) 75.
[13] The '1996 Constitution'.
[14] *Shilubana* (note 10 above) 70.
[15] *Shilubana* (note 10 above) 73.
[16] *Shilubana* (note 10 above) 60.
[17] DD Ndima 'The Resurrection of the Indigenous Values System in Post-Apartheid African Law: South Africa's Constitutional and Legislative Framework Revisited' *SAPL* (2014) 29 (2), 311.
[18] Himonga (note 5 above) 3.
[19] Himonga (note 5 above) 6.
[20] Himonga (note 5 above) 3.
[21] *Shilubana* (note 10 above) 75.

development mandate does not impose any rigid development procedure to the courts, except for the fact that the development must be coherent with the Bill of Rights, and that equal attention is paid to the rights concerned.[22] In addition, the flexibility approach steps in to resolve the court's inability to develop ACL, by facilitating the development.[23] Likewise, the community derives a substantial benefit from the flexible approach, as it is solidified as a source of living ACL.[24] It also leads to the flexible application of a development by the people on the ground, as evidenced in the empirical research of Mnisi-Weeks.[25]

The *Mayelane* case was equally instrumental in expanding the definition of living ACL for judicial interpretation. This stems from the Constitutional Court's development of the requirement for the consent of the first wife to enter into a further Tsonga customary marriages. The Court in this matter utilised constitutional values of human dignity and equality in order to arrive at the development. Since living ACL is community specific, the use of constitutional values has a binding effect on all South Africans and it expands the boundaries of the effect of such a development to apply to ACL across the spectrum.

The *Mayelane* case revealed the relationship of interdependence between the flexible feature of ACL, and diversity that is found in the living version of the law of communities.[26] The empirical research presented to the Court demonstrated that two practices existed in the context of polygamous marriages in the Valoyi community. There were people who practiced the rule of seeking permission from the first wife before entering into further marriages. While there were others who thought it was sufficient to merely inform the first wife of an impending marriage.

In order for flexibility to produce the desired development, the following is important to note:

1. The courts must be willing to entertain the living version of ACL, without substituting it or assimilating it with common law.

[22] S 39 (2) of the '1996 Constitution'.
[23] *Bhe* (note 2 above) 110.
[24] *Shilubana* (note 10 above) 74.
[25] Mnisi-Weeks 'Customary Succession and the Development of Customary Law: The Bhe Legacy: Part III: Reflections on Themes in Justice Langa's Judgments' *Acta Juridica* 2015 (1) 215 – 255, 248.
[26] *Mayelane v Ngwenyama* (CCT 57/12) [2013] ZACC 14, 43.

2. The courts must be able to accept empirical research from the community concerned that will reveal the diverse past practices. The practices must have been on-going for a reasonable period of time to be considered binding as ACL of that community.[27]
3. The courts must utilize the flexible approach which comprises of three phases to interpret which of the past practices, is in line with the constitutional values of human dignity and equality.
4. Finally, the courts will be able to develop the past practice that is coherent with the Constitution while keeping the values of the community intact. Thereafter, the development will have an umbrella effect on all ACL in South Africa.

6.2.3 The challenges and limitations of the flexible approach

The flexible approach is limited to the development of living ACL. This is primarily because the flexibility feature is only found in the living version of the law.[28] Currently, judicial interpretation and development have been done in a manner that encourages assimilation while eroding African values. The repugnancy clause lies at the discretion of courts, where courts must consider the internal limits that exist within ACL.[29] Thus, it is worth noting that the flexibility of African values and norms must be weighed against the legal certainty and vested rights, to promote development.[30] For example in *Shilubana*, if Nwamitwa was already a sitting *hosi* at the time of the dispute, the Court would've had to consider such internal limitations.[31] The role of the court in that instance is to balance the need to develop the male primogeniture rule against Nwamitwa's vested rights.[32]

[27] AJ Kerr 'The Nature and Future of Customary law' *The South African Law Journal* (2009) 126 (4) p. 677 – 689, 682.
[28] *Bhe* (note 2 above) 110.
[29] T Nhlapo 'Customary law in post-apartheid South Africa: The vexed question of Cultural diversity, Women's rights, living law, and appropriate law reform' (2014) www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Nhlapo.pdf (Accessed 30 October 2017).
[30] *Shilubana* (note 10 above) 47.
[31] *Shilubana* (note 10 above) 78.
[32] Ibid 78.

The case of *Mthembu* reveals institutional challenges with regards to interpretation and development.[33] Section 39 (2) is very clear and instructive:

> "When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum **must** promote the spirit, purport and objects of the Bill of Rights."[34]

The development mandate is imperative in terms of literal interpretation. In the *Bhe* case, Ngcobo J holds an opposing view to that of Langa CJ. He reiterates that in accordance with Section 39 (2) development is mandatory and the courts therefore cannot treat this duty as optional.[35] Furthermore, he mentions that Section 39 (2) and Section 173 are not mutually exclusive, as where Section 173 fails to advance the aims of Section 39 (2), the court's duty is classified as a 'general obligation' to ensure that appropriate development takes place.[36] Thus, any defect that is disharmonious with the Bill of Rights must be removed via development. As such, Ngcobo J was displeased with the finality of striking down this rule of ACL, as it was observed by many people, who will continue to practice the rule.[37]

The Court in *Mthembu* clearly misunderstood the mandate and thought that there was no imperative to develop the ACL to remove its discriminatory impact on women and children, and bring it in line with the Bill of Rights. From the literal interpretation, the word must is placed as a safeguard to standardize the interpretation and development of ACL. It is possible that in consideration of South Africa's history, the drafters of the Constitution had the foresight that there might be reluctance in the carrying out this mandate. Thus, catered for any judicial attitudes that still had traces of interpreting the official ACL. In such instances, the flexible approach is deprived of viability.

The flexible approach is limited to normal succession processes. According to *Sigcau v Sigcau*[38], there are two parallel systems involved in ACL succession matters. The first includes the appointment of a traditional leader by the royal family.[39] The second refers to the Commission of

[33] *Mthembu v Letsela* 1998 (2) SA 675 (T).
[34] The '1996 Constitution'. (Emphasis added).
[35] *Carmichele v. Minister of Safety & Sec.* 2001 (4) SA 938 (CC) 33.
[36] *Bhe* (note 2 above) 214.
[37] *Bhe* (note 2ss above) 215.
[38] 1944 AD 67.
[39] *Sigcau* (note 38 above) 14.

Traditional Leadership Disputes and Claims which becomes involved when a claim is lodged or a dispute arises regarding to the appointment of traditional leaders.[40] In *Sigcau,* the royal family had a decade's long succession dispute which led to confusion following the death of *ikumkani* Mpondombini Sigcau.[41] The Commission of Traditional Leadership Disputes and Claims appointed Zanozuko as the next *ikumkani* and the President had to recognise him by issuing a notice of recognition and a certificate of recognition.[42] The crisis erupted when the Commission erred by appointing Botha under the wrong statute, which meant that the President could not recognise his appointment.[43] In the meantime, the royal family showed their disapproval for the Commission's appointment of Zanozuko by appointing their own candidate, the late *ikumkani* Mpondombini's daughter Weziwe.[44]

The complexity emerges from the fact that once a dispute or a claim is lodged to the Commission, normal succession processes are halted. This means that the need to develop ACL is temporarily placed on pause, pending the outcome of the dispute. In instances where the dispute reaches the court, its mandate in that regard is to interpret ACL to resolve the dispute. The matter before the Commission must be concluded prior to normal succession processes resuming. Therefore, the Sigcau family had no place to step while Zanozuko's appointment had not reached completion. During such a time, the Act's requirement leaves no room for any further development, and thus the use of the flexible approach is limited.

The *Sigcau* case shows how institutional challenges should be considered when implementing the flexibility approach. In this matter, the members of the community complained that the approach utilised by the Commission to 'prove' the customs and traditions of particular communities, on few occasions, was displeasing.[45] This suggests that the people did not identify with their procedures and the results of the Commission's findings. Despite the Constitution's reassurance that the community's cultural interests remain at the core of traditional leadership disputes, such dissatisfaction raises a concern worth noting.[46] For example, the use of the flexible approach by

[40] *Sigcau* (note 38 above) 5.
[41] *Sigcau* (note 38 above) 7.
[42] *Sigcau* (note 38 above) 6.
[43] *Sigcau* (note 38 above) 10.
[44] *Sigcau* (note 38 above) 11.
[45] *Sigcau* (note 38 above) 17.
[46] Ibid 17.

the community to achieve development, particularly in the third phase, requires the establishment of a strategic plan which resembles that of an empirical study. This plan guides the collection of information directly from the people, in the community concerned. It further identifies specific target audiences in the community, taking into consideration which information is given more weight because it can be corroborated. Essentially, the strategic plan must be crafted carefully without excluding community members from participating, as living ACL recognises the people as the primary source of law. Thus, the flexible approach would benefit from establishing a blueprint for quality control when ascertaining the content of living ACL, with certainty. Likewise, the courts may receive opposing views on the content of living ACL, during the use of the flexible approach to achieve passive development.[47] As such, it would be a shame if the courts responded as it did in majority decision of the Bhe case. Hence, the establishment of a viable solution to overcome this challenge is a matter of priority.

6.3 Conclusion

Under the constitutional dispensation, ACL is truly recognised as a valid legal system alongside common law in South Africa. However, to date, there has been no judicial resolve for the conflict between common law and ACL. Thus, the court's role is more critical than ever, because it is tasked with unraveling ACL but it also has the mandate to ensure its interpretation and development. The case of Shilubana finally assists in the realisation of the vision of the Constitution, but this has not been without challenges. ACL development has been confronted with legal conservativism, assimilation and the importation of foreign norms and values. Furthermore, courts have been unable to strike a balance between relieving the plight of women, without eroding African values. Hence, the proposal of the flexible approach as a means to provide common ground for both belief systems (African and Western) to co-exist. Most importantly, the flexible approach offers a tool for judicial interpretation and development to bridge the gap between the law of the courts and the law according to the lived realities of the people. The flexible approach will allow

[47] *Alexkor* (note 4 above) 54.

for a constitutional compromise to be established for the uniform, judicial interpretation and development of ACL.

7. Conclusion

The objective of chapter 2 was to show the place of ACL in the integrated legal system. Courtesy of the Constitution, ACL is equally recognised as a valid legal system in South Africa, and therefore the courts have applied the Constitution in interpreting, applying and developing ACL. Chapter 3 primarily aimed to provide a context for the gender tensions that exist within ACL. Furthermore, the discussion revealed that once living ACL is separated from its distorted version, it has the capacity to comply with the Constitution. According to the discussion in Chapter 4, the duty to develop ACL is not a small task. It clearly highlighted the significance of ACL interpretation especially with regards to a judiciary that has never had the development mandate before. Chapter 5 showed that judicial development is truly symbolic as it fulfills the Constitution's vision of a pluralistic legal society. In contrast, it also exposed the need for courts to equally advance judicial development based on African values, to strengthen ACL jurisprudence. Going forward, the courts role in ACL development continues to be critical, and in chapter 6, the flexible approach is recommended to centralise the community in the development of living ACL. This is done with the hope of bridging the gap between the law of the courts and the law in accordance with the lived experiences of the people.

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