

The indigenisation of customary law: Creating an indigenous legal pluralism within the South African dispensation: possible or not?

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SUMMARY

The article examines the possibility of creating an indigenous legal pluralism within the South African context. Due to the historical and current marginalisation of customary law, can customary law be developed, reformed and codified? Furthermore, can the legal regimes and human rights of indigenous people of South Africa be ascertained? The article renegades the historical marginalisation of customary law due to colonialism and apartheid; where indigenous people's legal regimes were placed subordinate to common law. The article further implores the current status of indigenous law nationally and internationally. The article seeks to advance the argument based on legislative and judicial analysis, that customary law is still marginalised under the current constitutional dispensation. The international call and new recognition of customary law are commendable; the article seeks to review whether South Africa is keeping up or not to the international directives embedded within declarations and conventions they are a signatory to. The article will further comparatively analyse foreign countries that have managed to do what South Africa is struggling to achieve with regard to the recognition, development, application, and reform of customary law.

1 Introduction

South Africa prides itself on its post-1994 Constitution.¹ Embedded within it is the Bill of Rights to protect every person in South Africa,² and also giving recognition to the indigenous people of South Africa. South Africa's Constitution elucidates that customary law is in parallel with common law under section 39 of the Constitution,³ in light to the above

1 Constitution of Republic of South Africa, 1996 (hereafter the Constitution).

2 S 7(1) of the Constitution.

3 S 39 of the Constitution.

contention, the article begs to claim that this is only superficial.⁴ The constitutional advancement of customary law has been delayed in terms of legislative and judicial reform and development, and the legislature is inattentive with respect to remedying the inadequate position customary law is placed in. Instead, the legislature has been replacing customary law considered “non-transformative and undeveloped”, with common law to promptly deal with customary disputes.⁵ The insufficiency of the development and reform of customary law allows the judiciary and the legislature to limit the development of customary law as a whole in terms of its application and interpretation. It is highly significant to engage with the need to ascertain indigenous people's human rights in South Africa, by paving the way and ensuring due regard to their legal regimes and human rights.⁶ Indigenous peoples' human rights which Tobin list them as; self-determination; autonomy; land; territory; resource rights; rights to culture and cultural heritage; access to generic resources and protection of traditional knowledge; and the recognition of the issues on the conflict between human rights and customary law, and the future of customary law within the national and the international legal pluralism.⁷

Even at the advent of the codified version of customary law; there are still ambiguities and misunderstandings that exist within the official customary law.⁸ Engaging in the creation of indigenous legal pluralism in questioning whether customary law can exist as a separate pluralism within the South African state law pluralism, it is both bold and daunting. If an argument cannot be successfully made, the question left to ask by the article is: Can customary law exist successfully, undistorted and purposefully within the current dispensation? Can the courts and the legislature ensure its constant development and codification, especially giving due regard to living customary law and the customs that exist concurrently?

2 Historical marginalisation of South African customary law

2 1 Concept of customary law

Before the article can engage in the historical analysis of the marginalisation of customary law, it is beneficial to the reader to understand the concept of customary law. Customary law is the concept of law which attaches to a person or a group of people as a form of identity, it serves as both personal and communal law for indigenous

4 G Van Niekerk “The endurance of the Roman law tradition” <http://studia.law.ubbcluj.ro/articol.php?articollid=474> (accessed 2015-07-16).

5 As witnessed in *Bhe v Magistrate Khayelitsha* 2005 1 BCLR 1 (CC).

6 Tobin *Indigenous people, customary law and human rights – why living law matters 2*.

7 Tobin 3.

8 SALRC *Project 144 Single Marriage Statute 35* (2018) 6.

people.⁹ It is imperative to draw a distinction between living customary law and official customary law for the purpose of this article. Living customary law consists of unwritten customary practices that regulate the day-to-day lives of indigenous people.¹⁰ Living customary law consists of actual practices or customs of the indigenous people whose customary law is under consideration.¹¹ Furthermore, derived from the initial practices of customary law, custom practices that are long-established, reasonable and uniformly observed by the indigenous people,¹² custom can be ascertained under living customary law; it is an original source of living law.¹³ While, official customary law is the opposite of living customary law and is written down.

2 1 1 Pre-colonial, colonial, and apartheid marginalisation of customary law

Before the colonial era, customary law was practiced and applied unrestrictedly;¹⁴ customary law was generally unwritten and thus passed orally from one generation to another.¹⁵ The most prominent customary law was made by the ruling monarch, in which their orders and judgment made current law and amendments to existing living customary law.¹⁶ Ndulo correctly states the nature of customary law as:¹⁷

“The law before colonialization in most African states was essentially customary in character, having its bases in the practices and customs of the people. The great majority of people conducted their personal activities in accordance with and subject to customary law. ‘African customary law’ does not indicate that there is a single uniform set of customs prevailing in any given country.”

During this time, harmony to law and custom was brought about within the indigenous communities.¹⁸ Thereafter, a distinctive policy towards customary law in Southern Africa began with the British occupation of the Cape in 1806.¹⁹

9 Woodman 35.

10 Himonga & Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* 27.

11 Himonga & Nhlapo 27.

12 *Van Breda v Jacobs* 1921 AD 330.

13 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC).

14 Ndulo “African Customary Law, Customs, and Women’s Rights” (2011) *Cornell Law Faculty Publications*. 187.

15 Ndulo 187.

16 Ndulo 188.

17 Ndulo 189.

18 Seroto “An analysis of the depiction of indigenous people during the early colonial conquest in South African history textbooks” (2015) 14 *Indilinga African Journal of Indigenous Knowledge Systems* 169.

19 Seroto 170.

The current colonial power confirmed the Roman-Dutch law already operating in the Cape from 1600s, as the general law of the land, for that system was deemed to be suitably “civilized”, unlike customary law.²⁰ Roman-Dutch law as influenced by English law is what makes up common law, as currently observed in South Africa.²¹ Van Niekerk strictly defines Roman-Dutch law as, “...[as] the primary or dominant component of South African state law and in the courts and in academic writing the term ‘common law is used.’”²² No account was taken of the indigenous Khoi and San laws,²³ and based on the history of South Africa, preceding to the arrival of the European settlers in South Africa, indigenous peoples the Khoi, San and the Bantu-speaking people occupied the vast areas of South Africa.²⁴ In 1828 Ordinance 50 was passed to free people of colour from slavery. This is where the colonial rule was prominent. Consequently, declaring Roman-Dutch law as the law of the Cape.²⁵ When Britain annexed the Cape territory in 1843, Roman-Dutch law was again declared the general law of the current colony, but shortly afterward courts were also allowed to apply customary law in disputes between Africans.²⁶ Recognition of customary law was subject to the repugnant formula that was later to be adopted throughout the colony making customary law subject to common law.²⁷ The government attempted to codify some parts of customary law under the Code of Zulu law, which came in effect in 1869,²⁸ to regulate customary marriages and divorces for the Zulu nation.²⁹

In the Unionisation of the Republic in 1910, the position of customary law differed drastically from one part of the country to the other. In the Cape and Transvaal, customary law had no official recognition.³⁰ In British held territories and to a lesser extent in Natal and the Transkei territories, customary law was regularly applied subject to the supervision of higher courts.³¹ This created a system of confusion and complexities in terms of court application and interpretation because of the fragmented system of customary law. The Native Administration Act 38 of 1927 was passed.³² Although the government's ostensible purpose was to revive African tradition, its actual intention was to establish a separate system of justice to match segregation in land and society.

20 *Wi Parata v Bishop of Wellington* (1887) 3 NZ Jur 72 para 78.

21 Van Niekerk 18.

22 Van Niekerk 19.

23 Elphick *Kraal and Castle: Khoikhoi and the Founding of White South Africa* 7.

24 Seroto 170.

25 Burman 12.

26 Himonga & Nhlapo 5.

27 Ordinance 3 of 1849.

28 Code of Zulu Law 19 of 1891.

29 Code of Zulu Law 19 of 1891.

30 Mahomed & Nhlapo Project 90: The harmonization of the common law and the Indigenous law: Customary marriages Discussion article (1998) 74 *Pretoria: South African Law Commission* 9.

31 Mahomed & Nhlapo Project 90:10

32 Native Administration Act 38 of 1927.

During the advent of apartheid, the systematic oppression of Black indigenous people of South Africa augmented and it also extended to their legal regimes. Customary law was only recognised under a legal exception.³³ This was the apartheid government form of cultural segregation, through enacting of the Bantu Authorities Act 68 of 1951, power was centralised under the tribal rulers, who controlled land and indigenous people, where the tribal ruler was subject to state control and authority.³⁴ Section 4(1)(d) of the Bantu Authorities Act stated that.³⁵

“A tribal authority shall, subject to the provisions of this Act – generally, exercise such powers, and perform such functions and duties, as in the opinion of the Governor-General fall within the sphere of tribal administration as he may assign to that tribal authority.”

These tribal authorities paved ways for indigenous people to be subjected to further segregation, limited access to their land and freedom of movement.³⁶ Due to the uprising by indigenous communities against imposed and authoritarian traditional authorities in the established homelands (Transkei, Ciskei, Venda, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa, and QwaQwa).³⁷ The then government decided to establish the Law of Evidence Amendment Act 45 of 1988. The Act took judicial notice of customary law principles that could be readily ascertainable and apply them where applicable in customary disputes.³⁸ Even so, the Act placed a repugnancy clause, which gave the presiding officer the legal discretion to either apply customary law or to not, and when both parties to the litigation were African.³⁹

3 Constitutional marginalisation of South African customary law

Under the current dispensation, the Constitution recognises the application of customary law by the courts in order to promote the spirit, purpose, and object of the Bill of Rights.⁴⁰ Customary law must be applied when applicable, subject to the Constitution, public policy, rules of natural justice and legislation.⁴¹ Therefore customary law can only apply if applicable and parties seeking to apply customary law in court should prove that: there is a tribal connection between the litigants; that

33 Himonga & Nhlapo 14.

34 Himonga & Nhlapo 15.

35 Bantu Authorities Act 68 of 1951.

36 Himonga & Nhlapo 15.

37 South African History Online “The Homelands” 24 January 2019 <http://www.sahistory.org.za/article/homelands> (accessed 2019-09-10).

38 S 1(1) of Law of Evidence Amendment Act 45 of 1988.

39 Mahomed & Nhlapo 33.

40 S 39(2) the Constitution. Furthermore, please refer to Traditional Leadership and Governance Framework Act 41 of 2003.

41 S 211(3) of the Constitution. See also *Bhe v Magistrate, Khayelitsha* (1) SA 580(CC) 150 153; *Hlope v Mahlalela* 1998 (1) SA 449 (T); *Metis v Padongelufonds* [2002] 1 All SA 291 (T).

a particular system of indigenous law applies; and applicable principles.⁴² It is judicious that the courts must satisfy themselves with the contents of customary law and evaluate local customs in order to ascertain the contents of legal rules, bearing in mind that customary law is not uniform.⁴³ This ascertainment was done through the use of communal leaders and leaders within the royal clan or group, this will apply when the court is ascertaining living customary law.⁴⁴ Currently, the major constitutional recognition for the application and practice of customary rules, laws, and principles is contained under sections 39(2),⁴⁵ 30,⁴⁶ and 31⁴⁷ of the Constitution, which affords indigenous people the right to cultural self-determination. Sections 30 and 31 of the Constitution provides for the recognition and “assumed” protection of customary law.⁴⁸ These entrenched rights are to an extent a way to ascertain the indigenous people's rights to self-determination.⁴⁹ The right to self-determination centres on the need to allow indigenous people to exclusively enjoy their own culture, to profess and practice

42 *Maisela v Kgolane* NO [2000] 1 All SA 658 (T). The case concerned application by the appellant for a rescission of default judgment ordered against him for the return sale of a tractor which was sold and delivered to the appellant the respondent. The Magistrate issued a rule *nisi* to hear reasons of the appellant on reasons they did not make it to court for the initial hearing on the matter. After the discharged of rule *nisi* the Magistrate refused to grant the rescission of default judgment after application motion; even with good reasons given by the appellant and furthermore the Magistrate proceeded to refuse a special plea made by the applicant based on the reason that indigenous law applied to the case because the litigants were black thus extinctive prescription did not apply. The appellant applied to court for the decision on three issues: (1) whether the magistrate had been wrong to discharge the rule in terms of which the attachment was suspended pending the outcome of the application for rescission of the judgment and to award costs against the appellant; (2) whether the magistrate had been wrong not to set aside the judgment of 3 September 1996 as the appellant had shown good cause and had not been in wilful default; and (3) whether the magistrate had been wrong to dismiss the special plea of prescription, in particular in his finding that indigenous law applied without any mention of it on the papers. In an appeal to a Provincial Division. The court held that the Magistrate was wrong in refusing to grant the rescission of the default judgment; the court further held that the magistrate's application of indigenous law and his consequent dismissal of the appellant's special plea, that it was wrong to adjudicate on a sale that was not governed by indigenous law according to the principles of indigenous law merely because the parties were both black. It was clear that indigenous law could apply in cases of sale only where the principles of indigenous law provided for the sale of the thing sold. It would also be wrong to regard such an agreement as regulated by indigenous law if common law principles not known to indigenous law had been agreed upon by the parties.

43 *MM v MN* 2013 (4) SA 415 (CC) para 48-51.

44 Himonga & Nhlapo 25-27.

45 S 39(2) of the Constitution.

46 S 30 of the Constitution.

47 S 31 of the Constitution.

48 Ss 30 & 31 of the Constitution.

49 Tobin 3.

their own religion, or to use their own language.⁵⁰ Whilst, section 39(1)(b) of the Constitution, which states that, “when interpreting the Bill of Rights, a court, tribunal or forum; must consider international law.”⁵¹

Realising the importance of the Bill of Rights in ensuring the values of equality, freedom, and dignity especially for the marginalised women and children; which customary law may seek to exclude in terms of succession/ownership of land and property.⁵² This questions the real legitimacy of customary law and the indigenous community right to self-determination for the law to apply according to their beliefs and custom. The evidence in *Bhe v Magistrate, Khayelitsha*,⁵³ and *Mthembu v Letsela*,⁵⁴ both these cases indicate the current position of customary law in the constitutional dispensation, both these cases are similar in terms of customary rule and principle challenged.⁵⁵ Both cases are to be discussed below they deal with the rules of intestate succession in terms of Black indigenous people of South Africa.

4 Judicial marginalisation of customary law: Case law precedents

4 1 *Mthembu v Letsela* 2000 (3) SA 867 (SCA)

In the Supreme Court of Appeal case, in *Mthembu v Letsela*,⁵⁶ the court also came to refrain to interfere with how Black indigenous people dealt with their succession, and the court refused to make any decision about the constitutionality of the rule of male primogeniture regulated under section 4(1) of the Black Administration Act 38 of 1927 and regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks.⁵⁷ Simons explicitly explains the male primogeniture rule and he states that:⁵⁸

“The rule of male primogeniture is consistent with the structure and functions of the communal family for indigenous people. The general successor, who succeeds in the office as well as to an estate, must be a male because only a man can be head of the household in the traditional society. Intestate succession through the male line forestalls the partitioning of an estate and

50 Ermacora “The Protection of Minorities Before the United Nations” (1983) 1 *Recueil des Cours* 246. See also International Covenant on Civil and Political Rights of 1966.

51 S 39(1)(b) of the Constitution.

52 As illustrated in *Bhe v Magistrate, Khayelitsha* (1) SA 580(CC) & *Maisela v Kgolane* NO [2000] 1 All SA 658(T).

53 *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC).

54 *Mthembu v Letsela* 2000 (3) SA 867 (SCA).

55 See *Bhe v Khayelitsha Magistrate* para 3 and *Mthembu v Letsela* 867.

56 *Mthembu v Letsela* 868.

57 Regulations for the Administration and Distribution of the Estates of Deceased Blacks of the Act 23 (10) and promulgated under Government Notice R200 of 6 February 1987.

58 Simons *African Women: their legal status in South Africa* (1968) 239.

keeps it intact for the support of the widow, unmarried daughters, and younger sons.”

In the *Mthembu* case, the court was faced with the question whether to recognise Ms. Mthembu and Mr. Letsela, the deceased, as married couple; and whether to grant Ms. Mthembu and her daughter the right to claim succession intestate on the property acquired between her and the deceased, during the subsistence of their relationship/partnership.⁵⁹ The respondent, the deceased father, claimed that Ms. Mthembu and the deceased were not married in terms of customary law and that the estate of the deceased should devolve to him by the rule of male primogeniture as regulated by statutes.⁶⁰ The court refused to grant respondent’s claim, and the court reasoned that “it does not believe that the rule of male primogeniture is inconsistent and infringes on the rights entrenched in the Constitution.”⁶¹ Also, the court further substantiated that, “the gender discrimination contented by the appellant was not for the court to answer based on the hiatus of its constitutionality.”⁶² The court further refused to scrap section 23(4) of the Black Administrative Act which dealt with Black indigenous people succession, the court emphasised that, “the provision of succession under the Act is a legislative recognition of ‘Black’ laws and custom,⁶³ allowing Black people the opportunity to choose how they wish their estates to be devolved upon their death, either by means of customary rules or by means of a Will, it would be imposing for the court to declare a provision unconstitutional based on it being *contra bona mores*, which allowed an individual to choose how to devolve or what to do with their estate after their death.”⁶⁴ The court followed a more indigenous legal pluralism in terms of the interpretation of customary law and maintained the rigidity of the indigenous people’s legal regimes.

4 2 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC)

In the constitutional court case of *Bhe v Khayelitsha Magistrate*, the case is based on the rule of male primogeniture,⁶⁵ it is a custom rule where line of succession or inheritance follows the eldest males in the family. In the *Bhe v Magistrate, Khayelitsha* the applicant acting on behalf of her two daughters brought an application to challenge the customary law rule of male primogeniture as well as section 23 of the Black Administration Act.⁶⁶ As the applicant wanted to secure the deceased’s property for her daughters.⁶⁷ Under the customary law rule of male primogeniture as well as section 23 of the Black Administration Act, the house became the

59 *Mthembu v Letsela* para 2.

60 *Supra*.

61 *Mthembu v Letsela* para 3.

62 *Mthembu v Letsela* para 33.

63 S 23(4) Black Administration Act 38 of 1927.

64 *Mthembu v Letsela* para 45.

65 Black Administration Act 38 of 1927.

66 *Bhe v Khayelitsha Magistrate* paras 9-20.

67 *Supra*.

property of the eldest male relative of the deceased, in this case, the father of the deceased.⁶⁸ The Constitutional Court declared the customary law rule of male primogeniture unconstitutional and struck down the entire legislative framework regulating intestate succession of deceased Black South Africans.⁶⁹ According to the court, section 23 of the Act was archaic since it solidified official customary law and grossly violated the rights of Black South Africans.⁷⁰ With regard to the customary law rule of male primogeniture, the court held that it discriminates unfairly against women and illegitimate children on the grounds of race, gender, and birth.⁷¹ The result of the order was that all deceased estates are to be governed, until further legislation is enacted or developed by the legislature, by the Intestate Succession Act 81 of 1987, whereby widows and children can benefit regardless of their gender or legitimacy.⁷²

By scrapping out the entire rule/law, the court overlooked the indigenous communities who still practiced this custom and have embedded it as their custom.⁷³ In both cases, no other rules of interpretation were followed, unlike how it is done with common law, where rules of interpretation are followed. The purposive rule of interpretation could have been used and applied flexibly to allow consideration of the rule of male primogeniture,⁷⁴ Ngcobo J makes that suggestion in his minority judgment in *Bhe v Magistrate, Khayelitsha*, and he states that, “the courts have an obligation under the Constitution to develop indigenous law to bring it in line with the rights in the Bill of Rights in order to promote equality.”⁷⁵ The rigid application and interpretation of customary law is still marginalising, and the courts should be aware of these realities when dealing with disputes that are customary in nature.

5 Legislative marginalisation of customary law: Legislative disparity

5 1 Regulation of indigenous people marriages

Since the enactment of the Recognition of Customary Marriages Act 120 OF 1998 (herewith referred to as RCMA),⁷⁶ which came into force on 15 November 2000, there have been quite a few cases that challenged the provisions within the Act. The RCMA was the attempt by the legislature to regulate customary marriage especially with regard to polygynous

68 *Supra*.

69 *Bhe v Khayelitsha Magistrate* paras 107-108.

70 *Supra*.

71 *Supra*.

72 *Supra*.

73 *Bhe v Khayelitsha Magistrate* paras 137-146.

74 *Notham v London Borough of Barnet* [1978] 1 WLR 220.

75 *Bhe v Khayelitsha Magistrate* para 147.

76 Recognition of Customary Marriages Act 120 of 1998.

marriages.⁷⁷ The Act came under fire for some of its discriminatory or exclusionary provisions against women to claim their proprietary rights under customary marriages. Specifically, section 7(1) and (2) of RCMA,⁷⁸ the court had to consider section 7 constitutional validity in terms of its exclusion for women who were married before the Act's enforcement.⁷⁹ Women in monogamous customary marriages who got married before the RCMA's enforcement, could not claim their proprietary rights because of the matrimonial property system of such marriages were out of community of property.⁸⁰ Whilst marriages concluded after the enforcement of the RCMA wherein community of property.⁸¹ This question why did the Act not apply retrospectively to protect such women? These provisions were challenged in the case of *Gumede v The President of the Republic of South Africa*,⁸² where the applicant concluded a customary marriage with her husband in 1968. The husband instituted divorce proceedings, due to the nature of the customary marriage as classified as out of community of property and challenged the provisions under the RCMA. The applicant claimed that the provisions sought to discriminate wives who concluded their marriages before the enforcement of the RCMA. Section 7(1) of the RCMA stated that, "the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law."⁸³ Whilst, section 7(2) stated that, "marriage entered into after the commencement of the Act is marriage in community of property."⁸⁴ The court concluded that the provisions were indeed discriminatory and declared them unconstitutional.⁸⁵ The issue lies with the legislative oversight of the development and the protection of indigenous people with regard to customary law. This is not the only issue with regard to the RCMA, the Act refers to the Matrimonial Property Act 88 of 1984, for customary marriages concluded in community of property according to the default system in South Africa.⁸⁶ This means that if married in community of property, you are bound by Matrimonial Property Act, this questions the relevance of the RCMA, because the Act does not establish its own identity in terms of the regulation of Black people customary marriages. This leads back to the semiotic interpretation and view of customary law. This is the blind spot that customary law finds itself under the current dispensation and section 7 of the RCMA was referred to the legislature for amendment.

77 Recognition of Customary Marriages Act 120 of 1998.

78 S 7(1)-(2) Recognition of Customary Marriages Act 120 of 1998.

79 Louw, & Van Schalkwyk *Introduction to Family Law: Student Textbook* (2019) 83.

80 Louw, & Van Schalkwyk 83.

81 Louw, & Van Schalkwyk 83.

82 *Gumede v The President of the Republic of South Africa* 2009 (3) SA 152.

83 S 7(1) Recognition of Customary Marriages Act 120 of 1998.

84 S 7(2) Recognition of Customary Marriages Act 120 of 1998.

85 *Gumede v The President of the Republic of South Africa* 152.

86 Recognition of Customary Marriages Act 120 of 1998.

5 2 Regulation of indigenous people law of succession

Due to indigenous people's unfamiliarity with drafting Wills to regulate their estate, this status *quo* has raised a lot of disputes regarding the rights of wives married under customary rites to inherit intestate without an express contract akin to that. One must remember that the aspect of Wills and the devolvement of the estate of indigenous people is a foreign concept and arises from common law.⁸⁷ Only indigenous people who have money, resources, and knowledge about the devolvement of one's estate are able to make an informed choice.⁸⁸ Succession under customary law rest on the principle of the acquisition of status and family property of the deceased over their lifetime as the head of the household.⁸⁹ The successor will acquire the rights, duties and position of the person he succeeded.⁹⁰ The judge in *Mthembu v Letsela* erred in assuming that indigenous people do not understand the concept of succession. Where most indigenous communities devolve their estate intestate and also based on the rule of male primogeniture.⁹¹

Whilst, in the case of *Bhe v Magistrate Khayelitsha*,⁹² the court observed whether extra-marital children and domestic partner of the deceased could inherit intestate. The court declared the provision unconstitutional, which discriminated against gender and children with regard to succession and remedied the unconstitutionality by making the Intestate Succession Act,⁹³ applicable to indigenous people.⁹⁴ Balancing the rights of children under section 28(2) of the Constitution, where the best interest of the child is of paramount importance and ensuring the protection of women against gender discrimination.⁹⁵ The flexible and practical means sought by the court are commendable, but the judgment further marginalised and subordinated customary law to common law. The court's negation to reform and develop customary law roved the existential crisis that customary law finds itself under the constitutional guise. This declaration of unconstitutionality with regard to the provisions under Black Administration Act,⁹⁶ and the rule of male primogeniture came under heavy criticism in the minority judgment of Ngcobo J. The Judge reiterate that, "it is first important to understand the nature and scope of application of the rules established under customary law."⁹⁷ Courts should not deviate from the importance and existence of indigenous people's legal regimes.

87 Ndulo 70.

88 *Bhe v Khayelitsha Magistrate* para 66.

89 Himonga & Nhlapo 162.

90 Himonga & Nhlapo 163.

91 *Mthembu v Letsela* 867.

92 *Bhe v Magistrate Khayelitsha* paras 9-20.

93 Intestate Succession Act 81 of 1987.

94 *Bhe v Khayelitsha Magistrate* para 66.

95 S 28(2) of the Constitution.

96 Black Administration Act 38 of 1927.

97 *Bhe v Khayelitsha Magistrate* para 147.

6 International directives for the protection and advancement of indigenous people legal regimes

Article 27(1) of the Universal Declaration of Human Rights (herewith referred to as UDHR) state that: “everyone has the right freely to participate in the cultural life of their community, to enjoy the arts and to share in scientific advancement and its benefits.”⁹⁸ The right given in the UDHR is not limited by any right, the only infringement which is not allowed is when such enjoyment and practice seek to infringe on another’s rights, freedom, and security.⁹⁹ Since the prevalence of indigenous law-related cases, the Commission Drafting Group of United Nations proposed for the passing of the Declaration on the Rights of Indigenous Peoples.¹⁰⁰ During its ratification 144 states voted for its passing (this includes South Africa), and only 4 countries voted against it (Australia, Canada, New Zealand, and the United States), with only 11 countries abstaining from voting (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine).¹⁰¹ This was due to the persistence and call by the indigenous communities for the recognition of their legal regimes and independence by seeking autonomy from colonial laws and decolonisation from the colonial influence.¹⁰² Due to international calls by indigenous communities and bodies representing indigenous people, United Nations saw it fit to enact the United Nations Declaration on the Rights of Indigenous Peoples,¹⁰³ which South Africa is a signatory, to address the issues of indigenous people’s right to self-determination and autonomy from colonial laws that sought to eradicate their legal regimes.¹⁰⁴ Article 34 of the United Nations Declaration on the Rights of Indigenous Peoples states that:¹⁰⁵

“Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”

98 Universal Declaration of Human Rights 1948.

99 Universal Declaration of Human Rights 1948.

100 Establishing a Working Group to Elaborate a Draft United Nations on the Rights of Indigenous Peoples (March 1995), Commission on Human Rights, Report on the 51st Session, UN Doc. E/1995/23 and also UN Doc. E/CN.4/1995/L.11/Add.22.

101 United Nations: Department of Economic and Social Affairs “United Nations Declaration on the Rights of Indigenous Peoples” (2007) <http://www.un.org/development/desa/indigenouspeople/declaration-on-the-rights-of-indigenous-peoples.html> (accessed 2019-09-20).

102 Dugard *International Law: A South African Perspective* (2016) 100.

103 United Nations Declaration on the Rights of Indigenous Peoples, 2007.

104 Dugard 102.

105 United Nations Declaration on the Rights of Indigenous Peoples, 2007.

Tobin states that, “these are the instruments that affirm the status of customary law as a source of law that must be taken into consideration by states in the development of any law and policy affecting the rights and wellbeing of indigenous people.”¹⁰⁶ Customary law is important in recognising indigenous people’s rights to land; resources; guiding with the decision on the exploitation of their customs and resources or on their land; re-defining the relationship between the state and third parties.¹⁰⁷ These can also assist in international peace missions, adopting some of customary norms assist in better ways to solve disputes instead of the western way (i.e. restorative justice, social justice that is community-based and human-centred; transformative justice based on involving all parties and families and community in dispute resolution; the need to create a system of rehabilitation through dialogue and community service and not incarceration of perpetrators, etc.)¹⁰⁸

7 Foreign comparative law: Learning from Papua New Guinea

Papua New Guinea (hereafter, New Guinea) serves an acclaimed comparative analysis in terms of the reception and legal recognition of customary law. New Guinea was no exception to colonialism.¹⁰⁹ After their colonial independence and placed under the Australian territorial administration, the need to recognise and protect the indigenous people regimes, two legislation, was enacted for this purpose, Laws Repeal and Adopting Ordinance 1921 and Native Administration Regulation 1924, this was the foundation of when the status of custom gradually began to be recognised as a source of law post-colonialism, and over time through further legal developments, it made way into being part of the legal system of New Guineas.¹¹⁰ New Guinea has adopted a dual legal system where two court systems exist, the customary court systems and the formal court system. This is due to the fact that more indigenous people rely on customary law dispute agencies.¹¹¹ To respond as well as ascertain and maintain indigenous people legal regimes, there is a pipeline legal philosophy that needs to be developed into legal statutes, namely, Indigenous Melanesian Jurisprudence where it is based on the diverse custom, culture, and traditions of the people of New Guinea, where, customary law is to be the object of law reform, and as a basis of a legal system in New Guinea.¹¹² This is a legal stance that South Africa can adopt as part of the customary law reform and development.

106 Tobin 1-2.

107 Tobin 4.

108 Nhlapo 2.

109 Kamongmenan “Status of Customary Law Within Papua New Guinea’s Legal System” (2018) <https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA> (accessed 2019-07-12).

110 *Supra*.

111 *Supra*.

112 *Supra*.

8 The idea of underlying law and the hierarchy of laws

To place importance in the status and recognition of customary law in New Guinea enacted the Underlying Law Act 2000 under the constitutional directive,¹¹³ which places and recognises that custom is a source of law and also, how it is given preference over common law in terms of the order of application, interpretation in courts and development of the underlying law (common law).¹¹⁴ Section 6 of the Constitution further orders that:¹¹⁵

“Subject to this Act, in dealing with the subject matter of a proceeding, the court shall apply the laws in the following order: a) Written law; b) The underlying law; and c) The customary law; d) Common law.”

This indicates the preference and sequence of the importance of the application of customary law. The provision elucidates that common law has to be consistent with customary law of Papua New Guinea before it can be applied as part of the underlying law, and if a court applies common law instead of customary law, it has to supply reasonable and sufficient reasons for refusing to apply customary law.¹¹⁶

Sufficient and reasonable ascertainment of related custom is important. This stride is made by the judicial and legislative system of New Guinea is commendable and inspirational. The stance taken by Papua New Guinea in ascertaining the legal regimes of their indigenous people indicates the importance and respect awarded to the indigenous people residing there. This can also be said about the Constitution of South Africa due to its restorative approach and recognition of customary law but more work still needs to be done to develop customary law in South Africa.

9 Conclusion

Given the historical marginalisation of customary law and its constant battle to remain relevant and applicable to the indigenous communities, it has come to the need to ascertain indigenous people of South Africa are afforded their human rights through the development, reform, and codification of their legal regimes. This contention is based on living customary law, special legal reform is imperative in this regard. The article introspectively looked at the status of customary law in South Africa, and how it is handled, interpreted and understood by the legal fraternity, specifically the judiciary and the legislature.

113 S 20(1) of the Constitution of the Independent State of Papua New Guinea

114 Refer to the Underlying Law Act 2000.

115 S 6 of the Constitution of the Independent State of Papua New Guinea.

116 *Supra*.

The *legislative* approach should be based on understanding and the imposed intention of customary law. Further understanding of what customary law seeks to achieve and the values and norms it held dear by the indigenous people of South Africa, should be interpreted in a socio-traditional manner and a flexible approach must be employed to ascertain customary law in its true light, nature, and scope. Reform and codification of customary law must be understood to the cultural tenets and customs of indigenous people. A single statute that holistically regulates all aspects of customary law (i.e. marriage, land rights/ownership, succession, customary legal procedure, remedies, legal recourse, etc.), despite of diversity in customs because this will ensure that no doubt is left when customary disputes are in court. Furthermore, the legislative approach should be flexible and non-discriminatory to the legal regimes of the indigenous people of South Africa. The first point of departure is to remove all laws that seek to discriminate and still segregate indigenous people. It is true that customary law must be viewed as a separate legal system and not as stoic law that needs to be reformed according to the tenets imposed under western/common law, such foreign-imposed ideologies are what dismantles the legality of customary law and further distort its intention.

The indigenous people's *legal regimes* need to be maintained for the purpose of identity, cultural development, and reform. Not viewing customary law with a constrict attitude, but then holistically analyse the current status of customary law to the benefit of the current society and communities and also the future generation. Not only questioning its status and its constant marginalisation, but also seeking its preservation, protection, reform, and development. In the aspect of the focus of this article, reform is based on the idea of reforming customary law in correlations to modern society's moral aspects. Where it is found that customary law is contrary to basic human rights,¹¹⁷ it shall be reformed in a manner that does not eliminate the rule without proper legal interpretation and only eliminating aspects that are contrary to basic human rights and morality aspect.¹¹⁸ The reform also seeks to ensure the continuous codification and amendment of customary law which truly reflects indigenous people's legal regimes; the aspect of reform also seeks to look at the preservation and creation of indigenous pluralism also synonymously coined term "indigenisation" of customary law. Therefore, legal development in relation to customary law and the focus of this article means, the judicial and legislative development of customary law. This aspect means that the judiciary and the legislature are tasked to ensure that customary law is preserved and developed to fit and suit the modern social aspects of the indigenous people, whether urbanised or in a rural setting. The world, social anthropologists and the legal academic fields should accept and acknowledge the contribution of traditional-scientific research and knowledge in medicine that traditional healers and leaders possess.

117 Chapter 2 Bill of Right of the Constitution.

118 As argued by Ngcobo J in *Bhe v Khayelitsha Magistrate* case.

An international legal discourse based on the status and reform of customary law is indicated in the UNDRIP, this international declaration should be used to appreciate and ensure that the legal regimes of indigenous people are elevated and are acclaimed in a non-discriminatory fashion. The incorrectly unfounded criticism of customary law and indigenous people is the reason why it is difficult to attain indigenous pluralism to successfully exist in the current dispensation. The importance of customary law lies in the indigenous communities who still want to conform and be bound by customary law to the exclusion of positive/common law. Current mutual respect of the indigenous ideas, knowledge, and resource should be the State's approach to better understand indigenous people and their traditional regimes.

The strides in South Africa are commendable and this should be expanded to indigenous people's legal regimes and not only their traditional regimes. As it was said by Van De Westhuizen J, that, "Legislation has to be formulated to substitute the current inadequate requirements for the validity of a custom. These requirements must reflect the changing face of custom and grant this norm-structure its rightful place in jurisprudence,"¹¹⁹ no better than the article could say.

119 *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 44.