

THE JUDICIAL INTERPRETATION OF INDIGENOUS LAW AS AN INFERIOR LEGAL SYSTEM IN POST-APARTHEID CULTURAL JURISPRUDENCE IN SOUTH AFRICA

Dissertation submitted in compliance of the LLM degree
(Socio-economic Rights: Practical and Theory)

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EPIGRAPH

“The approach whereby African law is recognized only when it does not conflict with principles of public policy or natural justice leads to an absurd situation whereby it is continuously being undermined and not properly developed by the courts, which rely largely on ‘experts’”.

Cape Provisional Division Judge President Hlophe in the case of;

Mabuza v Mbatha 2003 (4) SA 218 CPD at 228 C.

DEDICATION

To my parents, Motlatjo Frans Malowa and Mmantlatjo Rosah Malowa, my children Empress, Culture, Blessed-Lij, Precious and Beauty and all sons and daughters of African soil, those that are at home and those that are abroad

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ACRONYMS

APHR - African People's Human Rights
ANC - African National Congress
BCLR - Butterworth Constitutional Law Report
CC - Constitutional Court
CPD - Cape Provincial Division
DCJ - Division of Criminal Justice
DOJ & CD – Department of Justice and Constitutional Development
GG - Government Gazette
IJAC – International Journal of Arts and Commerce
JSC – Judicial Service commission
LR - Law Report
N - foot note
PARA - Paragraph
RSA - Republic of South Africa
S - Section
SA - South Africa
SAJHR - South African Journal for Human Rights
SALCR - South African Law Commission Report
SCA - Supreme Court of Appeal
SSNR - Social Science Research Network
T - Transvaal
TBVC States – Transkei, Bophuthatswana, Venda, Ciskei

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ABSTRACT

The significant issue in customary or indigenous law is that in its original form, it is unwritten. Application and interpretation of rules is done by the tribal authorities at a time when the matter is being tried; and precedents are kept in memory of attendants and those who had orally heard the application of rules.¹

In terms of common and/or foreign law the legislators or the parliamentarians, politicians, lawyers, counsel and moreso presiding officers have throughout been responsible for the judicial interpretation of law on socio-economic rights.² Apparently the legislators, politicians, lawyers, litigants, presiding officers' interpretation and application of common law during apartheid South Africa had influenced the way indigenous law is interpreted. The interpretation of judicial officers in the post- apartheid cultural jurisprudence is conservative or narrow in approach.³ This did not allow the indigenous law, though influenced, to be applied and interpreted within its own ambit, but through common law's ambit.⁴

There is responsibility on the post-apartheid South African government to ensure that the cultural jurisprudence of previously marginalized citizens is not organized.⁵ There must be development equality of indigenous legal system during judicial interpretation.⁶ The indigenous law which governed the lives of African people in pre-apartheid era is still in existence and all the rights emanating from it, to an extent that it is consistent with the Constitution.⁷ The judicial interpretation of indigenous law on cultural jurisprudence should be developed on the same par with other legal system like common law development as evident on right regarding allocation of fishing quotas.⁸ The presiding officer's failure to interpret indigenous law on equal level with other legal systems may constitute unconstitutionality. Furthermore it may amount to lack of equality in protection and benefit of law to indigenous

¹ TW Bennet *Customary Law in South Africa* (2004) 2.

² KE Klare 'Legal Culture and Transformation Constitutionalism' (1998) *SAJHR* 14.

³ KE klare (n 2 above).

⁴ N Ntlama 'Equality' misplaced in the development of customary law of succession: Lesson from *Shilubana v Namitwa* 2009 (2) SA 66 CC 209 Stellenbosch Law Review 333 – 356.

⁵ Section 211(3) of The Constitution of the Republic of South Africa (hereinafter referred to as 'the Constitution').

⁶ Section 39(2) of the Constitution (n 5 above).

⁷ The Constitution (n 5 above).

⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) court held that it is not bound to rubber-stamp unreasonable decision simply because of complexity of decision or identity of the decision-maker.

people from their legitimate expectation of enjoyment of cultural jurisprudence in post-apartheid South Africa.

Provision is made for recognition of indigenous law by sections 39,⁹ 211¹⁰ and 212¹¹ of the Constitution wherein among others judicial officers when interpreting that legal system they must consider that fact. However there seems to be no actual consideration of Constitutional recognition of indigenous law on cultural jurisprudence through judicial interpretation on equal par with other legal systems.¹² In some instances the judicial officers quote section 39 of the Constitution in alleging recognition of indigenous law without practically implementing that recognition.¹³ There is hurry to allege indigenous law's contradiction with the Constitution without proper judicial interpretation been done, especially on gender issues.¹⁴ The Department of Justice and Constitutional Development (DOJ & CD) in February 2012 released a discussion document. The document is entitled 'Transformation of the judicial system and the role of the judiciary'.¹⁵ The purpose of the document was among others to

⁹ When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider the international law; and (c) may consider foreign law. (2) When interpreting any legislation and when developing the common law or customary law every court, tribunal or forum must promote the spirit and object of the Bill of Rights (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

¹⁰The institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution.(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those custom.(3)The courts must apply customary law when that law is applicable, subject to the Constitutionand any legislation that specifically deals with customary law".

¹¹ National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law – (a) national of provincial legislation may provide for the establishment of houses of traditional leaders; and (b) national legislation may establish a council of tradition leaders".

¹² Shilubana v Namiwa 2009 (2) SA 66 CC.

¹³ Shilubana (n 12 above).

¹⁴ Shilubana (n 12 above).

¹⁵ Transformation of the judicial system and the role of the judiciary (www.doj.gov.za February 2012).

develop judicial interpretation of indigenous on cultural jurisprudence; probably to be on an equal standing with other legal systems.

The government's eagerness to enact a Traditional Court Bill¹⁶ is another indications of a need for development f indigenous laws. The judicial interpretation of indigenous law on cultural jurisprudence will minimize inferiority or what may be seen as lesser recognition if empowering legislations are enacted. Inferior judicial interpretation may be inexistence due to ignorance of indigenous legal systems or its misunderstanding of it, but not necessarily *mala fides*.¹⁷ The document released by the DOJ & CD incorporates a section within it which is entitled 'Plural legal system and the problem of legal impression'.¹⁸ The document is an initiative that shows awareness by the government that judicial interpretation of indigenous law on cultural jurisprudence is undermined or inferior. Judicial interpretation of common law has developed in pre and post-apartheid South Africa than the indigenous law legal systems.¹⁹ This query lack of indigenous law development on satisfactory level is understandable because recognition and protection of indigenous people's legal system is essential for equal benefit of the law to all.

In the premises, the judicial interpretation of indigenous law on in post-apartheid cultural jurisprudence in South Africa should be evident. Furthermore it should be in a manner that is distinct from the pre-Constitutional era wherein it was undermined and inferior.²⁰ Achievement of judicial interpretation of indigenous law in the post-apartheid cultural jurisprudence in South Africa depends on the untiring efforts of indigenous people themselves. The government, judges, magistrates, litigants and their legal representatives too has a duty; however background of those people, play a pivotal role to achieve equality on judicial interpretation of indigenous law.²¹

¹⁶ Traditional Court Bill published in the Government Gazette no. 34850 of 13 December 2011 / Bill originally introduced in National Assembly at Traditional Court Bill 15 – 2008.

¹⁷ Shilubana (n 12 above).

¹⁸ Transformation of the judiciary system and the role of the judicial system (n 15 above).

¹⁹ *Charmichele v Minister of Safety & Security & Another* 2001 (4) SA 938 (CC).

²⁰ *Mabuza v Mbatha* 2003 (4) SA 218 (CPD).

²¹ KE Klare (n 2 above).

CHAPTER 1

THE JUDICIAL INTERPRETATION OF INDIGENOUS LAW AS AN INFERIOR LEGAL SYSTEM IN POST- APARTHEID CULTURAL JURISPRUDENCE IN SOUTH AFRICA

1.1 INTRODUCTION

This chapter deals with the origin of and definition of indigenous law and its implementation under the interpretation of the Bill of Rights.²² It also deals with the hurdles in the judicial interpretation of indigenous law on the same par with other legal system more so considering cultural jurisprudence in post-apartheid South Africa. The chapter further deals with the manner in which indigenous people's law is judicially interpreted as an inferior legal system on cultural jurisprudence in South Africa. It contains a desktop research methodology, background, aims and objectives of research study, problem statement, research question and rational behind questions.

It is further about introducing background to the research with an insight engagement on reality check regarding judicial interpretation of indigenous law as inferior legal system in the post-apartheid cultural jurisprudence in South Africa. It has the ability to provide a model of investigating the root cause and cure for judicial interpretation of indigenous law as inferior legal system. Indigenous law will be an equal legal system with common law and other legal systems provided within the Constitution. Ultimately indigenous law should emerge as an equal and independent legal system. The court's interpretation will enable cultural jurisprudence to be enjoyed by indigenous communities. There is quest for cultural pride on the involvement of indigenous people in the legal administration and application of their ancient dispute resolution mechanism. It is disturbing for another person's legal system to be imposed on indigenous people. The indigenous people should not be made to be peripheral spectators of foreign actors using local indigenous principles on their home ground.

In countries that have been under colonial rule, the indigenous people are aspiring to have a government with a new legal administrative system that recognizes their political and socio-economic rights that had been suppressed in their community in the post-colonial era.²³ That

²² S 39 of the Constitution (n 5 above).

²³ Freedom Charter policy document as adopted at the African National Congress (ANC)'s Congress of the People, Kliptown, on 26 June 1955.

aspiration includes having a judicial interpretation that encourages equal treatment of indigenous legal systems of the former colonized people without subjecting it to moral fibres, public policy and natural justice of another legal system²⁴. South Africans too years for judicial recognition and interpretation of the legal system that will alleviate their restricted cultural conditions. South Africans had in pre-Constitutional era hoped to have their rights fully catered in different categories.²⁵

The Constitution in its chapter two under the heading “*Interpretation of Bill of Rights*” lightly considered recognition of indigenous law by stating it in a negative form that “*The Bill of Rights does not deny ...*”.²⁶ In chapter 12, the Constitution deals with traditional leaders and it bears the heading “*Recognition*”. This chapter provides conditional application of indigenous law by ambiguously. This is so because it states that “*The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law*”.²⁷ Surely indigenous law can only apply when or in instances where it is applicable. It is further subjecting indigenous law to public policy and principles from common law because the rights incorporated within the Bill of Rights are common law rights in nature. The crust of what makes indigenous law to be judicially interpreted inferior is by being subjected to legislations that are of pre-Constitutional era despite that the conditions are set down within the Constitution for its applicability of indigenous law.²⁸ Those legislation have a common law perspective, background and influence.

The conditional recognition of indigenous law *vis-a-vis* its Constitution compliance before its applicability has a serious impact on the judicial interpretation of the indigenous law on the same par with other legal systems. The connection between indigenous law recognition in post-apartheid by the Constitution with pre-Constitution repugnance provision against indigenous law is contradictory.²⁹ Indigenous law could not be applied if it is contrary to natural justice or public policy through interpretation by certain courts.³⁰

²⁴ Mabuza (n 20 above).

²⁵ Freedom Charter (n 23 above).

²⁶ S 39 (3) of the Constitution (n 5 above).

²⁷ S 211(3) of the Constitution (n 5 above).

²⁸ TW Bennet (n1 above) 66 and 67(g).

²⁹ Mabuza (n 20 above).

³⁰ TW Bennet (n 1 above) 67.

The question is; did South Africans attain the aspired freedom from colonial governance which includes freedom of the judiciary from colonial influence and domination? Judicial interpretation of indigenous law happens with participation of litigants, legal representatives and judicial officers. The sole recognition of indigenous law by the government through the Constitution or other legislation is not enough. They had to be given with equal treatment or interpretation in post-apartheid cultural jurisprudence in South Africa by the judiciary.

A starting point is that litigants, legal representatives, judicial officers and parliamentarian must know what is indigenous or customary law and where does it derive. That must be done first before expectation is made on judicial officer to interpret indigenous law in a manner that is not inferior to other legal systems on cultural jurisprudence or rights. "Customary law derives from social practices that the community concerned accepts as obligatory".³¹ Indigenous law is also regarded as customary law and it refers to law of original inhabitants or indigenous people of the country.³² Initially when colonists conquered the southern tip of Africa, their "courts were allowed to recognize and enforce those aspects of customary law that were thought [to be] compatible with European standards of morality".³³ This is so because they were in no position to impose English or Roman-Dutch law on recently conquered peoples.³⁴ When indigenous people were first placed under common law, it was essential that certain aspects of their practice to be recognized to a certain extend.

Judicial interpretation of indigenous law as inferior legal system in post-apartheid cultural jurisprudence in South Africa was evident from the fact that common law approach was used in Bhe's³⁵ case. This is gender and birth determination of inheritance in indigenous law. In this case it was seen as unfair discrimination on gender issue thereby making indigenous legal system inferior and against other legal systems. The indigenous law applicability must be determined by reference not to common law rights analysis but by the Constitution.³⁶ The courts have to use different approach when it applies rules or principles from customary or common law. Notwithstanding the recognition of indigenous law as part of the general law of

³¹ TW Bennet (n 1 above).

³² TW Bennet (n 1 above).

³³ South African Law Commission Report 90: Customary Marriage.

³⁴ TW Bennet (n 1 above) 9.

³⁵ *Bhe and Others v Magistrate, Khayelitsha and Others* (Commission for Gender Equality as Amicus Curiae); *Shibi v Sithole and Others*, South African Human Rights Commission and Another v President of the Republic of South Africa and Another 2005 (1) SA 580 (CC).

³⁶ C Rautenbatch 'Deep Legal Pluralism in South Africa' (2010) 60 *Journal of Legal Pluralism and Unofficial Law* 144.

the land, the circumstances in which it is to be applied are still vague. Whenever rules derived from the two different legal systems that are potentially applicable to the same sets of facts, the courts or judges need to decide which rules to apply.³⁷

In deciding which law is applicable, the court has to deal with the nature of disputes, background of parties involved, to can cater for cultural, socio-economic rights of the parties within their indigenous communities. However the South African courts have very few explicit choices of customary law rules within the Black Administration Act 38 of 1927 more specifically section 23(9). This Act contains some rules regulating the question of succession, but apart from these, the legislature for indigenous law has been silent on many issues as compared to common law.³⁸

It follows that in deciding when to apply customary law has generally been a matter of judicial discretion in the South African courts. The result of that is judges have decided to treat each case on its merits and consequently led to a situation wherein the application and interpretation of customary law on cultural jurisprudence or rights became vague and confusing to an extent which undermines customary law as well as the administration of justice as a whole.³⁹

Application and interpretation of indigenous law on cultural jurisprudence by the judiciary in post-apartheid South Africa is still considered if it is in line with other laws and legislation that are associated with the common law.⁴⁰ Indigenous law is negatively subjected to legal pluralism. Although the Constitution indicates that indigenous law is one of the core elements of the South African legal system, on the same footing with common law, the indigenous law court interpretation prove the contrary. The indigenous law interpretation by courts on cultural

³⁷ SALCR Project 90: Harmonisation of the Common Law and Indigenous Law. Report on conflict of Law September 1999 1.

³⁸ SALCR Project 90: (n 33 above) para. 1.5 2.

³⁹ SALCR Project 90: (n 33 above).

⁴⁰ S 39(1) of The Black Administration Act of 1927 which provides that; 'Whenever a Black has died leaving a valid will which disposes of any portion of his estate, Black law and custom shall not apply to the administration or distribution of so much of his estate as does not fall under sub-section (1) or (2) and such administration and distribution shall in all respects be in accordance with the Administration Estates Act, 1913 (Act No 24 of 1913).

jurisprudence is interfered with by common law influence on analysis and reasoning even in post-apartheid era in South Africa.⁴¹

“The most striking feature of nearly all customary law is the fact that in their original form at least, they are unwritten”.⁴² Furthermore, indigenous law is transmitted from one generation to another orally although other judicial officers disregard “...rules transmitted orally ...”.⁴³ South Africa, like other African countries that were under colonial rule, have its indigenous people who are faced with general limitation of repugnancy provision on their legal system.⁴⁴ They want judicial interpretation of their legal system with which they have a historical connection. In pre-constitutional era, the need to develop folk culture and custom was envisaged by the majority on indigenous people in political movements.⁴⁵

In post-apartheid era there are some of the traces of Freedom of Charter contents or rights within the Constitution.⁴⁶ The judicial interpretation of indigenous law rights is approached from common law perspective by officials who are of middle class and/or politically inclined. There is no evident, strive for judicial interpretation of indigenous law on equal par with other legal system on cultural jurisprudence in post-apartheid South Africa.

Judicial interpretation of indigenous law on cultural jurisprudence outside South Africa was treated as equal legal system and brings about the justice to affected parties.⁴⁷ Distorted cultural teachings, foreign religious and philosophical influence coupled with lack of knowledge of indigenous law may be contribute towards disregard or inadequate consideration of indigenous law on judicial interpretation.

⁴¹ J Church ‘The place of indigenous law in a mixed legal system and a society in transformation: A South African Experience - *Bhe and others v Magistrate, Khaylitsha and Others; Shibi v Sithole and others; SA Human Rights Commission and another v President of the RSA and Another* 53 with regard to succession and *Alexkor Ltd v another v Richtersveld Community and Others* 54 regarding land tenure page 103-105.

⁴² TW Bennet (n 1 above) 2(a).

⁴³ TW Bennet (n1 above) 3.

⁴⁴ TW Bennet (n 1 above) 67(g).

⁴⁵ Freedom Charter (n 23 above).

⁴⁶ Freedom Charter (n 23 above) 34.

⁴⁷ Unreported North Gauteng High Court (now Gauteng Division of the High Court of the Republic of South Africa) case of *Masipa & Another vs. Mahlaole & Others* under case no. 21853/11.

In the process of developing indigenous law and adapting it to the ever-changing circumstances, courts are required by section 39(2) of the Constitution to do so in a manner that promotes the spirit, purport and objects of the Bill of Rights”.⁴⁸

In some instances there is a destructive confrontation between the Bill of Rights and legislation, on one hand, and indigenous law, with obliteration of indigenous law. “...There is a substantial number of people whose lives are governed by indigenous law. People who live by indigenous law and custom are entitled to be governed by indigenous law. The Constitution accords them that right”.⁴⁹ The application of the common law on indigenous aspects may lead to unpleasant results in certain situations. If judicial interpretation of indigenous law is done where is due or on equal par with other legal systems, it will bring harmonious justice to the disputed rights. Judicial interpretation of indigenous law as inferior legal system on cultural rights by applying common law sometimes disintegrate family and diminish property held communally with intent to preserve it to exist in perpetuity to family members. Consequently incorrect judicial interpretation of indigenous law as an inferior legal system on cultural rights creates poverty among the indigenous people and strain family relationships.

There must be judicial interpretation that put into practice the recognition of the Constitutional right of those communities that live by indigenous law on the same par as it would be the case for common law rights. The rights of people who are without being forced to subordinate themselves to the cultural and religious norms of others, highlight the importance of individuals and communities being able to enjoy the right to be different and also right of self-determination.

1.2 RESEARCH METHODOLOGY

This study is based on literature review of books, journal, articles, legislations, reports and case law. The nature of the topic of the mini-dissertation cannot be well expressed through an interview, questionnaire and/or field work research. This is so because the topic is about court’s interpretation of indigenous law on cultural jurisprudence. Judicial interpretation of indigenous law as an inferior legal system in post-apartheid cultural jurisprudence in South

⁴⁸ The Constitution (n 5 above).

⁴⁹ Bhe (n 35 above).

Africa is well evident through the outcomes of court cases. The challenge is that whereas most court cases are not reported, some outcomes of cases are not well-reasoned. In burial rights disputes, high courts form part of judicial interpretation on indigenous law. However the proceedings are not accessible as there are no law reports on them. Furthermore there are no cross references of legal authorities essential for judicial interpretation on indigenous law. The other challenge is that judicial interpreters have staff shortage with tight schedules and bulk of cases to adjudicate. Furthermore they are conservative in discussing their judgment with anyone by law and/or due to their inaccessibility even when the matter is finalised. The judges are in most instances not willing to discuss their court findings outside court process for a number of reasons. One of the reasons is that a judge may be quoted in an appeal process for having admitted that he had done a mistake in the judicial interpretation of one of the matter he had dealt with. The participants to a judicial interpretation of indigenous law include lawyers and advocates. If a face-to-face research methodology had to be opted for this topic, the participants may not have much to say because interpretation is on the mostly deriving from the judicial officers in the case analysis.

1.3 AIM AND OBJECTIVES OF RESEARCH STUDY

Judicial interpretation of indigenous law as equal legal system in post-apartheid cultural jurisprudence is essential for every post colonized country. Recognition of an indigenous law has to have back-up of judicial interpretation. An instrument like legislation or Constitution provision on indigenous law recognition is not enough.

Although the laws of the country are normally laws of general application without discrimination of race, place of origin, etc,⁵⁰ indigenous law on cultural jurisprudence may be interpreted on indigenous peoples' disputes. This should be so not only where common law provides a solution which is contradictory to indigenous law principles. Indigenous law on cultural jurisprudence should be interpreted judicially on equal par with other legal system only where there is no other legal system that can provide solution to a dispute. Caution should be taken when a judicial officer in a case is not of indigenous origin as there may be no written reference to some aspects of indigenous law.⁵¹

⁵⁰ Save for few second generation rights or socio-economic rights that were initial not justiciable, the majority of rights derive from common law.

⁵¹ SALCR Project 90: (n 33 above).

Indigenous law is recognized, but it is subjected to supervision by the legislature and by the courts.⁵² Indigenous law interpretation by judicial officers on cultural jurisprudence should not be subjected to test of acceptance by foreign standard or moral scrutiny, intelligence and/or logic. Common law's logic, effectiveness and authenticity does not seem to be put to test by judicial interpretation in comparison to indigenous law.⁵³

1.4 BACKGROUND TO THE STUDY

Even in post-apartheid era on cultural jurisprudence, common law continues to reign higher than indigenous law in judicial interpretation despite recognition of indigenous law within the Constitution. Although the Constitution is supreme, independent and distinct from common law, if one unpacks it, its core is exactly the common law.⁵⁴ There are few constitutional rights that are distinctively derived from indigenous law like right to language, culture and freedom of religion.⁵⁵ The Constitution provides for recognition of indigenous law, however its recognition was supposed to be visible through interpretation, among other areas, on cultural jurisprudence and not merely lip-service.

Indigenous law recognition was given lip-service under section 39(2)⁵⁶ and (3)⁵⁷ and 211(3)⁵⁸ of the Constitution because generally speaking there is no judicial interpretation of indigenous law as an equal legal system in post-apartheid cultural jurisprudence in South Africa. The Constitution provides that "everyone has a right to use the language and participate in the cultural life of their choice ...".⁵⁹ However that right's limitation and restriction is not necessary with the ambit of section 36 of the Constitution.

Civil and political rights including indigenous law concepts of *ubuntu* form part of the Constitution. The Constitution on its embodiment stated the recognition of indigenous law whereas there is nothing said about recognition of common law. It is as if common law is

⁵² I Currie Indigenous Law: Indigenous law in the new constitutional order 1999 para 36.1.

⁵³ S 9(3) of the Constitution (n 5 above).

⁵⁴ Right to life S v Makwanyane and Mchunu 1994(3) SA 868 (A).

⁵⁵ S 15 and 30 of the Constitution (n 5 above).

⁵⁶ The Constitution (n 5 above) S 39(2) Interpretation of the Bill of Rights.

⁵⁷ The Constitution (n 5 above) S 39(3), The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

⁵⁸ The Constitution (n 5 above) S 211(3) - The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

⁵⁹ The Constitution (n 5 above).

automatically recognized within the Constitution and what has to be done is just to develop it further.⁶⁰ The Constitution provisions from an indigenous law point of view from a judicial interpretation is not emphatic on indigenous law role other than right to tradition and culture of interpretation of the Bill of Rights⁶¹ and section 211 and 212 of the Constitution. The post-apartheid judicial interpretation of indigenous law should not have been given less emphasis on section 39 of the Constitution. Indigenous law should have been made more specified and detailed recognition in the constitutional provision more than other legal systems like foreign law. This is so because apparently indigenous law has enjoyed higher recognition in the pre-Constitution era with specified provisions, although it was clearly inferior to other laws.

Judicial interpretation of indigenous law on cultural jurisprudence should at least be on equal par with other legal systems. The judiciary seems to be limiting the interpretation of indigenous law as an equal legal system by applying it on insignificant issues and/or at a little scale as compared to other legal systems referred to in the Constitution. Courts, tribunals, forums and parliament should play a pivotal role in assisting judicial interpretation of indigenous law in socio-economic rights as an equal legal system in the post-apartheid South Africa.

Judicial platforms like courts should play a significant contribution in dispensing justice from an indigenous legal perspective on cultural jurisprudence. Through interpretation mechanism, courts can make indigenous law to attain status of an equal legal system without hindrance by repugnancy clauses based on foreign principles and public morality from common law background.

1.5 RESEARCH QUESTIONS

- Is judicial interpretation of indigenous law on cultural jurisprudence an equal legal system embrasive and capable of being applicable not only to indigenous people but broader South Africans?
- Is judicial interpretation of indigenous law on cultural jurisprudence as an equal legal system essential, in line with developing world and/or capable of being developed to can merge modern legal challenges?

⁶⁰ S 211(1) and S 39(2) of the Constitution (n 5 above).

⁶¹ S 39(2) of the Constitution (n 5 above).

- Can the courts apply and interpret indigenous law on cultural jurisprudence on equal par with other legal systems despite what appears to be community gender discrimination?
- Is judicial interpretation of indigenous law on cultural jurisprudence as an equal legal system with others?
- Is it capable of being attained despite limited written reference and inaccessibility of reference?
- Is judicial interpretation of indigenous law on cultural jurisprudence as an equal legal system a fleeting illusion that may be pursued but cannot be attained?

1.6 PROBLEM STATEMENT

Justice may not be attained and reach its intended purpose as long as indigenous people of South Africa who are in majority, do not enjoy judicial interpretation of indigenous law as an equal legal system in the post-apartheid cultural jurisprudence in South Africa. “It is for this reason that an approach that condemns rules or provisions of customary law merely on the basis that they are different from those of common law or legislation, such as the Intestate succession Act is incorrect”.⁶²

1.7 RATIONALE BEHIND QUESTIONS

The rationale behind problem questions are that there is a need for change of a mindset of judicial officers, commissioners, chairpersons of forums or tribunals, litigants and their legal representatives in their judicial interpretation of indigenous law as an inferior legal system in post-apartheid cultural jurisprudence in South Africa. If an indigenous law right is suspected to be violating a right protected by the Bill of Rights, the latter should be subjected to scrutiny under section 36⁶³ of the Constitution and not the indigenous law right in issue.

⁶² *Bhe* (n 35 above) para 42.

⁶³ *Shilubana* (n 10 above). It is submitted that although the Court appears to have developed the customary law rule of succession of women to traditional leadership in reinforcing the right to gender equality, it has done nothing more than institutionalise the inferior status of customary law's pre-1994 past. The Court, as it did in *Bhe*, imported the common law principles of equality in addressing the customary law dispute of the succession of women

CHAPTER 2

CASE STUDIES OF THE ACTUAL SCENARIOS ON JUDICIAL INTERPRETATION OF INDIGENOUS LAW AS LEGAL SYSTEM IN THE BURIAL RIGHTS LITIGATIONS IN THE POST- APARTHEID CULTURAL JURISPRUDENCE IN SOUTH AFRICA

2.1 INTRODUCTION

This chapter deals with burial rights litigation between family members together with factual background in the case of Masipa and Monyepao, legal principles in the case study of both cases of Masipa and Monyepao. This cases gives an insight perspective on the judicial interpretation of indigenous law as an equal and inferior legal system in post-apartheid cultural jurisprudence in South Africa. The discretion of judges in judicial interpretation determines whether the judge uses indigenous law approach or common law approach towards litigants' dispute resolution.

2.2 FACTUAL BACKGROUNDS IN THE CASE STUDIES OF MASIPA AND MONYEPAO

In 2011 the only adult male in Masipa's family was Ngoako Masipa (hereinafter referred to as 'Masipa') amongst his three female sisters. He is residing in one of the villages in the Province of Limpopo, South Africa. During the death of his mother (hereinafter referred to as 'the deceased'), he confronted with judicial interpretation of indigenous laws as inferior legal system in cultural jurisprudence.⁶⁴

'Masipa' brought an application in the North Gauteng High Court⁶⁵ supported by his uncle Malelane Ramatshela as co-applicant in burial-rights dispute litigation.⁶⁶ 'Masipa's application was brought on an urgent basis on a "Good Friday" holiday⁶⁷ of the 22nd April 2011 against his three sisters who were married and staying around the town of

for chieftaincy without considering the implications it would have on the identity of the particular traditional communities and their institutions.

⁶⁴ Masipa & Another vs. Mahlaole & Others (n 47 above).

⁶⁵ The court is currently called "The High Court of the Republic of South Africa; Gauteng Division, Pretoria".

⁶⁶ Masipa (n 47 above).

⁶⁷ Christian religious day celebrated in South Africa as the day on which Jesus Christ has died on the cross.

Polokwane.⁶⁸ 'Masipa' was a family man residing at the homestead and family yard where his mother was married to his father. 'Masipa's' mother had later deserted her homestead after the lapse of mourning period of her late husband, who is 'Masipa's' father. This burial-right dispute happened about ten years after the death and burial of 'Masipa's' father in 2001. The burial of 'Masipa's' father took place in the village cemetery of his residence called Ga-Ramokgopa, Mokomene⁶⁹. Although 'the deceased' frequently visited her daughter's residential place in the town of Polokwane, there was no indication that she changed her *domicilium citandi et executandi*.⁷⁰ 'The deceased' had ultimately decided to stay with one of her daughters in Polokwane and no longer visited her homestead in Ga-Ramokgopa, Mokomene. One of 'the deceased' daughter still bore the maiden surname, but the rest of 'Masipa's' sisters were using the marriage surnames and they were staying with their husbands in the vicinity of Polokwane. There was acrimonious relationship between 'Masipa' and his sisters. They were not visiting each other. 'The deceased' was having about eight years staying with one of 'Masipa's' sisters. 'Masipa' was paying tribal levies for himself and for 'the deceased' too. 'Masipa' has assumed the position of his deceased father as the guardian of Masipa family and he was also taking care of family livestock and the house that belonged to her father and mother.

In April 2011 'the deceased' passed away and 'Masipa's' sister informed their aunt, who in turn told 'Masipa'. Delegation were sought to transport the corpse of 'the deceased' from town to the village for burial. 'Masipa's' sisters refused to hand-over 'the deceased' to 'Masipa' by claiming that they have the right to bury 'the deceased'. They claimed right to equality to 'Masipa' as they are equally biological children of 'the deceased' who should not be discriminated on the basis of gender. The issue was who has the right to bury 'the deceased' and where? 'Masipa's' sisters wanted to bury 'the deceased' in Polokwane but 'Masipa' wanted to bury 'the deceased' next to his late father in Mokomene.⁷¹ 'Masipa' claimed judicial interpretation of indigenous law in post-apartheid cultural jurisprudence in South Africa to be in his favour. Culturally speaking 'Masipa' is according to indigenous law, a custodian and guardian of intestate heir and successor of his father's obligation and responsibilities. The indigenous law principle of primogeniture permit 'Masipa' as an adult

⁶⁸ Capital city of Limpopo Province, Republic of South Africa.

⁶⁹ About 70 kilometers North of Polokwane, about 15 kilometers on the corner of Tropic of Capricorn and N 1 Road towards the East.

⁷⁰ Latin word for domicile.

⁷¹ Ga-Ramokgopa (n 69 above).

male who had already taken and assumed duties and roles of his late father. 'Masipa's' sisters did not put their stances on the matter in a written form but they telephonically informed the judge why an order should not be granted in 'Masipa's' favour. It was alleged by 'Masipa's' sisters that 'the deceased' was not in good terms with 'Masipa' and she was no longer residing with him ('Masipa').

'Masipa's' sisters had indirectly relied on common law principles and/or Constitutional right to gender equality.⁷² They seem to consider themselves to be Constitutionally on the same equal footing with 'Masipa'. In terms of indigenous law, the marriage status of 'Masipa's' sisters makes them to belong to different tribes or customs that has to govern their lives. By virtue of their marriages, their customs and applicability of rules and regulations are different than those of their mother. They do not have a discretion and/or equal say on 'the deceased's' burial as compared to 'Masipa'. They have chosen an applicability of a different legal system apart from that of 'the deceased' and/or 'Masipa'. By virtue of their marriage outside the border of the village, they might have opted to be governed by common law marriage or marriage law of their husbands. 'Masipa's' sisters were against 'Masipa's' application and the judicial officer ruled in the sisters' favour. The order was a clear evidence of judicial interpretation of indigenous law as an inferior legal system in post-apartheid cultural jurisprudence in South Africa. It had further proved that indigenous law is treated and judicially interpreted as inferior legal system and not on equal par with other legal systems.

Three months after 'Masipa's' case in the same court,⁷³ another case was brought by the Monyepao siblings. In this matter Monyepao siblings and their deceased brother's son instituted an urgent application against the deceased's estranged wife and daughter over a burial right of their brother. Their deceased brother was staying with a girlfriend in Sebokeng, Vereeniging⁷⁴ Monyepao's siblings were residing⁷⁴ in one village called Eisleben, Ga-Ramokgopa⁷⁵ in the outskirt of Polokwane. The case was brought for burial-rights dispute between the Monyepao family at the village and the deceased's wife and daughter who wanted to bury the deceased at Kempton Park,⁷⁶ Johannesburg. The Monyepao siblings

⁷² S 9 of the Constitution (n 5 above).

⁷³ Unreported North Gauteng High Court Monyepao *et al* v Monyepao *et al* under case number 31424/11.

⁷⁴ A township in far South of Johannesburg, Republic of South Africa.

⁷⁵ A village 7 kilometers South of Mokomene but within Ga-Ramokgopa jurisdiction.

⁷⁶ A town east of Johannesburg which is the matrimonial house of the deceased's daughter and her husband.

were contesting the deceased's wife and her daughter's right to bury 'the deceased' in the city of Johannesburg despite that they were estranged for about 20 years. 'The Monyepao wanted to bury the deceased at an ancestral graveside in the village. 'The deceased's wife did not have a house of her own in Gauteng Province but wanted to conduct 'the deceased's burial ceremony at her daughter's matrimonial home in the suburb of Kempton Park. 'The deceased's wife also alleged to have a matrimonial home with 'the deceased' in Phalaborwa.⁷⁷ 'The deceased' death brought about burial-right dispute which required judicial interpretation of indigenous law as the litigants are indigenous people well conversant with indigenous law. In terms of common law legal standing to can bury may be limited to the relationship of marriage or biological relationship that is parent-child relationship. Although in strict sense, marriage relationship is ceased by death. In terms of indigenous law, burial is not individualistic but communal with extended family having undivided right to burial.

2.3 LEGAL PRINCIPLES IN THE CASE STUDY OF MASIPA

'Masipa' alleges that in terms of indigenous law he together with relatives which constitute a community has a right to bury 'the deceased. There is a duty to dispose 'the deceased's remains with dignity in terms of culture and customs at the family grave side. 'Masipa alleges to be the legitimate custodian of 'the deceased's remains in terms of indigenous law principle of male primogeniture.⁷⁸ He further indicated that the culture and custom of 'the deceased' will be belittled, distorted. Furthermore 'the deceased' integrity would have been undermined if there was no judicial interpretation of indigenous law as equal legal system on cultural jurisprudence. He further stated that the interest of justice as per Constitution's⁷⁹ recognition of indigenous law does not permit that there be judicial interpretation that deny existence or make indigenous law appear to be inferior legal system. 'The deceased's burial in a town away from his people in the village due to judicial interpretation makes an impression that indigenous law is inferior on cultural jurisprudence even in post-apartheid South Africa. He also raised religious aspect of the matter by stating that burial of 'the deceased' at a separate grave will also separate his ancestral spirits. 'Masipa's deceased father was buried at a different cemetery to that which his sisters desire. 'Masipa' wanted to preserve an action of worshipping at one graveside for the family and up-keeping of traditional norms and customs. 'Masipa' further considered his sisters' instances desire to bury 'the deceased' in town with a

⁷⁷ A mine-town in far North of Limpopo Province.

⁷⁸ TW Bennet (n 1 above).

⁷⁹ S 39(3) of the Constitution (n 5 above).

ceremony held at the homestead which use a different surname to ‘the deceased’ as likely to create family curse⁸⁰.

The crust of the matter is that the court in its judicial interpretation of indigenous law in post-apartheid cultural jurisprudence in South Africa “...must promote values that underlie and open and democratic society based on human dignity, equality and freedom.”⁸¹

‘Masipa’ did indicated in his contestation that court’s denial to grant him permission to bury ‘the deceased’ will be judicial interpretation of indigenous law in a manner that contravene inherent dignity and the right to have dignity respected and protected. He further stated that in terms of indigenous law, its judicial interpretation dictates that ‘the deceased’ as a wife to ‘Masipa’s family, should be buried at a cemetery for the ‘Masipa’s family. The judicial interpretation of indigenous law in the post-apartheid cultural jurisprudence was ultimately done in a manner that proved that it is seen as inferior.

2.4 LEGAL PRINCEPLES IN THE CASE STUDY OF MONYEPAO

The Monyepao siblings and son of ‘the deceased’ claimed that in terms of indigenous law, the parents and the entire next-of-kin of ‘the deceased’ have communal interest and right to bury a family member. Irrespective of ‘the deceased’ marital status, the type of matrimonial regime and the fact that the closest person to him or her is the son or wife, burial right is communal.⁸² ‘The Monyepao siblings allege that burial right interpretation from indigenous law perspective does not attach matrimonial right like conjugal right within a marriage, as may be interpreted judicially from a common law perspective. The Monyepao siblings submitted that they have a Constitutional right to religion, belief and opinion, language and culture⁸³ and cultural, religious and linguistic community.⁸⁴ In terms of judicial interpretation of indigenous law in post-apartheid cultural jurisprudence, the courts are obliged to develop indigenous law through interpretation of rights in such a manner that shows that indigenous law is recognized to an extent that it is consistent with the Bill of Rights.⁸⁵

⁸⁰ S 15(1) of the Constitution (n 5 above): “Everyone has the right to freedom of conscience, religion, though, belief and opinion”.

⁸¹ The Constitution (n 5 above).

⁸² TW Bennet (n 1 above) 333.

⁸³ S 10 of the Constitution (n 5 above).

⁸⁴ S 15, 30 and 31 of the Constitution (n 5 above).

⁸⁵ S 39 of the Constitution (n 5 above).

In Monyepao's case, the deceased's wife alleged that the duration of her separation with her husband did not have any legal effect to her marriage entitlement and her right to bury 'the deceased'. That is a common law approach. She alleged that the marriage status gives her *locus standi*⁸⁶ which the deceased's sisters do not have on the deceased. 'The deceased's' wife was claiming legal protection on her right to bury her husband from a common law perspective. She further alleged that it is within her right to choose a burial site or place of burial ceremony for her deceased husband.⁸⁷ The deceased's wife indicated that in the alternative, the deceased can be buried by her in Phalaborwa where the deceased had a house. She further indicated to court through her legal representative that the home of 'the deceased's parents is not his home any longer after marriage⁸⁸ moreso that he was no longer residing there. The deceased's wife indicated that in terms of common law herself and her daughter are the rightful heirs of the deceased and they have inherited the deceased's body to bury it. She further said in her affidavit opposing the application of Monyepao's siblings that "where culture is inconsistent with applicable law then culture shall not succeed". The deceased's wife stated that she "deny that he [biological brother of the deceased] is entitled in terms of customary law to alleged custodian" [of the deceased's remains].⁸⁹

2.4 CONCLUSION

The court's judgments in the two factual case studies are at contrast to each other. They clearly demonstrate the judicial interpretation of indigenous law in post-apartheid cultural jurisprudence in South Africa to be undetermined and discretionary by the judicial officers. In 'Masipa's'⁹⁰ case, common law right had find victory in the judicial interpretation of indigenous law inferiority. In Monyepao's⁹¹ case similar to a position in Mabuza's⁹² case, there was judicial interpretation of indigenous law as an equal legal system to other legal systems in post-apartheid cultural jurisprudence in South Africa.

⁸⁶ Legal standing or right.

⁸⁷ In terms of common law the spouse do get letter of executorship to have control over the deceased's assets and to assume the deceased's responsibilities over liabilities.

⁸⁸ Genesis 2 : 24, Ephesians 5 : 31, Matthews 19 : 5 and Mark 10 : 7 "A man shall leave his father and his mother and hold fast to his wife and they shall become one flesh" – The Holy Bible King James Version 1611 The British and Foreign Bible Society.

⁸⁹ The statement of the deceased's wife in the opposing affidavit filed by her in court against the sibling's contestation to bury their brother.

⁹⁰ Monyepao (n 73 above).

⁹¹ Masipa (n 47 above).

⁹² Mabuza (n 20 above).

The typical application and interpretation of indigenous law inferiority in burial rights disputes undermines the cultural values and practices of the indigenous communities. The right to bury in terms of indigenous law is a communal rights as opposed to the way it is interpreted by some judges to be an individual right from a common law perspective. Indigenous law should be developed through judicial interpretation without destroying the balance created by indigenous law between individual right and communal right on cultural jurisprudence.

CHAPTER 3

ANALYSIS AND LITERATURE REVIEW ON JUDICIAL INTERPRETATION OF INDIGENOUS LAW AS AN INFERIOR LEGAL SYSTEM IN IN THE POST-APARTHEID CULTURAL JURISPRUDENCE IN SOUTH AFRICA

3.1 INTRODUCTION

This chapter deals with analysis of the core case of Mabuza⁹³ which appears to be exception together with few cases of the likes of Monyepao⁹⁴ for judicial interpretation of indigenous law as an inferior legal system in the post-apartheid cultural jurisprudence in South Africa. This chapter further deals with literature review, in-depth and general analysis of judicial interpretation of indigenous law as an inferior legal system in the post-apartheid cultural jurisprudence in South Africa.

The study shows that judicial interpretation of indigenous law as an equal system on cultural jurisprudence should be implemented without common law approach. Caution should be exercised on textbooks and authorities due to the fact that authors' view on indigenous law is through the prism of legal conceptions that were foreign to it.⁹⁵ The court stated while in the past indigenous law was seen through common law lens, it must now be seen as an integral part of our law. Like all the laws the indigenous law depends for its ultimate force and validity on the Constitution.⁹⁶ "It is not necessary at all to say African customary law should not be opposed to the principles of public policy or natural justice. To say that is fundamentally flawed as it reduces African law (which is practiced by the vast majority in this country) to foreign law in Africa."⁹⁷

The approach whereby African law is recognized only when it doesn't conflict with the principles of public policy or natural justice leads to an absurd situation whereby it is being continually undermined and not properly developed by courts, which largely rely on 'experts'.⁹⁸ "This is untenable. The courts have a constitutional obligation to develop African

⁹³ Mabuza (n 20 above).

⁹⁴ Monyepao (n 73 above).

⁹⁵ *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC).

⁹⁶ Shilubana (n 12 above).

⁹⁷ Mabuza (n 20 above).

⁹⁸ Shilubana's case a contrary stance was taken although it was said indigenous law is flexible.

customary law, particularly given the historical background...”.⁹⁹ Although the referred case law shows flexibility of customary law and potentials for it to have equal standing to common law, it is a drop in an ocean.¹⁰⁰ Furthermore the case does not totally reflect the judicial interpretation of indigenous law as an equal legal system on cultural jurisprudence. The concern is that any indigenous law or practice which on the face of it does not allegedly withstand Constitutional scrutiny, as may be interpreted by a conservative judicial officer, will view indigenous law to be against the Constitution.¹⁰¹

3.2 GENERAL ANALYSIS

Judicial interpretation of indigenous law as an equal legal system in post-apartheid cultural jurisprudence in South Africa is essential for fair disposition of justice.

Indigenous law as the legal system of indigenous people was not specifically stipulated in the Freedom Charter¹⁰² as the desired legal system which is sought to be operational in the post-apartheid era. However the leaders of the African National Congress come from indigenous law environment.¹⁰³ Although the Freedom Charter stipulated in the pre-Constitution era that in post-apartheid South Africa there was no stipulated type of law to be implemented. The congress of the people which constituted a Freedom Charter included Indians, Coloured, Blacks and Whites and apparently common law legal system was envisaged.

The indigenous law is often treated as an inferior legal system through judicial interpretation on cultural jurisprudence and is merely recognized for taking judicial notice to an extent that its recognition is not inconsistent within the Constitution.¹⁰⁴ Common and/or foreign law together with legislation, authors' view and courts has an impact on judicial interpretation. That aspect is evident, on rights like succession, land access, burial and marriage. Wife's right to bury her husband at her desired place seems to take precedent as a common law right contrary to the manner in which indigenous law provide. In terms of indigenous law,

⁹⁹ *Mabuza v Mbatha* (n 20 above).

¹⁰⁰ Shilubana case (n 12 above) a contrary stance was taken although it was said indigenous law is flexible.

¹⁰¹ KE Klare (n 2 above).

¹⁰² Freedom Charter (n 23 above).

¹⁰³ First provision of the Freedom Charter after its preamble.

¹⁰⁴ The Constitution (n 5 above).

burial and marriage are communal to the family and deceased wife cannot have exclusive right thereof.¹⁰⁵

The other area which shows judicial interpretation of indigenous law inferiority as opposed to common law is on adoption and foster care.¹⁰⁶ Marriages wherein a wife is married to go to the in-laws with a child born out-of-wedlock from another relationship is not putting the interest of her husband on that child more than his or her biological father contrary to indigenous law provision¹⁰⁷. A biological father's right to that child who is now staying with his or her mother's in-laws remains supreme to that of a stepfather. Rights in terms of indigenous law marriage are distinct from common law approach but indigenous law is by judicial interpretation regarded as inconsistent with the Constitution. The outcome of judicial interpretation of indigenous law clearly shows common law takes precedence under the Constitution umbrella as opposed to what indigenous law provide.¹⁰⁸

The communal right to property in terms of indigenous law as opposed to individual right to property in terms of common law as incorporated in the Constitution¹⁰⁹ has a serious impediment to judicial interpretation of indigenous law as an equal legal system.¹¹⁰ The said judicial interpretation is undermining the indigenous law as an equal legal system. Judicial interpretation of indigenous law as an inferior legal system is not as a result of indigenous law right being justifiably limited or having failed Constitutional muster.¹¹¹

The male primogeniture principle as applicable in indigenous law to inheritance of property and chieftainship cannot rightfully be found within the judicial interpretation of indigenous law to be inconsistent with Constitution.¹¹² Judicial interpretation of indigenous law inferiority on cultural jurisprudence makes indigenous law to always appear invalid to an extent that it is alleged that it exclude or hinders gender equality or women from holding or inheriting

¹⁰⁵ TW Bennet (n 1 above).

¹⁰⁶ Documentary or court documents in that regard proves adoption or foster care and not indigenous process.

¹⁰⁷ TW Bennet (n 1 above).

¹⁰⁸ TW Bennet (n 1 above) 333.

¹⁰⁹ S 39(3) of the Constitution (n 5 above).

¹¹⁰ S 36 of the Constitution (n 5 above).

¹¹¹ S 36 of the Constitution (n 5 above).

¹¹² S 36 of the Constitution (n 5 above).

property title in their name or chieftaincy.¹¹³ However that is not true because judicial interpretation on indigenous law should not be made from common law approach.

From an indigenous law perspective, woman can be compared to soil which means food comes from, but judicial interpretation of that scenario from a western perspective can be viewed as an insult and associating woman with 'dirt'. From an indigenous law perspective of judicial interpretation that can mean women is extremely important as everything comes and grows on a soil. Judicial interpretation of indigenous law on cultural jurisprudence as an equal legal system should be done with judicial notice, observation of indigenous practice, proverbs and idioms of the indigenous people.

Although the Constitution is the supreme law of the land, it derives mainly from common law sources.¹¹⁴ That in itself judicially affected neutrality of the Constitution vis-à-vis indigenous law right interpretation. There are however a few instances in which there is serious limitation of enjoyment of common law rights within the Constitution.¹¹⁵ In rare instances indigenous law is given equal recognition to other legal systems through judicial interpretation by using the spirit of ubuntu and equity principles provided in the Constitution.¹¹⁶ The said limitations on common law rights does not happen in a manner that can be construed as judicial interpretation of common law inferiority.¹¹⁷ Among other common law rights that may be limited is the right to property to which landowners' rights may be curtailed to allow former right to visit the ancestors' graves.¹¹⁸

The Constitution is made of mostly common law rights as compared to indigenous law rights.¹¹⁹ Those rights are further given a position which can hardly be curbed by Constitutional limitation of right clause¹²⁰ when judicial interpretation on indigenous law on cultural jurisprudence is made rights that are in contrast with them.

¹¹³ *Shilubana* (n 12 above).

¹¹⁴ First generation right like freedoms of movement, religion, etc.

¹¹⁵ *Christian Education South Africa v Minister of Education* (CCT 13/98) [1998] ZACC; 1999 (2) SA 83; 1998 (12) BCRL 1449 (14 October 1998).

¹¹⁶ The Constitution (n 5 above).

¹¹⁷ The Constitution (n 5 above).

¹¹⁸ The Constitution S 38 (n 5 above).

¹¹⁹ S 9 to 35 of the Bill of Rights (n 5 above).

¹²⁰ S 36 of the Constitution (n 5 above).

3.3 LITERATURE REVIEW

This study reviews the judicial interpretation of indigenous law inferiority in post-apartheid cultural jurisprudence in South Africa as evident in superior courts¹²¹ cases.¹²² The study highlights the role played by the judges alongside other stakeholders to interpret indigenous law in a manner that put the survival or development of indigenous law at a fate or mercy of common law due to the fact that it is commonly seen as inferior.

The title or topic in issue is more about judges' interpretation of indigenous law on cultural jurisprudence before arriving at a finding and/or judgment. The court through interpretation of indigenous law dispute blocks indigenous law influence.¹²³ In most cases indigenous law's inability to develop emanate from judicial restricted or conservative¹²⁴ interpretation and by perceived inequality and unconstitutionality treatment.¹²⁵

Authors like Bennet¹²⁶ do not capture the judicial interpretation of indigenous law as equal legal system but inferior one which is conditionally recognized.¹²⁷ As evident by many courts' findings in pre-Constitution and post-apartheid era, the author's analysis does not firmly emphasis development of indigenous law through judicial interpretation from the basis that it is an equal legal system to common law. What is mainly dealt with in his book is conflict of laws, i.e. indigenous and common law which is applied in line with the Constitution. The legal writings and legislation regarding indigenous law is recognized as an independent legal system in the Constitution, but it has to pass comparison scrutiny that indirectly inferiorates it to common law.

Bennet¹²⁸ states that "In principle, the initial choice of law determination should be made on the basis of the law of where the parties resides. Although if that law which has to be applied is customary law it will be excluded under certain circumstances". The author in Bennet¹²⁹ also put more legal emphasis on judicial interpretation of indigenous law in pre-Constitutional

¹²¹ High Court, Supreme Court of Appeal and Constitutional Court judgment.

¹²² *Shilubana* (n 12 above).

¹²³ *Masipa* (n 47 above).

¹²⁴ *KE Klare* (n 2 above).

¹²⁵ *TW Bennet* (n 1 above).

¹²⁶ *TW Bennet* (n 1 above).

¹²⁷ *TW Bennet* (n 1 above).

¹²⁸ *B TW Bennet* (n 1 above).

¹²⁹ *TW Bennet* (n 1 above).

era. In a post-apartheid era there is substantial recognition of indigenous law application, but as an alternative legal system to common law application.¹³⁰ The alternative or conditional recognition and application of indigenous law appears to be merely academic than practical.¹³¹

In strict analysis of judicial interpretation of indigenous law on property, there has actually been no conflict between indigenous law and common law on land issues as the indigenous law did not provide for property ownership right but right to access land.¹³² A common law right holder can freely sell his or her land, but indigenous law right holder cannot be allowed to sell the land because he has a right to land use and not title thereof.¹³³

There is a vast gap between what Bennet provides and what this study provides. Although they all deal with judicial interpretation of indigenous law on cultural jurisprudence in the post-apartheid South Africa; this study is promoting judicial interpretation of indigenous law in its own context on equal par with other legal systems. On the other hand Bennet¹³⁴ present analysis that undermines indigenous law in that he perceive indigenous law as mainly against the principle of natural justice and equality. Indigenous law is mainly disregarded, or applied only in instances that seem not to be against morality, public policy and other factors as envisaged within the common law perspective.¹³⁵

The Constitution provisions provides for interpretation, development and recognition of indigenous law.¹³⁶ However the judiciary in interpretation of indigenous law within the provision of section 39(3) of the Bill of Rights accepts or recognizes indigenous law from a negative approach.¹³⁷ The foundation of interpretation which the judiciary uses is tainted with common law approach.¹³⁸

¹³⁰ Mabuza (n 20 above).

¹³¹ Shilubana (n 12 above).

¹³² TW Bennet (n 1 above).

¹³³ The reference to the provisions of Communal Land Rights Act 11 of 2004 as it applies to the indigenous communities in the rural areas of South Africa.

¹³⁴ TW Bennet (n 1 above).

¹³⁵ Mabuza (n 20 above).

¹³⁶ S 39(3) of the Constitution (n 5 above).

¹³⁷ S 39(3) of the Constitution (n 5 above) states that "The bill of Rights does not deny the existence of any other right or freedom that are recognized or conferred by ... customary law ...".

¹³⁸ N Ntlama (n 4 above).

An article by Danie Brand¹³⁹ is very much relevant to judicial interpretation and methodology of adjudicating law, however from a common law rights perspective. The aforesaid author is concerned with political need for socio-economic right as interpreted by courts. This study is about judicial interpretation of indigenous law as an equal legal system on cultural jurisprudence. That appears to be lacking¹⁴⁰ but applicable in exceptional cases.¹⁴¹ The aforesaid author wrote from a backdrop of a transformative constitution as elaborated by the writer Karl Klare.¹⁴² The effect of his writing is that the extent of work product of Judges in their legal interpretation “either erodes or reinforces discursive politics, open up or limits space for political contestation, depen[s] democratic culture’ or ignores it”. The relevance of Danie Brand and Karl Klare’s works to this study is the shared approach to judicial interpretation. Although their focus is on socio-economic rights and political rights, this study is on judicial interpretation of indigenous law on cultural jurisprudence to be on equal basis with other legal systems.

It is true that the extra-legal political concerns can influence Judge’s interpretation¹⁴³ and it may be positively used for development¹⁴⁴ of indigenous law to be treated with equality with other legal systems.

In analysis of Constitutional right that display appropriate judicial interpretation like housing right, the approach of the court in interpretation of that right was said to have been done and understood in the social and historical context.¹⁴⁵ The fact that indigenous law is “a flexible living system of law which develops over time to meet the challenging needs of community”¹⁴⁶ gives a wide room for judicial interpretation of indigenous law as equal legal system to other legal systems. However the court’s interpretation had to be done with understanding of indigenous law’s historical context on cultural jurisprudence.¹⁴⁷ It is

¹³⁹ “The politics of need interpretation and the adjudication of socio-economic rights claim in South Africa”.

¹⁴⁰ N Ntlama (n 4 above).

¹⁴¹ Shilubana (n 12 above) and Masipa (n 47 above).

¹⁴² KE Klare (n 2 above).

¹⁴³ Mabuza (n 20 above) and Monyepao (n 73 above).

¹⁴⁴ KE Klare Constitutional Transformation.

¹⁴⁵ Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC).

¹⁴⁶ *Shilubana* (n 12 above).

¹⁴⁷ Monyepao (n 73 above) and Mabuza (n 20 above).

unfortunate that judicial officers do not take advantage of the fact that indigenous law is not a rigid or a blatant law.¹⁴⁸

The other authors and judges have in the past arrived at judicial interpretation of indigenous law inferiority on cultural jurisprudence based on their perceived thoughts. Their perceived thoughts are that indigenous law is a “source of potential conflict and perpetrating inequalities and prejudices against woman...”.¹⁴⁹ Furthermore they thought that indigenous law principles and values are irreconcilable with gender equality and other objectives in the form of rights as contained in the Constitution.¹⁵⁰

Constitutional Court case law like *Bato Star Fishing (Pty) Ltd*¹⁵¹ shows that the court should be careful not to attribute to itself superior wisdom in relation to judicial interpretation. Furthermore courts must respect the decision by person with specific expertise, even though equilibrium must be struck to balance between range of competing interest or considerations.¹⁵² However the court has indicated that on the other hand it cannot rubber-stamp unreasonable decision simply because of complexity of decision or identity of decision-making.¹⁵³ This situation is very relevant to judicial interpretation of indigenous law as an equal legal system with other legal systems by considering input or consideration of view if specific expertise in that field.¹⁵⁴

The Ministry of Justice and Correctional Services as it is currently known, had issued a discussion or debate document on the transformation of judicial system and the role of the judiciary in the developmental of South African State. That document contains among other issues, a heading entitled the “plural legal system and the problem of legal imperialism”.¹⁵⁵ The document in issue shows concession at the department that the Constitution interpretation alone cannot bring about the solution to gaps which affect the interest of justice. There is a need for judicial interpretation of indigenous law as equal legal system coupled with other statutory provisions for purpose of dispensing justice on cultural

¹⁴⁸ Shilubana (n 20 above).

¹⁴⁹ N Ntlama (n 4 above).

¹⁵⁰ TW Bennet (n 1 above).

¹⁵¹ Bato (n 8 above) 492.

¹⁵² Bato (n 8 above) 492.

¹⁵³ Bato (n 8 above) 492.

¹⁵⁴ TW Bennet (n 1 above).

¹⁵⁵ February 2012 (www.doj.gov.za)

jurisprudence.¹⁵⁶ The indigenous law as it stand seems to be seen by the government as having problems which have to be addressed by incorporating policy documents which can be harmonized with the Constitution to achieve the end-results.¹⁵⁷ There seems to be a view that the Constitution, other legislations including support structure can play a pivotal role in reaching the objective.¹⁵⁸ The indigenous laws, traditions, customs and systems within the Constitution and the South African common law require debate.¹⁵⁹

The said document does not however deal with judicial interpretation of indigenous law as equal legal system on cultural jurisprudence. It is about elevation and development of indigenous law through incorporation of certain enabling provisions to the Constitution for its equal applicability to be on the same par with common law legal system.¹⁶⁰ The endeavor appears to be a milestone toward equality on plural legal system especially on the side of indigenous people. There seems to be step-by-step realization of judicial interpretation of indigenous law as an equal legal system by the government in the interest of justice.¹⁶¹

The Minister of Justice and Correctional Service¹⁶² had after he had withdrawn a Bill¹⁶³ on the 02nd June 2011 reintroduced it for debate on the 13th December 2012. The government is eager to redress its legal system which had despite the presence of the Constitution remain imbalanced in favor of common law as opposed to the law of the indigenous people due to judicial interpretation.¹⁶⁴

The said Bill¹⁶⁵ is intended to affirm the recognition of the indigenous law and applicability of justice in a traditional and cost effective manner to the advantage of indigenous people. It will highlight the judicial interpretation of indigenous law as value-based restorative justice and reconciliation. The purpose of the bill is also to provide for the structure and functioning of traditional courts in line with constitutional imperatives and values.¹⁶⁶ It is also said to be

¹⁵⁶ Tribal Court Act.

¹⁵⁷ www.doj.gov.za.

¹⁵⁸ www.doj.gov.za.

¹⁵⁹ Department of Justice and Constitutional Development of the judicial system and the role of the judiciary in the development of South African State (www.doj.gov.za).

¹⁶⁰ Department of Justice and constitutional Development (n 159 above).

¹⁶¹ Department of Justice and constitutional development (n 159 above).

¹⁶² By then it was Department of Justice and Constitutional Development.

¹⁶³ Traditional Court Bill [B15 – 2008].

¹⁶⁴ Masipa (n 47 above).

¹⁶⁵ Traditional Court Bill - preamble (n 16 above).

¹⁶⁶ Traditional Court Bill (n 16 above).

enhancing indigenous law and the customs of communities observing a system of indigenous law which will enrich judicial interpretation of indigenous law as an equal legal system on cultural jurisprudence.

Constitutional imperatives were supposed to be brought in line with indigenous law as an equal legal system. The document indirectly reflects the government's concession that the Constitution needs judicial interpretation so the Constitution's recognition of indigenous law and applicability should not be theoretical.¹⁶⁷

The judicial interpretation of indigenous law as an equal legal system on cultural jurisprudence is not without challenges. The Traditional Court Bill, is among other factors having a public concern over gender discrimination and abuse of power by male traditional Courts officials. The judicial interpretation of indigenous law as an equal legal system on cultural jurisprudence is a necessity. The establishment of Traditional courts will create a platform for those courts to be specialized courts wherein indigenous law is administered at its best form as an independent legal system. In that forum indigenous law will not be expected to be justified by other legal system except supreme law of the country which is the Constitution.¹⁶⁸

Legal education and training on indigenous law together with a consultative forum on indigenous legal principles of natural justice can have a positive attribute towards momentous judicial interpretation of indigenous law as equal legal system on cultural jurisprudence. There is a need to promote the spirit, purport and objectives of the Bill of Rights by judicial interpretation of indigenous law as an equal legal system on socio-economic rights in the post-apartheid South Africa.¹⁶⁹ There is a pressing need to transform legal system on judicial interpretation of indigenous law to affirm its recognition.

The judicial interpretation of indigenous law as equal legal system on cultural jurisprudence will not be necessarily found through a single court decision.¹⁷⁰ The need for judicial interpretation of indigenous law as an equal legal system on cultural jurisprudence emanates from the fact that there is scarcity in the application of indigenous law system cases.

¹⁶⁷ Traditional Court Bill (n 16 above).

¹⁶⁸ S 2 of the Constitution (n 5 above).

¹⁶⁹ S 39(2) of the Constitution (n 5 above).

¹⁷⁰ Mabuza (n 20 above).

However when those cases are adjudicated, indigenous law must be applied when it is applicable.¹⁷¹ Judicial interpretation on indigenous law as equal system on cultural jurisprudence should not be subjected to the limitation clause¹⁷² when the right issue is not one of the rights within the Bill of rights. The Constitution's limitation clause was intended specifically to limit the rights stipulated in the Bill of Rights and not indigenous law rights.¹⁷³ The judicial interpretation of indigenous law as equal legal system on cultural jurisprudence incorporates recognition of reasonable oral decisions taken by tribal authorities.¹⁷⁴

Judicial interpretation of indigenous law on cultural jurisprudence equivalent legal system should not be only justified and measured for compliance by moral values and public policy principles of common law.¹⁷⁵

The Constitutional provisions on traditional leadership, require transformative interpretation by those who are responsible for judicial interpretation of law on cultural jurisprudence to promote indigenous law applicability on equal par with other legal systems.¹⁷⁶ In terms of the Constitution, judicial officers in interpretation of indigenous law should consider relevant issues where indigenous law is applicable.

This approach of identifying the applicability of indigenous law on equal par with other legal system through judicial interpretation on cultural jurisprudence should be encouraged. The understanding is that the approach will not be applied slavishly without subjecting that indigenous law approach to exceptions. However currently to subject applicability of indigenous law to the Constitution through a common law approach will further inferiorate and/or relegate indigenous law to be an accessory to common law.¹⁷⁷

The need for judicial interpretation of indigenous law as an equal legal system on cultural jurisprudence is more evident on land right issues because of several victories¹⁷⁸ which it has

¹⁷¹ S 211(3) of the Constitution (n 5 above).

¹⁷² S 36 of the Constitution (n 5 above).

¹⁷³ S 36 of the Constitution (n 5 above) stated that "The right in the Bill of Right ...".

¹⁷⁴ TW Bennet (n 1 above).

¹⁷⁵ Mabuza (n 20 above).

¹⁷⁶ S 211 and s 212 of the Constitution (n 5 above).

¹⁷⁷ S 25(6) of the Constitution (n 5 above).

¹⁷⁸ *Popela Community v Goedgelegen Tropical Fruits (Pty) Ltd* [CCT 69/06] 2007 ZACC 12, 2007 (10) BCLR 1027 (CC), 2007 (6) SA 199 (CC).

achieved in issues within the Land Claims Court.¹⁷⁹ The Constitution was also indigenous law rights to property. This is so because it state that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to an extend provided in the Act of Parliament, either to tenure which is legally secure or comparable redress.¹⁸⁰

On the 'property' right¹⁸¹ the Constitution guarantees the right not to be "deprived of a property except through legal process. Reference to the exception of the right to be in terms of law of general application may not be indigenous law because indigenous law may not be regarded as a 'law of general application'. One may be inclined to disagree with Bennet's Constitutional analysis of property clause on which he states that "our courts have not as yet, had occasion to decide whether this section applies to customary interest in land".¹⁸² Bennet¹⁸³ is one of the authors who alleges that indigenous law is not the intended legal system that is stated in the Constitution when it refers to 'law of general application'.¹⁸⁴

Although indigenous law interest into land 'fall short of the concoction of ownership'¹⁸⁵ due to lack of title deed, there had been protection of indigenous law interest through reasonable legislative measures envisaged in terms of Section 25(5) of the Constitution.¹⁸⁶ When section 25(6) of the Constitution was implemented by creating an Act of Parliament,¹⁸⁷ the judicial interpretation of indigenous law suffered setback. The reason is that landowners produced title deed as proof of land ownership right, but indigenous people often find it hard to proof ownership without documentation as it is common law way of proof.¹⁸⁸ Indigenous people whose acquisition of land uses oral evidence of indigenous lawright and interest to the

¹⁷⁹ The Land Claims Court is established in terms of the Restitution of Land Right Act 22 of 1994.

¹⁸⁰ Mabuza (n 20 above).

¹⁸¹ The Constitution at S 25(1) "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

¹⁸² TW Bennet (n 1 above).

¹⁸³ TW Bennet (n 1 above).

¹⁸⁴ S 25 of the Constitution (n 5 above).

¹⁸⁵ TW Bennet (n 1 above).

¹⁸⁶ The State must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

¹⁸⁷ S 25(1) of the Constitution (n 5 above).

¹⁸⁸ Restitution of Land Right Act 22 of 1994.

property had failed to succeed.¹⁸⁹ Through proper judicial interpretation of indigenous law as an equal legal system on cultural rights, it can be found that indigenous law is also a 'law of general application'.¹⁹⁰

Through judicial interpretation of indigenous law, protection of property in terms of Section 25 of the Constitution includes protection of customary tenure which embraces different interest in land¹⁹¹. It is clear that there is slight judicial interpretation of indigenous law as an equal legal system. Section 25 of the Constitution equally meant to protect right to land use in a communal area much as it can be used for protection of individualistic rights to residential site and arable plots. This is so especially from arbitrary expropriation by traditional leaders as they deem to have a final word like kings.

It will be not in accordance with indigenous law for an elder, a child but an adult member of the community whose interest or right to livestock derived from family, to be liable for damage caused by livestock. In few instances the child may be in which he belong to be held responsible by the third party, to the exclusion of the elder (father) as the holder of right for minor offences to which the child can just be called to order. The Constitution cannot be interpreted to mean that the rights and obligations are individualistic in nature in terms of indigenous law.¹⁹² If the child has grown and assumed full responsibility to the extent that he is a man, his father will no longer be obligated towards responsibility of his child. The judicial interpretation of indigenous law as an equal legal system with other legal systems on post-apartheid cultural jurisprudence in South Africa will provide a Constitutional based outcome.

The circumstances of each case have to be analyzed with recognition of indigenous law in mind when dealing with right of equality and/or limitation of right in the Constitution. The Constitution provides for grounds on which the State organ and/or juristic person including tribal authority may not unfairly discriminate another person.¹⁹³

¹⁸⁹ *Monyeki-Makgai Family Land Claim v Regional Land Claims commissioner, Limpopo Province and Others* [LCC 18/05].

¹⁹⁰ *Monyeki-Makgai* (n 189 above).

¹⁹¹ TW Bennet (n 1 above).

¹⁹² M Hansengule 'Human Rights Conception from the standpoint of African Philosophical Perspective II' (January 2013) *International Journal of Arts and Commerce* Vol. 1 45 - 77.

¹⁹³ S 9(3) of the Constitution – The grounds includes; gender, se, pregnancy, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Judicial officers have a duty to develop indigenous law through its interpretation. Indigenous law right or interest of a child may be protected differently than the way it is done in terms of common law. It is judicial interpretation of indigenous law that some conduct on the protection of the child's interest can be found to be acceptable and in line with the Constitution. A resolution of disputes among parties from an indigenous law system together with interpretation should be found within the ambit of indigenous law.

The notion of subjection of indigenous law's judicial interpretation to be done from a common law perspective should be discarded.¹⁹⁴ Interpretative approach that put common law in mind while interpreting indigenous law does not necessarily develop indigenous law, but it convert indigenous law into a different entity altogether.¹⁹⁵ There should be a will for judicial interpretation of indigenous law on cultural jurisprudence to be done in a manner that is not inferior to other legal system. The process can be easily done, just like in other cases¹⁹⁶ on which harmonious interpretation was implemented amidst possible or *prima facie*¹⁹⁷ evidence of inconsistency of indigenous law with the Bill of Rights' provision.

The judicial interpretation of indigenous law as equal legal system to other systems on cultural jurisprudence seems to be on the face of it contradicted by the provisions of the Constitution on various topics like children's rights, adoption, gender, succession of property and chieftainship.¹⁹⁸

There must be equal treatment of indigenous law through judicial interpretation which in turn will create accessibility of justice to indigenous people's communities. There are other aspects of law on which indigenous law and common law share similarities on issues like *contra bonos mores*¹⁹⁹ and public indecency. However where women's breast are uncovered in public it may be seen to be public indecency in terms of common law and cultural celebration in terms of indigenous law.²⁰⁰

¹⁹⁴ M Hansengule (n 192 above).

¹⁹⁵ Mabuza (n 20 above).

¹⁹⁶ Mabuza (n 20 above).

¹⁹⁷ On the face of it, first impression.

¹⁹⁸ S 39(2) of the Constitution (n 5 above).

¹⁹⁹ Contrary to good morals.

²⁰⁰ Annual Zulu Reeds Dance conducted by the Zulu kingdom.

It may be true that “It is also clear from this [i.e. section 39(2)] of the Constitution and other provisions in the Constitution shows that African and other customary laws are on the par with our western common law [and that] these laws do not occupy a second rank position”.²⁰¹ However the judicial interpretation of indigenous law on cultural jurisprudence is crucial to determine gender equality and rights in such a way that it does not amount to inferiority analysis of indigenous law. Judicial interpretation of indigenous law on as a legal system cultural jurisprudence has to be respected. There are few instances on which the writing of D.G. Kley²⁰² regarding equality of indigenous law with common law has taken effect, but on majority of issues there is equality. The judges should interpret indigenous law on cultural jurisprudence without compromising essential rights within the Constitution like equality and justice, although those aspects should not be determined from common law perspective.

The Constitution imposes an obligation on courts to develop indigenous law by bringing it in line with the Constitution where it appears that there is deviation from provisions in the Bill of Rights.²⁰³

The court has an obligation to develop indigenous law and that can be done not by removing essential part or purpose of indigenous law because that action will seem as amounting to deviation.²⁰⁴ The judicial interpretation of indigenous law on cultural jurisprudence must cautiously be interpreted by harmonization to preserve and retain indigenous to the best of its ability. This must be one in line with the Constitution as evidence within the following quotes in Carmichele²⁰⁵ and Bhe²⁰⁶ case;

“In view of the decision of the court in Carmichele,²⁰⁷ there are at least two instances in which the need to develop indigenous law may arise. In the first instance it may arise where it is necessary to adapt indigenous law to the changed circumstances. Like the common law, the indigenous law must be adjusted to the ever-changing needs of the community in which it operates”²⁰⁸.

²⁰¹ JE Spruit Roman Law at the Crossroad (2000) 73.

²⁰² The role and function of Roman Law in South African Legal System.

²⁰³ S 39(2) of the Constitution (n 5 above).

²⁰⁴ Carmichele (n 19 above).

²⁰⁵ Carmichele (n 19 above).

²⁰⁶ Bhe (n 35 above).

²⁰⁷ Carmichele (n 19 above).

²⁰⁸ Bhe (n 35 above).

“In the second instance, it may be necessary to develop indigenous law in order to bring it in line with the rights in the Bill of Rights. This is the kind of development that is envisaged in Carmichele. Where indigenous law is inconsistent with the rights in the Bill of Right, courts have an obligation to develop it so as to bring it in line with the rights in the Bill of Rights. In this case, the Court assesses the rule of indigenous law (the rule of male primogeniture) against the applicable provision in the Bill of Rights. In this instance, the Court is not primarily concerned with the changing social context in which indigenous law of succession operates or the practice of the people. The death of authority on what the living indigenous law is, should not thereof preclude a court from bringing a rule of indigenous law in line with the rights in the Bill of Rights”.²⁰⁹

“The Court must have regard to what people are actually doing in order to adapt the indigenous law to the ever-changing circumstances. That is not to say that in this process court should not have regard to the Constitution”²¹⁰.

3.4 AN IN-DEPTH ANALYSIS OF JUDICIAL INTERPRETATION

The continual judicial interpretation of indigenous law as inferior legal system in post-apartheid cultural jurisprudence is influenced by pre-Constitutional legislation and other authorities. There is conservative approach and lack of Constitutional transformative interpretation for indigenous law on the side of some judges who are clued to the pre-Constitution legal system and common law approach to the Constitution.

There is no reason why the approach of burial right in Kenya²¹¹ cannot be adopted as post-apartheid cultural jurisprudence despite the presence of the Constitution and other legislations. The judicial interpretation of indigenous law should not be done to conform with principles and public policies of common law. Indigenous law interpretation by the judiciary struggles to go beyond recognition of indigenous law. Indigenous law interpretation by the judiciary struggles to go beyond recognition of indigenous law. The development of

²⁰⁹ Bhe (n 35 above).

²¹⁰ Bhe (n 35 above).

²¹¹ Van Doreen 1988 36 AM J Comp L 329 – In Kenya, the burial of a prominent lawyer, SM Otieno became a cause celebre that highlighted the difference between customary and common law. The deceased's widow claimed that the body should be buried near Nairobi where she said was the family home, while the eldest brother wanted him buried near Lake Victoria, the land of his patrilineal Luo ancestors. The Kenyan Appeal court finally decided for the brother, by implication favouring clan rights than the widow.

indigenous law through judicial interpretation on cultural jurisprudence should maintain the core principles of indigenous law and its approach to dispute resolution mechanism.

Judicial interpretation of indigenous law as an inferior legal system in the post-apartheid cultural jurisprudence should go beyond access to land and its administration. Judicial interpretation mechanism should be developed to the extent that indigenous law does not contradict the Constitution provisions. Indigenous law may be interpreted judicially towards its possible development without eradicating its core form and purpose. Furthermore it should be interpreted judicially where there is legal lacuna which cannot be filled by common law. There should not be 'cut and paste' approach from common law in an endeavor to interpret indigenous law and solve its problem in line with the Constitution.

Judicial interpretation of indigenous law as inferior legal system gives common law right where it is not due and it may be waived. Duty to comply with that imposed common law right or disobeyed for various reasons, among others because of its impracticability it may be considered immoral, un-ethical and unenforceable. Unless indigenous law is developed through judicial interpretation within which its recognized context, indigenous law will remain stagnant, defaced and/or die because of quick assumptions that it is un-Constitutional or contrary to common law.²¹²

The judicial interpretation of indigenous law as equivalent legal system on cultural jurisprudence was not done in pre-Constitutional era's model of homeland.²¹³ Although in pre-Constitution era indigenous law was subjected to repugnancy provision application, indigenous law was effected with slightly higher recognition due to cultural influences of the homeland on which those courts were located. The example of a compromised judicial interpretation of indigenous laws as inferior legal system is in relation to culture, immovable property, chieftaincy succession and inheritance. The right to cultural practice is extinct and improperly taken from indigenous law.

Judicial interpretation of indigenous law as an inferior legal system in post-apartheid cultural jurisprudence in South Africa is lack of knowledge and or understanding indigenous law. The authorities from written sources of pre-Constitution era and blanket view of no gender

²¹² Bhe (n 35 above) para 41.

²¹³ Transkei, Bophuthatswana, Venda and Ciskei or TBVC States.

inequality from the Constitution is sometimes misinterpreted on indigenous law rights. Authorities from scholars and/or writers who are not indigenous people contribute to misinterpretation. In some instances judicial notice is not capable of being taken by that judicial officer in their judicial interpretation of indigenous law on cultural jurisprudence.

Indigenous law is the inheritance of the country and it defines people of their history through proper judicial application and interpretation of their indigenous law.

South Africa will be completely liberated from the chains of its unjust past, if indigenous law which is the law of the majority people is not merely offered bare Constitutional recognition,²¹⁴ but also through judicial interpretation that is equivalent to other legal systems. Indigenous law deserves equivalent treatment to common law in its judicial interpretation on cultural jurisprudence.²¹⁵

Equality in terms of section 9 of the Constitution was misplaced in what is alleged to be the ‘development’ of the indigenous law on Chieftainship succession²¹⁶. The analysis and conclusion of *Ntlama* are correct,²¹⁷ least to state that the usage of the term misplacing of equality shows lack of intention but error or misunderstanding in the judicial interpretation of indigenous law. It is strange that judicial interpretation of indigenous law on cultural jurisprudence in post-apartheid era does not recognize the fact that indigenous law must be retained in its pure status and not be subjected to common law style-limitation clause within the Constitution. The limitation clause²¹⁸ was supposed to limit Shilubana’s right to equality not used to disregard cultural rights and applicable legal system of parties to a dispute, their community customs and practice. Indigenous law right is *prima facie*²¹⁹ unconstitutional and it is therefore ‘undermined’ in ‘preferring’ (with little guidance given on how to reconcile the competing interest)²²⁰ common law in a manner that is evident that “indigenous law’s application and enjoyment occurs through the prism of common law”.²²¹

²¹⁴ S 39(3) of the Constitution (n 5 above).

²¹⁵ *Mabuza* (n 20 above).

²¹⁶ *N Ntlama* (n 4 above).

²¹⁷ *N Ntlama* (n 4 above).

²¹⁸ S 36 of the Constitution (n 5 above).

²¹⁹ On the primary view or at face value.

²²⁰ *N Ntlama* (n 4 above).

²²¹ *N Ntlama* (n 4 above).

“Where parties agree that succession to the deceased must be governed by indigenous law of succession, that is, the law that must govern the succession. Any dispute as to whether indigenous law is applicable must be resolved by the magistrate’s court having jurisdiction. The magistrate must enquire into the most appropriate system of law to be applied”.²²²

The judicial interpretation of indigenous law on cultural jurisprudence is in its cultural form promoting inferiority and underdevelopment of that legal system despite the fact that it has not been enjoying free existence of pre-Constitutional era as compared to other legal systems. The declaration or emphasis of the need to develop both common law and indigenous law from the same sections of the Constitution convey interpretation of equality and equal need on development of legal systems.²²³ However common law had legal precedents even that which undermine indigenous law, to be judicially interpreted inferior. There is an earnest need for judicial interpretation of indigenous law on cultural issues to be given higher or special treatment.

There are number of rights which are in contrast with each other from common law and indigenous law perspectives.²²⁴ The right to equality and children’s rights appears to be common law orientated even if they are now Constitutional rights.²²⁵ This rights are judicially interpreted from a common law and not indigenous law perspective. It is as if indigenous law right has a duty to proof its legitimacy in case it is a contrary to what common law right provide. This shows that indigenous law is not treated equally, but it is instead inferior as it emanate from presumption of unconstitutionality unless it is proven to be constitutional. That type of approach is narrow interpretation and it limits the development of indigenous law. In essence the judicial interpretation of indigenous law on cultural rights suggests that every aspect of law is covered under common law. The wrong judicial interpretation of indigenous law in socio-economic rights is killing indigenous law “as an independent source of law²²⁶ as if there is intention to eliminate plural legal system. The judicial interpretation of indigenous law on cultural jurisprudence as an inferior legal system is indirectly questioning or challenging the genuineness for the Constitution’s recognition of indigenous law.

²²² Bhe (n 35 above).

²²³ S 39(3) of the Constitution (n 5 above).

²²⁴ Right to adoption, marriage and succession.

²²⁵ S 9 and S 28 of the Constitution (n 5 above).

²²⁶ N Ntlama (n 4 above).

Limitation of right clause in the Constitution²²⁷ should be limited to the specified rights in the Bill of rights and not the indigenous law rights. The unequal treatment of persons based on gender disparity from an indigenous law perspective should not be judicially interpreted as if it is a common law right. Indigenous law interpretation should not be slavishly brought for interpretation in the same approach when it is done to common law analysis. When indigenous law issue or right is challenged on gender or age inequality, the judicial interpretation of indigenous law should not take that as an opportunity to align indigenous law with the Constitution but not with a mind to change it but to understand its purpose and objective. There should be much attempt by the participants in the judicial interpretation of indigenous law for deeper underlying principles or other Constitution imperative, values to be promoted, spirit, purport and objects.²²⁸ There is usually a rush to look as to whether discrimination is based on issues like gender.²²⁹ It is normally deemed that if discrimination is based on gender in indigenous law that is the end of enquiry by the judicial officer without considering whether it is a fair or unfair discrimination. The core rationale behind inequality, the consequences of not discriminating or inclusiveness is not normally considered in the judicial interpretation of indigenous law. The rights in terms of common law and the Constitution are individual orientated as compared to the communal rights in terms of indigenous law.²³⁰ The other rights that are closely related to indigenous law like right to participate in the cultural life of choice and the right to enjoy culture with other community members. Indigenous people have the right to have their indigenous law developed and promoted through interpretation of legislation. However more often that is ignored or underrated by the judicial officers in their judicial interpretation of indigenous law.

If the Bill of Rights provide for right to equality²³¹ and the right to culture²³² and the two turns to be in contrast with each other on certain aspect. The right to equality cannot be automatically and judicially interpreted to have upper hand over the right to culture. Furthermore cultural rights need not carry the burden to prove itself to the right of equality. There is no reason why equality right need not prove its legitimacy as compared to the right to culture. If a certain cultural right is scrutinized for its inequality application that is justifiable. However a right within indigenous law should not be judicially interpreted to be

²²⁷ S 36 of the Constitution (n 5 above).

²²⁸ The Constitution (n 5 above).

²²⁹ Shilubana (n 12 above).

²³⁰ M Hansungule (n 192 above)

²³¹ S 9 of the Constitution (n 5 above).

²³² S 30 of the Constitution (n 5 above).

unconstitutional because it is not equally enjoyed by members of the community or family. It would be indirect and unfair discrimination of indigenous law and against its recognition if that is done. The right to culture the centerfold of indigenous law as compared to common law which does not prioritize cultural right. The right to culture will remain in vain if its integral part is set aside by courts simply because it is judicially interpreted with common law spectacles. The Constitution should not be seen as if it contradicts itself on the types and different importance of rights it provides. Furthermore the incorrect judicial interpretation of indigenous law on cultural issues gives impression that the Constitution promotes certain rights that are associated with other sections community to the detriment of the other sections²³³ Failure to implement judicial interpretation of indigenous law as equal legal system on n post-apartheid cultural jurisprudence in South Africa stalls the development and promotion of African values and customs. It tramples upon the constitutional imperatives which are currently observed by indigenous people of South Africa on their daily basis from a grass-root level.²³⁴

The Constitutional Court case of *Shilubana*²³⁵ is one of the cases which shows lack of judicial interpretation of indigenous law as an equal legal system in post-apartheid cultural jurisprudence in South Africa. Within the afore-stated case law of *Shilubana*²³⁶ the judicial interpretation of indigenous law thereof had literally meant that indigenous people have no right to culture. This is simply because that culture incorporated what appears from another legal system as unfair gender inequality.²³⁷ Male primogeniture rule on chieftainship, which is discriminating on gender contrary to Constitutional equality clause should be maintained. This is so because there is no absolute right to equality and there is a good and fair purpose for that stance. The interpretation was made on the face of it without investigating purpose of disallowing another gender to do certain things as opposed to another gender. That assumption is wrong and chieftainship is pivotal and have roots to culture and its preservation. However that interpretation of cultural right will probably make males only to be presiding officers in terms of Traditional Court Bill.²³⁸ The judicial interpretation of indigenous law should not emulate European norms of approach to law. South Africa will have another version of post-apartheid common law-cum-indigenous law when indigenous law is judicially

²³³ *Shilubana* (n 12 above).

²³⁴ *Shilubana* (n 12 above).

²³⁵ *Ntlama* (43 above).

²³⁶ *Shilubana* (n 12 above).

²³⁷ *Shilubana* (n 12 above).

²³⁸ Traditional Bill (n 16 above).

interpreted by persons who use common law approach.²³⁹ Equality clause was ‘misplaced’ in the Constitutional Court’s interpretation that sought to develop indigenous law of succession in the matter of *Shilubana*.²⁴⁰ Indeed the court’s understanding and interpretation from common law approach of “equal recognition of right to gender equality and right to culture has created tension between the application of customary law, values and national agenda for the realization of gender equality”.²⁴¹ However in essence this shows that it is not true that in post-apartheid era, indigenous law was given equal recognition alongside common law within the Constitution.

Judiciary does interpret indigenous law on cultural issues in this post-apartheid South Africa in a manner that infringes the right of cultural communities and indigenous people. The indigenous people’s rights have also been endorsed by Government of the Republic of South Africa by signing convention on the African Charter on Human and People’s Rights.²⁴² The “misplaced” “equality” consideration by judicial interpretation of indigenous law on cultural issues. The rationale for that appears to be an endeavour to ‘develop’ indigenous law in a disrespectful approach that distorts indigenous people’s traditions and values. Incorrect judicial interpretation of indigenous law on cultural jurisprudence obstructs indigenous people to benefit from liberal, but positive interpretation of the Constitution.

The cultural right to chieftainship on male line was undermined and it was not developed through judicial interpretation of indigenous law in terms of the spirit of the Constitution.²⁴³ There was no basis for the court to take away chieftaincy from a male person within a royal family to a female person outside the royal family. It is not clear as to whom the chieftainship would be returned upon death of the female chief. Ordinarily only male children are due to become heir and that constitutes a fair differentiation but not unfair discrimination. The damage that has been created to the right to culture and compared to what is termed gender equality development is severe and irreparable.²⁴⁴ It would have been preferable to have an interpretation that preserves culture and development; “within its own value system before

²³⁹ *Shilubana* (n 12 above).

²⁴⁰ *Shilubana* (n 12 above).

²⁴¹ *Shilubana* (n 12 above).

²⁴² S 22 of Right to Cultural Development in terms of African Charter on Human Rights and People’s Rights of 1981.

²⁴³ *Shilubana* (n 10 above).

²⁴⁴ *Shilubana* (n 12 above).

being replaced by a system completely foreign to the living law practiced by the communities”.²⁴⁵

The courts have continued to show lack of respect to the recognition of indigenous law as a separate legal system. This is evident by the fact that judiciary is given bizarre interpretation to indigenous law on cultural jurisprudence. Courts had brought about judgment that is also infringing upon indigenous people’s rights like right to culture.²⁴⁶ The indigenous law is peeled and discarded of its cardinal rule. This was done under the auspices that even if it is primary source of law; “there had to be a threshold enquiry aimed at determining whether the rule of customary law constitutes a limitation on one or more guaranteed rights, such as equality”.²⁴⁷ Ntlama correctly quoted J Kriegler’s analysis in the case of *Ex parte Minister of Safety and Security: In re S v Walters & Another*²⁴⁸ which indicated that the enquiry aims to examine, weighing up of “(i) the content and scope of relevant protected rights; and (ii) the meaning and effect of the impugned customary law rule to determine whether there is a limitation of the protected right”.²⁴⁹ The problem is that the judicial interpretation seems to stop there; there is no further inquiry and balancing with living indigenous law. At most if balancing had to occur it is normally done only on the Constitution and moreover from the spectacles of a common law, not indigenous law on its own or within its values. The requirements of independent or supreme legal system as envisaged in the provision of the Constitution in its recognition of indigenous law are not evident in many courts judgments where indigenous law right had to be decided.

In the case of *Bhe v the Magistrate Khayelitsha, Shibi v Sithole, SA Human Rights Commission v President of RSA*²⁵⁰ the court’s majority judgment made comparison approach to indigenous law with common law in its endeavor to live by gender equality clause for purpose of inheritance. The court did not develop indigenous law by caring or put mechanism to safeguard widow’s rights, but it had just brought in a competing legal system to address flaw in another legal system.

²⁴⁵ N Ntlama (n 4 above).

²⁴⁶ Shilubana (n 12 above).

²⁴⁷ N Ntlama (n 4 above).

²⁴⁸ 2002 (4) SA 613; 2002 (7) BCLR 663.

²⁴⁹ N Ntlama (n 3 above).

²⁵⁰ Bhe (n 35 above).

The judiciary through its interpretation is taking common law answers to respond to indigenous law questions thereby in principle making new indigenous law, belittling it, surrendering it to common law in a manner that can be sometimes said it is assisted by the Constitution, although that is not the case. The *Bhe*²⁵¹ and *Shilubana*²⁵² decision are in fact promoting judicial interpretation of indigenous law in socio-economic rights as inferior legal system as compared to the cases of *Carmichele v Minister of Safety and Security*²⁵³ and *Mabuza v Mbatha*.²⁵⁴ In the *Carmichele*²⁵⁵ case although it was for development of common law, it is also relevant for indigenous law development. It was held that “where a rule of indigenous law deviates from the spirit, purport and objects of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation. This obligation is especially important in the context of indigenous law. Once a rule of indigenous law is struck down, that is the end of that particular rule; furthermore the Constitution guarantees the survival of the indigenous law. These considerations require that, where possible, courts should develop rather than strike down a rule of indigenous law.”²⁵⁶

In the case of *Mabuza v Mbatha*²⁵⁷ the judicial interpretation of indigenous law was recognizing indigenous law on equal par with other legal system in that court had held “that it is not necessary at all to say African customary law should not be opposed to the principles of public policy or natural justice”. That approach is fundamentally flawed as it reduces African law (when is practiced by the vast majority in this country) to foreign law-in-Africa!”²⁵⁸ Any custom or customary practice which is inconsistent with the Constitution cannot ‘withstand the constitutional scrutiny’, although “an appropriate order in that regard will be made”.

In the aforesaid matter the judiciary had in fact shown through its interpretation that indigenous law is an equally applicable legal system and that the Constitution should live up to the indigenous people’s expected justice and promise of recognition of their indigenous law. The court occasionally gives verdict on indigenous law or cultural issues in a manner

²⁵¹ *Bhe* (n 35 above).

²⁵² *Shilubana* (n 12 above).

²⁵³ *Carmichele* (n 19 above).

²⁵⁴ *Mabuza* (n 20 above).

²⁵⁵ *Carmichele* (n 19 above).

²⁵⁶ *Bhe* (n 35 above).

²⁵⁷ *Bhe* (n 35 above).

²⁵⁸ *Mabuza* (n 20 above) 228.

which gives an impression that South Africa still exists in the pre-Constitution²⁵⁹ era. The court had indicated that the approach where indigenous law is accepted, if it is not in conflict with common law, public policy or natural justice will lead to an absurd situation whereby indigenous law is continuously being undermined and not properly developed by the courts.²⁶⁰

In the High Court²⁶¹ and the Supreme Court of Appeal²⁶² the courts had correctly exercised judicial interpretation of indigenous law on cultural jurisprudence as an equal legal system to common law by giving a decision that nullified royal family's decision that was not in accordance with custom and traditions of the tribe. Those courts had declared Mr Nwamitwa a rightful Chief before the Constitutional Court had overruled those decisions and misplaced gender inequality from indigenous law spectacle and gave it common law approach if it was inequality.

The judicial interpretation of indigenous law in socio-economic rights as an equal legal system in post-apartheid South Africa requires courts to give expression to the transformation on or legal systems' development theme of the Constitution". The sentiment of Brand is shared on the double-sided nature of sought judicial interpretation that sometimes "guarantees and denies freedom, reinforces and destruct democracy".²⁶³ The courts, not only in socio-economic rights cases, but also on indigenous law cases, should innovate and 'depoliticize' "rhetorical strategies" in their interpretation and judgment of deeper democracy without belittling or making one legal system inferior to the other.²⁶⁴

The view of Cornell²⁶⁵ is disputed in his support to the outcome of *Shilubana* case.²⁶⁶ Both Cornell and Justice van der Westhuizen's statement that the issue is not primarily inferiority of indigenous law by violating section 211(2) of the Constitution when the court impose common law principle which is within the Constitution without showing intent to develop

²⁵⁹ Masipa (n 47 above).

²⁶⁰ *Mabuza* (n 20 above); *Bhe* (n 27 above).

²⁶¹ *Shilubana* (n 12 above).

²⁶² *Nwamita v Philla and Others* 2005 (3) 536 (T).

²⁶³ D Brand 'The Politics of Need Interpretation' and 'The Adjudication of Socio-Economic Rights Claims in South Africa': *Theories of Social and Economic Justice* (2005) Stellenbosch p 17 - 36.

²⁶⁴ D Brand (n 263 above).

²⁶⁵ D Cornell 'The significance of the living customary law for an understanding of law. Does custom allow for a woman to be Chief? 2010 Constitutional Court Review.

²⁶⁶ *Shilubana* (n 12 above).

indigenous law as per constitutional mandate. It is however true that there is a need to understand that indigenous law is flexible.²⁶⁷

Professor Hansungule had correctly but indirectly shown that the judicial interpretation of indigenous law in on cultural issues or should take cognizance that indigenous law use a 'group concept' to manifest itself in justice on land issue, unlike common law orientated constitution's provisions. Indigenous law had to be substantive not procedural in character if it is interpreted correctly according to its own kind; unlike common law which is "fascinated with precedent as a means to identify a 'likened' standard to use in a case before the presiding body".²⁶⁸ The proper judicial interpretation of indigenous law on cultural jurisprudence in post-apartheid South Africa was evident in *Mabuza* case when it was alleged by one of the parties that requirement of a IsiSwazi marriage were not met for a valid marriage between parties.²⁶⁹ However Judge President Hlope ruled that African indigenous law is always flexible and "has somehow evolved so much that it is probably practiced differently from what it was centuries ago".²⁷⁰

If regard is made to constitutional equality clause specifically on gender, from a common law perspective, the measuring scale is the same with the Constitution. However on indigenous law it is different. Judicial interpretation of indigenous law as equal legal system in post-apartheid cultural jurisprudence in South Africa, is not developing indigenous law as it should have done. This is so because considering property and succession rights from indigenous law perspective, on gender it appears as if indigenous law is contradictory to the Constitution. However by proper interpretation and analysis, indigenous law on gender issues is not in contravention to the bill of rights on equality. In most cases indigenous law preference on one gender to do or say something which the other gender is not permitted to do or say is a fair discrimination done purposefully. An indigenous law precedent may be considered, but in most likelihood there may be no precedents that provide answers to the question of gender equality. This is so more specifically under the judicial interpretation of indigenous law on cultural jurisprudence in post-apartheid South Africa. Although certain similarity may exist on certain cases, principles and/or precedent should not be followed slavishly. If precedent and principles are slavishly followed, that can promote the indirect applicability of common law as

²⁶⁷ D Cornel (n 265 above).

²⁶⁸ M Hansungule (n 192 above).

²⁶⁹ *Mabuza* (n 20 above).

²⁷⁰ KE Klare (n 2 above) 171.

opposed to genuine indigenous law due to lack of indigenous law precedents and authorities. Despite the Constitution having called upon for judicial interpretation that has analysis and reasoning which is in accordance with the spirit of transformation, indigenous law is being continuously belittled and ridiculed in court's decision due to lack of commitment by judicial officer on equal treatment of indigenous law on cultural jurisprudence.

The judicial interpretation of indigenous law as an equal legal system to other legal systems on cultural jurisprudence in post-apartheid South Africa is not an easily 'realizable' goal. This is so despite the fact that in some cases the courts have shown that they do, but to a limited extent, consider indigenous legal system as recognized in terms of section 39 of the Constitution. There is still a lot of fear or 'cautions' interpretation approach (conservative or 'professionalism'), interpretation which is judicial officer or 'legal actor's [slavish] relationship to legal materials' wherein he or she does not use his or "her moral courage."²⁷¹ Subsequently that makes court to fall short of developing a unique ['non-obvious results'] trend of interpreting indigenous law.

Klare²⁷² correctly indicated that the judicial interpretation is too cautious or professional that it discourage interesting intellectual resources in interpretive projects which may produce results that may leap progressively far beyond just documentary and authority legal materials of reference. Judicial interpretation of indigenous law as equal legal system to other legal systems on socio-economic rights does not require conservative interpretation approach; but robust analytical thinking coupled with investigative inquiry about the origin of indigenous law rights and their purpose. It will be difficult to find judicial interpretation on indigenous law as equal legal system to other legal systems as long as there still exist highly structured, techniques, literal and rule-bound²⁷³ Judges who are afraid to be labeled radicals and servants of the ruling party in the country.

Indeed a Judge's moral and political values including background have impact on his or her adjudication and there seem to be less number of Judges whose hearts are closer to indigenous law and/or people. When coming to a need for judicial interpretation of indigenous law as equal legal system to the other legal systems, the court is less legally constrained and

²⁷¹ KE Klare (n 2 above).

²⁷² KE klare (N 2 above).

²⁷³ *Mabuza* (n 20 above).

had more room for interpretative maneuver than it understood and/or acknowledged²⁷⁴ as seen by Mahmood Mandeni.

Although the backdrop is with the Judge or court to give judicial interpretation of indigenous law, other participants to a judicial forum also contribute to it, for example, like academics who write articles, lawyers and litigants contribute immensely to the outcome. The Judge cannot just issue legal interpretation without litigation process or argument not being engaged, as such the old, legal-positivistic mindset of the society also do contribute towards the way in which there is undermining or belittling of indigenous law which is evident through judicial interpretation, amidst its recognition in the Constitution. If society does not challenge societal issues which show oppression of indigenous law, those issues won't be brought to court. If it happens that they are brought to court, lawyers must properly present their case to 'compel' or give the Judge no option, but to recognize such indigenous law right. Furthermore if the matter does not enjoy justice from the court's finding appeal should be lodged against such formalization, authorization or mechanistic fashion that "clung to the formalistic habit of old:" [which] have been unable to develop an approach of style more suited to the demands of the constitutional adjudication.²⁷⁵ However litigation costs and stereotypes by judicial participants may be obstruction towards achievement of indigenous law's equal treatment with other legal systems on cultural jurisprudence.

Judicial interpretation on indigenous law should not inferiorate indigenous law either using section 36 of the Constitution, otherwise that will be like the way national security legislation were used in pre-Constitution era were phrases like 'public interest' were used to justify human rights violations. For judicial interpretation of indigenous law to occur on equal par with other legal systems, there is a need for judges, magistrates and commissioners to refrain from simply giving ruling based on reference to a case or legislation. Even if they refer it, it does not matter whether there is a genre of case at hand, they must look into surrounding circumstances of each case, persons involved and applicable indigenous law in the area of the litigants among other factors.

²⁷⁴ M Mandani – When does reconciliation turn into a denial of justice? In Nolitshangu Memorial Lectures 1998.

²⁷⁵ H Botha 'Civic republication and legal education (2000) 23 – 31.

The promulgation of Traditional Court Bill²⁷⁶ as introduced in the National Council of Provinces on request of the Minister of Justice and Constitutional Development indicate the dire need for government intervention for implementation of judicial interpretation of indigenous law as equal legal system on cultural jurisprudence in post-apartheid South Africa. The Bill may have some technical problems including possible inability to stand Constitutional scrutiny on aspects like gender inequality. However most of its sections together with its purpose is intended to make judicial interpretation of indigenous law on cultural jurisprudence to be administered by knowledgeable judicial officers. A mere knowledge that constitutional indigenous law is recognized is insufficient for judicial interpretation. Wherefore judicial interpretation of indigenous law on socio-economic rights cannot practically happen solely because there are Constitutional clauses recognizing indigenous law. It is furthermore not enough to have tradition and culture clauses in the Constitution together with interpretation of those rights in the Constitution. There must be consideration of indigenous law background, purpose and relevant legislation. Judges and legal representatives too has to know indigenous law and/or to consult community elders and other authorities before they apply judicial interpretation of indigenous law on socio-economic rights. The purpose is to take the development of indigenous law further and the Constitution's recognition of "institution, status and role of traditional leadership including a role in the administration of justice, as well as the application of customary law".²⁷⁷

The rights of children as contained in the Constitution were made from Children's Act together with principles relating to the care and protection of children emanate from a common law approach. Judicial interpretation of indigenous law on socio-economic rights cannot be on equal par with other legal systems if it is expected to be judged on an equal scale with common law. Common law has its source within the Constitution as its core issues are covered by the Constitution. Provision for adoption and creation of offences relating to children including defining of parental responsibilities and rights, are common law orientated. However indigenous law rights and responsibilities like primogeniture and adoption of orphans or marriage which could have been accessories to the judicial interpretation of indigenous law in cultural jurisprudence are not specifically incorporated in the Constitution. It

²⁷⁶ Explanatory summary of Bill of Rights was published in the Government Gazette no. 34850 of the 13th December 2011 / Bill originally introduced in National Assembly at Traditional Court Bill 15 – 20087 and was withdrawn on the 02 June 2011. ISBN 978-1-77037-921-3.

²⁷⁷ Traditional Court Bill permeable (n 16 above).

is evident that on the issue of children's rights as applicable in an indigenous law set up, its applicability is only judicially interpreted to prevail over common law if it is not inconsistent with common law provisions which has been 'candy-coated' as the Constitution clauses. In indigenous law, children's liability over damages cause of action to the other person may be effected through criminal, civil or both types of sanctions. Although a criminal sanction will be imposed on a child through whipping and civil liability will only be against their parents or responsible head of the kraal. The delict which were committed by any of the people who reside under head of kraal will create head-kraal's liability despite age or blood relations of the perpetrator to the head of the kraal. Adoption and foster care in terms of indigenous law happen for various reasons, for example where a child's mother is married and it is not desirable for that child to go to his or her mother to the in-laws. The agreement on indigenous law adoption is made between the biological father or grandfather in the absence of the father, adoptive person or father. As the adoption process is discussed with the extended elderly family members. The headman of the village is only informed of the agreement, but the Chief or tribal authority does not get involved in the transaction where in terms of common law court is involved.

The Constitution²⁷⁸ provide for is about a right to self-determination which right will be futile if another legal system is imposed indirectly on indigenous people who have the right to self-determination in which they are to be governed by their legal system. Judicial interpretation of indigenous law as inferior legal system on cultural, religious and cultural jurisprudence enshrined within the Constitution is without basis and/or justification. Although it is important to distinguish among a lived, observed and official documented indigenous law, judicial interpretation of indigenous law on cultural jurisprudence should incorporate observed cultural dispute resolution approach which should take a precedent over what academics or judicially trained judges from a different background may think it is correct. The lack of judicial interpretation of indigenous law as equal legal system may cause court to divide indigenous people's communities. Other legal systems appear to be respected and indirectly imposed on indigenous people for them to abandon their legal system when it appears to contradict common law legal system. Judicial interpretation of indigenous law on cultural jurisprudence cannot be said to be developed when it is applied with inferiority as compared to other legal systems and when such interpretation seems to do away with the cornerstone or backbone of that indigenous legal system. The judicial interpretation of indigenous law as inferior legal

²⁷⁸ S 235 of the Constitution (n 5 above).

system on cultural jurisprudence may be said to be conservative and opportunistic resistance to change, technicality and law flaw associated with influence which previous legal system had on legal profession.

Under the current legal status generally a woman elect to change her surname to that of her husband. Furthermore she may have to relocate to her husband's place of residence or choice in terms of her indigenous law or constitutional right or freedom of movement. This will make the royal kraal and rights associated with it like her right to throne to be subjected to individualistic choice and movement from one place to another in a manner that can be similar to rights from a common law perspective. The court in its interpretation of indigenous law has shown lack of understanding of rational behind certain practices and the content of right to culture. The court has somewhat declared cultural right as null and void as long as it appears to be discriminating women and denying women 'equal treatment' on chieftaincy despite that there was no analysis that such discrimination is a fair or unfair one. There is a duty within the judicial interpretation of indigenous law on cultural jurisprudence to examine further whether discrimination, if there is any, is fair or not and/or that right to equal treatment is justifiably limited or not.

CHAPTER 4

GENERAL RECOMMENDATIONS AND CONCLUSIONS

4.1 GENERAL RECOMMENDATIONS

Introduction

This chapter deals with general recommendation and conclusion of the mini-dissertation. The study form the basis of analysis for the government of the Republic of South Africa to further legislate accessory on indigenous laws that should help in judicial interpretation of indigenous law. Indigenous law should be read, interpreted and understood judicially alongside the Constitution or be incorporated as the addendum thereto.

It is without doubt that indigenous law is recognized in terms of the Constitution.²⁷⁹ However judicial interpretation of indigenous law by various courts on cultural jurisprudence seems to be lacking appropriate recognition and application.²⁸⁰ In some cases the judicial interpretation of indigenous law is not necessarily inconsistent with the Bill of Rights provisions.²⁸¹ Various factors including but, not limited to lack of knowledge about indigenous law scarcity of authorities readily available as a sources due to contribute towards inferior interpretation of indigenous law on cultural jurisprudence.²⁸² Judicial officer's ignorance, attitude or views about indigenous law has a significant impact on the conclusion of the case.²⁸³

The Judicial Service Commission (JSC) and Magistrate's Commission²⁸⁴ in co-operation with the Government should address the judicial interpretation of indigenous law as an equal legal system on cultural jurisprudence. The recognition and interpretation of indigenous law must be done in a positive and constructive approach in line with indigenous law objectives.²⁸⁵ It should not be done a condition that the right advanced by that indigenous law is not

²⁷⁹ S 39(3) of the Constitution (n 5 above).

²⁸⁰ Masipa (n 47 above).

²⁸¹ Shilubana (n 12 above) High Court and Supreme Court of Appeal.

²⁸² Shilubana(n 12 above).

²⁸³ KE klare (n 2 above).

²⁸⁴ Respective bodies of judges and magistrates created in terms of legislation.

²⁸⁵ S 39(3) of the Constitution (n 5 above).

repugnant to justice or morality from a common law perspective or approach.²⁸⁶ The court is capable of “affirming the supremacy of indigenous law through interpretational analysis”.²⁸⁷ A judicial officer should recognize his or her duty to transform pre-Constitutional era of negative or common law approach to interpretation of indigenous law. A positive constructive and liberal approach to harmonise indigenous law with the Constitution in should be adopted and monitored in judicial interpretation of indigenous law.

The Constitutional Court had in most case, except *Shilubana*²⁸⁸ interpreted indigenous law on cultural jurisprudence with a view to develop it. In contrast to conservative legal approach, the Constitutional Court judges’ judicial interpretation is seen by some ‘political’ than legal due to their robust approach. Superior court, had in most cases interpreted indigenous law as inferior legal system on cultural jurisprudence except in *Nwamita*.²⁸⁹ The Constitutional Court had in the chieftaincy case of *Shilubana*²⁹⁰ ‘misplaced’²⁹¹ gender issue and equality on its non-reliance to indigenous legal system interpretation as provided in the Constitution.²⁹² That court had showed lack of full understanding of judicial interpretation of indigenous law on cultural jurisprudence as compared to the Constitution. The Constitutional Court has taken out the cardinal rule in the indigenous legal system by taking away culture or tradition as a pillar of patrilineage. The rational behind the Constitutional Court decision seems to be simply allegation of unfair gender discrimination against right to equality on chieftainship. The misplacing of ‘equality’ as stated by *Ntlama* appears to be an un-intended or what was not envisaged by the Constitution, but mere misinterpretation by the Constitutional Court. The Constitutional Court had overweighed equality right against the indigenous law right to culture. The interpretation of indigenous law on cultural rights must be uniquely done. The interpretation can destroy unity’s cultural identity and lineage of the family and the entire community. Secondly in the inheritance of property case of *Bhe*²⁹³ where the court had applied intestate succession principle thereby misconstruing equality and gender of issue from an indigenous law point of view.

²⁸⁶ *Mabuza* (n 20 above).

²⁸⁷ AT Skibine “Formalisation and judicial supremacy in Federal Indian Common Law” (<http://ssrn.com/abstract=1241465>).

²⁸⁸ *Shilubana* (n 12 above).

²⁸⁹ High Court and Supreme Court of Appeal citation also *Monyepao* matter.

²⁹⁰ *Shilubana* (n 12 above).

²⁹¹ *N Ntlama* (n 4 above)

²⁹² S 30, S 39, S 211 and S 212 of the Constitution (n 5 above).

²⁹³ *Bhe* (n 35 above).

As much as the parties' intention is given effect in a contract regarding common law title, it is possible that parties to litigation can be allowed to choose whichever personal law can be used to decide the nature of rights. When sales and wills are involved, the Ghanaian and Nigerian Courts simply applied the law intended by the party as per their personal law to determine the conflict of laws.²⁹⁴

4.2 CONCLUSION

It is recommended that the Constitutional Court should lead other courts and forums on judicial interpretation of indigenous legal system on cultural jurisprudence by positive radical example. Judicial interpretation of the indigenous legal system on cultural jurisprudence on equal par with other legal systems should be encroached by the government through promulgation of enabling legislations. In the judicial interpretation of indigenous law on cultural jurisprudence, the courts should not interpret indigenous legal system as limited, narrow, inferior and through common law perspective. In this era of the Constitution, the legacy of past judicial interpretation that had been going on for more than a century,²⁹⁵ there should be means and ways in place for protection against that irrational judicial interpretation on indigenous law through Constitutional provisions.²⁹⁶ Indigenous law should be taught as a compulsory course to legal students as well as additional training to aspirant magistrates and judges. Furthermore community elders who are well conversant with the indigenous law should be consulted for documenting their knowledge into authorities. Furthermore community leaders should be used as assessors in matters involving indigenous law to transfer procedure and substance analysis mechanisms to assist judges and magistrate who has no sufficient background of indigenous law. The knowledge of indigenous law by community elders should be captured through a special government project with intention to archive that information before it is too late.

²⁹⁴ TW Bennet (n 1 above) 413.

²⁹⁵ S 39 of the Constitution (n 5 above).

²⁹⁶ Okupasie Wet of 1889.

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