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THE INDIGINISATION OF CUSTOMARY LAW: CREATING AN INDIGENOUS LEGAL PLURALISM

by

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Prepared for the Faculty of Law, Private Law, at the University of Pretoria under the supervision of Dr. Charles Maimela

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EPIGRAPH

‘Legislation has to be formulated to substitute the current inadequate requirements for the validity of a custom. These requirements must reflect the changing face of custom and grant this norm-structure its rightful place in jurisprudence’

Constitutional Court, Judge Van der Westhuizen, in the case of:

Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC) at par 44

DEDICATION

To my familiar support system and their long-overdue understanding. To the educationalist who believed in me and kept on pushing me to my highest limit, Mr. Charles Maimela; I wouldn't be able to fully write a competent paper without your guidance. Finally, to myself; for not giving up.

ACKNOWLEDGMENTS

To my spiritual guide; God of all high, for constantly blessing me academically. The profound knowledge and wisdom I have acquired are due to Him.

To my supervisor who kept me on my toes and set the academic standard high; I hope to meet your expectations.

To my uncle and close friends who provided financial relieve through this financially straining journey, your money did not go to waste; I ate well and therefore I wrote well.

ACRONYMS

A:	APPEAL COURT
AD:	APPELLATE DIVISION
AJ:	ACTING JUDGE
AJA:	ACTING JUDGE OF APPEAL
ALL SA:	ALL SOUTH AFRICA LAW REPORTS
ALR:	AFRICAN LAW REVIEW
ALRAEAS:	ASSOCIATION OF LAW REFORM AGENCIES OF EASTERN AND SOUTHERN AFRICA
BAA:	BLACK ADMINISTRATION ACT
BCLR:	BUTTERWORTH CONSTITUTIONAL LAW REPORTS
C:	CAPE PROVINCIAL DIVISION
CC:	CONSTITUTIONAL COURT
CCT:	CONSTITUTIONAL COURT
CILSA:	COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA
CJ:	CHIEF JUSTICE
C&O:	CAPE AND ORANGE FREE STATE
CPD:	CAPE PROVINCIAL DIVISION
DCJ:	DEPUTY CHIEF JUSTICE
DP:	DEPUTY PRESIDENT
ED(S):	EDITORS(S)
EJCL:	ELECTRONIC JOURNAL OF COMPARATIVE LAW
ET:	AND

EX PARTE:	THE ONLY INTERESTED PARTY
IBID:	THE SAME AS IMMEDIATELY ABOVE
IDEM:	THE SAME AS ABOVE BUT ON DIFFERENT PAGE
IK:	INDIGENOUS KNOWLEDGE
IN RE:	IN THE MATTER OF
IPLAA:	INTELLECTUAL PROPERTY LAW AMENDMENT ACT 28 OF 2013
J:	JUDGE
JA:	JUDGE OF APPEAL
JAL:	JOURNAL OF AFRICAN LAW
NEMBA:	NATIONAL ENVIRONMENTAL MANAGEMENT BIODIVERSITY ACT 10 OF 2004
NEMA:	NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998
SALRC:	SOUTH AFRICAN LAW COMMISSION
UNDHR:	UNITED NATIONS DECLARATION OF HUMAN RIGHTS
UNDRIP:	UNITED NATIONAL DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES
UNESCO:	UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANISATION

Table of Contents

DECLARATION

I, Ntebo Lauretta Morudu, declare that The Indigenisation of Customary Law: Creating an Indigenous Legal Pluralism, which is hereby submitted for the award of Master's in Research in Private Law, is my original work. It has not been previously submitted for the award of a degree at this or any other tertiary institution. Where works of other people are used, comprehensive references have been provided.

Signed……....

N.L Morudu

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08 November 2019

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ABSTRACT

In the advent of the current dispensation, South Africa's Constitution elucidates that customary law is in parallel with common law under section 39 of the Constitution,[1] in light to this contention, the study begs to claim that this is only superficial.[2] The constitutional advancement of customary law has been delayed in terms of legislative and judicial reform and development, and the legislature is inattentive with respect to remedying the inadequate position customary law is placed in. Instead, the legislature has been replacing customary law considered 'non-transformative and undeveloped', with common law to promptly deal with customary disputes.[3] The insufficiency of the development and reform of customary law allows the judiciary and the legislature to limit the development of customary law as a whole in terms of its application and interpretation. It is highly significant to engage with the need to ascertain indigenous people's human rights in South Africa, by paving the way and ensuring due regard to their legal regimes.[4]

Even at the advent of the codified version of customary law; there are still ambiguities and misunderstandings that exist within the official customary law.[5] Engaging in the creation of indigenous legal pluralism in questioning whether customary law can exist as a separate pluralism within the South African state law pluralism, it is both bold and daunting. If an argument cannot be successfully made, the question left to ask by the study is, can customary exist successfully, undistorted and purposefully within the current dispensation? Can the courts and the legislature ensure its constant development and codification, especially giving due regard to living customary law and the customs that exist concurrently?

There are foreign and international legal improvements and ways in which some states seek to enforce indigenous people's rights to self-determination and enforcing their legal regimes to recognise and apply their laws in solving their prevailing customary

1 Constitution of Republic of South Africa, 1996.
2 Gardiol Van Niekerk 'The endurance of the Roman law tradition' http://studia.law.ubbcluj.ro/articol.php?articolId=474 (accessed 26 July 2015).
3 As witnessed in *Bhe v Magistrate Khayelitsha* 2005 1 BCLR 1 (CC).
4 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014).
5 SALRC 'Project 144 Single Marriage Statute' Issue Paper 35 (2018) 6.

disputes.[6] A comparative analysis is essential to assess the longstanding argument that will be made in the study. It is of great significance to consider not only national law in terms of seeking advancement and legislative reform of South Africa's indigenous pluralism. Additionally, comparatively studying the legal status of foreign customary law that will be used in the study to shed light on how to create such deep indigenous pluralism. Not only considering foreign law but also the current reform of intellectual property law and environmental law; which seeks to recognise the indigenous people's rights for the protection of their indigenous knowledge and resources, respectively. The study would like to engage such legislative reform in order to answer the daunting question of the creation of deep indigenous legal pluralism to ascertain indigenous people's legal regimes and the hegemonic realism of their customary law.

[6] The countries of Vanuatu and Papua New Guinea will be comparatively covered in the paper.

CHAPTER 1: Research Proposal

1 1 Introduction

South Africa has come a long way into formally recognising customary law and its significance in the current dispensation. Customary law or synonymously known as indigenous law,[7] is insignificantly recognised source of law and has gone through grave marginalisation, distortion, repression and attempts to eradicate it in favour of imposed common law by the settler state government since colonialism.[8]

The study will discuss the legal pluralism of customary law and whether customary law can be afforded its own indigenous legal pluralism to restore its legitimacy and application as the indigenous peoples' legal regimes.[9] Such indigenous legal pluralism is based on the concept of the existence, application, and interpretation of customary law and its reform and development to cater to modern customary disputes. As customary law is part of national and international governance, though in colonised states such as South Africa, such customary law it is not favoured in terms of application and development. The rationale on this argument is based on the fact that customary law challenges the legitimacy of statutory law with aspects such as extinctive prescription, which is unknown indigenous people;[10] ownership and succession of communal property instead of private property ownership;[11] the practice

7 Both terms will be used interchangeably within the research study.

8 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014).

9 Indigenous people are also referred to as Black South Africans.

10 MB Ramose reiterates in his paper that prescription is unknown in African law, as Africans believes that time cannot change the truth or undo a past event. Just as truth must be taken into consideration each time it becomes known, so must no obstacle be placed in the way of the search for it and its discovery. It is reasoning that judicial decision are not authoritative to indigenous people and holds no thesis in terms of understanding and reasoning. In Ramose, MB 'An African perspective on justice and race' (2001) Polylog and K Mbaye (1974) "The African Conception of Law" 2 International Encyclopedia of Comparative Law 138.

11 As the Constitution of South Africa legally protects private ownership under the now controversial section 25 of the Constitution of Republic of South Africa, 1996. Indigenous propel do hold such values to private ownership, instead the customary stance adopted by indigenous people of South Africa is based on communal ownership and property vesting with the community if no ownership subsists in the head of the household. Discussed further in D Lea *Property Rights, Indigenous People and Developing World: Issues from Aboriginal entitlement to intellectual ownership rights* (2008).

of male primogeniture;[12] etc.).[13] South Africa is not exempted from the incredulous marginalisation of customary law, with the current constitutional dispensation, customary law is subjected to the Constitution.[14] An attempt was made by the colonial and apartheid legislative body to codify some aspects of living customary law which was considered civil and not against state existing law.[15] Although scholars tend to argue otherwise, asserting that customary, especially living customary law is hard to codify, varying according to the current way of life of the indigenous people or that it lacks credible source and origin.[16] They further argue that state-law pluralism is the only law that can be trusted since it is codified and recognised by the state.[17]

The study will comparatively analyse the selected foreign countries, on how such indigenous legal regimes were adopted and sustained through the advent of the new international dispensation of Universal Declaration of Human Rights;[18] where there is legal vetting of application of customary laws which infringes on human rights, especially in terms of gender equality and children. The study not only seeks to look at the creating of legal pluralism but also look at the preservation and constant codification of customary law if it is impossible to achieve such; then a consideration of a separate legal pluralism for customary law may be recommended. The argument made will look at the amended Intellectual Property Law Amendment Act,[19] and National Environmental Management Biodiversity Act,[20] and how it aims to advance the protection of indigenous knowledge systems and resources and seen as a way to ensure the legitimate legal protection of indigenous people's customs and resources. Additionally, the study would like to advance an argument for the legislative protection, advancement, and legitimisation of customary law.

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12 See Chapter 3 for discussion of this topic.

13 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014).

14 Section 39(2) of the Constitution of the Republic of South Africa,1996

15 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 3-5.

16 Similar argument made in C Himonga & T Nhlapo (eds) 2014 *African Customary Law in South Africa: Post-Apartheid and Living Law Perspective* (Cape Town: Oxford) 6-7.

17 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 5.

18 Universal Declaration of Human Rights 1948.

19 28 of 2013 and (thereafter, IPLAA).

20 10 of 2004 and (hereafter, NEMBA).

1 2 Problem Statement

Through time it is witnessed that customary law has played a non-significant role within state law. The Dutch occupation in 1652 has proven this fact.[21] Where the colonial settlers never officially recognised customary law, instead customary law was used as a strategic move to limit the chances of revolution by the natives.[22] The systemic oppression of Black people during the colonial era and the apartheid era not only diminished the right of self-determination, but it also grew systemic marginalisation of customary law.[23] It is argued that this is because there is no uniform system of customary law for all indigenous communities in South Africa and that it is nearly impossible to successfully codify and develop customary law due to its unorthodox nature. Through time, customary law was put under a time out and subjected to distortion and severe colonial scrutiny.[24] This led to an improper codification of the so-called 'official customary law'.[25] Tobin elucidates that, 'customary law is subordinated to human rights law, and it is frequently subordinated to national constitutions, laws, regulations and creating a fraught relationship between customary law and positive/statutory law.'[26] Creating a harmonious co-existence of customary law and positive law is possible. The pre-colonial existence and practice are significant because the early indigenous settlers or inhabitants of the land practiced and lived through living customary law.[27]

Another issue identified by the study is based on the soft interpretation of customary law adopted by our courts as evident in the decision of *Bhe v Magistrate, Khayelitsha*,[28] which indicates the discrepancy between common law and customary

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21 This is when the Dutch settled in Cape Town and imposed Roman-Dutch.

22 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 4.

23 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014).

24 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 8.

25 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 4-8.

26 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014) 6.

27 Bennett TW 'Legal pluralism and the family in South Africa: lessons from customary law reform' 2011 *Emory International Law Review* 1029 – 1059.

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

law.[29] Creating a legitimate legal pluralism where customary law does not superficially exist in parallel with common law or trampled on without due regard by the constitutional sovereignty; learnings from countries like Papua New Guinea and Vanuatu is imperative; these countries customary law supersedes the inherited British common law and French civil law.[30] These questions the current status of customary law in the state law pluralism of South Africa. Nevertheless, no legal scholar has proposed for the preservation of customary law (living and official/state law), and that can be a feasible solution to restore the legitimacy and the durability of customary law as the indigenous people legal regime. Correspondingly, there is no single or stand-alone degree program, centre or field of study that focuses specifically on customary law and traditions.[31] Furthermore, in tertiary level customary law is reduced to a single middle year module and not an epitome to grant further engaging study and course work learning around this field of law. Legislatively, it is reduced to single statute alongside fragmented statutes to cover all the differential customs and living customary law, to the exception of the codified Zulu law.[32] Does customary law have a place in a highly critical and conservative legal structure within South Africa? The inability of the legislature and judiciary in recognising the significance of customary law in our current dispensation is the same unfounded reasons the colonial and apartheid systems kept customary in the legal reform background.

1 3 Research Questions

1 5 1 What are the roles and current status of customary law under the current South African dispensation, nationally and internationally?

1 5 2 Can customary law exist as a separate pluralism within the current South African legal dispensation?

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29 The above arguments raised will be discussed in the study and further elaborated in the final dissertation.

30 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014) 2.

31 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014) 2.

32 Black Administration Act 38 of 1927'; also, Recognition of Customary Marriages Act 120 of 1998, which regulates customary marriages; and Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, which regulates intestate succession of indigenous people of South Africa.

1 5 3 What is the significance of indigenous knowledge systems and resources and the current application of Intellectual Property Amendment Act 28 of 2013 and National Environmental Management Biodiversity Act 10 of 2004 in ensuring the legal pluralism of customary law?

1 4 Research Methodology

The study's approach is entirely qualitative in that the study's argument will be based on the marginalisation of customary law and throughout the study will try to ascertain the argument of the possibility of creating an indigenous legal pluralism and also consider the foreign law (statutes, journals, and books), which may guide in leading to such argued indigenous pluralism. This qualitative research will be based on journals, textbooks on the topic in question, books and chapters in books that covers in-depth the topic advanced in the study. The study seeks to look at the current legislative amendments made by the South African legislature in terms of the protection of indigenous knowledge and resources.

1 5 Aims and Objectives of the Research Study

The research study research seeks to look at the preservation of indigenous law within the constitutional dispensation. The study would like to engage and test whether indigenous law could be applied within the pluralism without distorting its significance and application by the indigenous communities. The research also looks at the current Intellectual Property Amendment Law and the National Environmental Management Biodiversity Act and how they seek to protect and advance indigenous knowledge systems, this stance by the legislature may prove that indigenous law also deserves the legal protection and preservation as knowledge and customary system. The study would also make a comparative analysis of countries which have adopted and apply their indigenous laws within the spectrum where western law influences lifestyle and the way people live. Comparative analysis that will be made in the study will be based on the analysis of foreign law that seeks to advance, develop, reform and properly codify customary law. This analytic approach will be an aide to advance the study's argument for the indigenisation of customary law. The comparative argument and

analysis that will be conducted in the study is a contextual description of foreign systems and cultures to deduce understanding,[33] also a contextual description will be adopted to provide knowledge that recognises functional equivalents in the foreign law.[34] The research study will also highlight the reasons and ways in which indigenous law can be applied in parallel with common law and constitutional law, and why indigenous law is still significant for the indigenous communities within the country. The study would like to advance a legal reason on why indigenous law should be protected, developed and advanced an argument for the possibility to create a deep indigenous pluralism within the current dispensation, this is mainly based on its rich custom and values which shall be imparted within our pluralism to solve some of the legal problems that common law cannot solve or give light to.[35]

1 6 Assumptions

The assumption to be made in the study is based on the argument that customary law is still marginalised and improperly developed. The study seeks to test for the creation of indigenous centred legal pluralism; the aim of the study is to legally and legislatively reflect the true legal existence of customary law, in its accurately developed and reformed nature under the South African Constitution. The assumptions to be drawn from the study are: can customary law initially exists without being distorted, can it be developed and properly codified, and can it be genuinely appreciated as an academic system and its course to contribute academically. The study will use comparative foreign laws that indicate the appreciation of customary law and the current reform and legislative protection of indigenous people's knowledge systems and resources; the study will advance these analyses as means of a guide and shed light for that development, reform, codification and academic advancement of customary law. The study is no way glorifying cultural practices that are against or seek to infringe on one's rights as humans. The study simply implores the indigenisation, preservation, reform, and development of customary law in order to retain the human rights and legal

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34 E Frank, & R Vliegenthart, 'Comparative research Methods' http://www.onlinelibrary.wiley.com/pdf (accessed 18 June 2019.

35 Ndima DD 'Re-Imagining and Re-Interpreting African Jurisprudence Under the South African Constitution' unpublished PhD thesis, University of South Africa, 2013.

regimes of indigenous communities' rights to identity and self-determination; it also insuring the legal status and continued pluralism of customary law. The study is not arguing for piecemeal statute; the study argues for the legislative consideration for the creation of a hegemonic statutory development in order to attain the reform and development needs of customary law; and furthermore, for the establishment of legal centre(s) dedicated to furthering research on the institutions and legal regimes of indigenous people of South Africa.

1 7 Conclusion

Given the study's analysis based on current sources and legal interpretation, it would be the study's discourse to further analyse the contentions made and to cover necessary aspects relating to the research proposal. The study will in-depth cover the aspects in contention, especially with claims regarding the historical and current marginalisation of customary law. The study's first focus is the historical analysis which will be an indebt look at the historic marginalisation of customary law; this will be followed by the argument for the creation of indigenous pluralism, which is the centre argument of the study; followed by engaged analysis of the international law in ascertaining the indigenous people legal regimes and human rights; further followed by a comparative analysis on a foreign jurisdiction which they have successfully afforded a more influential status and legislative and judicial recognition of indigenous law in their respective jurisdictions; and finally a South African legislative analysis will be made based on legislative amendments that are believed to indicate advancement and development of customary law in which customary reform may be affirmed; and in conclusion the study will advance recommendations and a way forward. All of the above will be entirely based on qualitative legal sources.

CHAPTER 2: The historical marginalisation of customary law

2 1 Introduction

The chapter will give an in-depth background to the history on the 'recognition or attempt recognition of customary law and how that historical marginalisation has led to current issues related to customary law. The historical analysis is a true reflection of the status and form of customary law; where it has been marginalised and distorted to the benefit of the colonial settlers and the apartheid government. The study will highlight how under the pre-constitutional dispensation, customary law has been subjected to marginalisation and how the then governmental authorities viewed customary law in light of colonial and apartheid rule. This highlights further in the study, the semiology which persists with regard to how customary law is viewed by the legislative and judicial authority. Borrowed semiology from the past allows for a systematic view of customary law, which allows the legal authorities to be less inclined to see its importance to the indigenous people and their regimes and the current dispensation.[36] The sub-headings of the chapter will look at the precolonial, colonial and apartheid post-apartheid regimes attempt recognition, development, and reform of customary law. The historical *status quo* of customary law illuminates the true rendition of the status of customary law and why the study proposes the current need to reform, develop and proper codification of customary law.

2 2 The concept of Customary law

Before the study can explain the historical marginalisation of customary law in depth, it is imperative to further explain the concept of customary law within the spectrum of South Africa. Customary law is the concept of law which attaches to a person or a group of people as a form of identity, it serves as both personal and communal law for indigenous people.[37] It is imperative to draw a distinction between living customary law and official customary law for the purpose of this study. Living customary law

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36 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 7-8.

37 G Woodman 'Legal pluralism in Africa: The implications of state recognition of customary laws illustrated from the field of land law' (2011) 1 *Acta Juridica* 35.

consists of unwritten customary practices that regulate the day-today lives of indigenous people.[38] Living customary law consists of actual practices or customs of the indigenous people whose customary law is under consideration.[39] Furthermore, derived from the initial practices of customary law, custom practices that are long-established, reasonable and uniformly observed by the indigenous people,[40] custom can be ascertained under living customary law. It is an original source of living law and also official customary law.[41] Living in the constitutional privilege, there are more socio-legal factors that lawmakers have to consider, bearing in mind the history of South Africa and its historical battle with colonialism and apartheid; the system of rule which sought to divide people according to race and class.[42] Whereas, official customary law is customary law that has been codified and recognised through legislative enactments.[43] Official customary law is contained in legislative enactments such as Reform Customary Law of Succession and Regulations of Related Matters,[44] Codes of Zulu Law,[45] and Black Administration Act.[46]

2 3 The marginalisation of customary law: a look through history and the current dispensation

2 3 1 Pre-colonial era

Before the colonial era, customary law was practiced and applied unrestrictedly; African indigenous law was generally unwritten and thus passed orally from one generation to another.[47] The most prominent African indigenous law was made by the

38 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 27.

39 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 27.

40 *Van Breda v Jacobs* 1921 AD 330.

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

42 SALRC 'Project 144 Single Marriage Statute' Issue Paper 35 (2018) 6.

43 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 3.

44 11 of 2009.

45 of 1878.

46 38 of 1927.

47 M Ndulo 'African Customary Law, Customs, and Women's Rights' (2011). *Cornell Law Faculty Publications.* Paper 187. http://scholarship.law.cornell.edu/facpub/187 .

ruling monarch, in which their orders and judgment made current law and amendments to existing customary law.[48] Ndulo correctly states the nature of customary law as:

> 'The law before colonialization in most African states was essentially customary in character, having its bases in the practices and customs of the people. The great majority of people conducted their personal activities in accordance with and subject to customary law. "African customary law" does not indicate that there is a single uniform set of customs prevailing in any given country.'[49]

During this time, harmony to law and custom was brought about within the indigenous communities.[50] Subsequently, a distinctive policy towards African indigenous law in Southern Africa began with the British occupation of the Cape in 1806.[51] The current colonial power confirmed the Roman-Dutch law already operating in the Cape from the 1600s, as the general law of the land, for that system was deemed to be suitably 'civilized', unlike African indigenous law.[52] Roman-Dutch Law as influenced by English law is what makes up common law, as currently observed in South Africa.[53] Van Niekerk strictly defines Roman-Dutch law as, '…[as] the primary or dominant component of South African state law and in the courts and in academic writing the term 'common law is used.'[54] Roman-Dutch law has its origins from Roman law, but through its reform and development by the Dutch settlers in South Africa, it got to be termed Roman-Dutch law.[55] No account was taken of the indigenous Khoi and San laws, [56] and based on the history of South Africa, preceding to the arrival of the

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48 M Ndulo 'African Customary Law, Customs, and Women's Rights' (2011). *Cornell Law Faculty Publications.* Paper 187 http://scholarship.law.cornell.edu/facpub/187 .

49 M Ndulo 'African Customary Law, Customs, and Women's Rights' (2011). *Cornell Law Faculty Publications.* Paper 187 http://scholarship.law.cornell.edu/facpub/187 88.

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

51 Seroto, J 'An analysis of the depiction of indigenous people during the early colonial conquest in South African history textbooks' (2015) 14 *Indilinga African Journal of Indigenous Knowledge Systems* 169 170.

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

53 G Van Niekerk, 'The endurance of the Roman law tradition' http://studia.law.ubbcluj.ro/articol.php?articolId=474 (accessed 26 July 2015) p 1/8.

54 G Van Niekerk, 'The endurance of the Roman law tradition' http://studia.law.ubbcluj.ro/articol.php?articolId=474 (accessed 26 July 2015) p 1/8.

55 G Van Niekerk, 'The endurance of the Roman law tradition' http://studia.law.ubbcluj.ro/articol.php?articolId=474 (accessed 26 July 2015) p 1/8.

56 Elphick, R. *Kraal and Castle: Khoikhoi and the Founding of White South Africa* (1977) 7.

European settlers in South Africa, indigenous peoples the Khoi, San and the Bantu-speaking peoples occupied the vast areas of South Africa.[57] These indigenous people lived a nomadic life and are who we refer to as Black people of South Africa.[58] Archaeological evidence points out that the Khoi were the first people to settle in South Africa, more specifically in the Cape of Good Hope.[59] They originated from the northern and eastern regions of what is now Botswana. The Khoi were farmers and heavily involved in agriculture.[60] Furthermore, the San, later known as 'Bushmen,' were among the earliest indigenous people who also inhabited the Cape of Good Hope before the colonial conquest.[61] They were hunters and gatherers, which was indicated by their constant relocation and traveling.[62] The third group of people who inhabited South Africa before 1652 were the Bantu-speaking people.[63] The Bantu people were mainly situated north of the Fish River and had not yet penetrated the Cape of Good Hope during the Dutch East India Company (VOC)/ the Dutch occupation period. [64] The currently recognised Bantu speaking people are the Nguni – where the language of this group is Zulu and Xhosa or related or derivative language.[65] Secondly the Sotho-Tswana tribe - which are classed under three divisions: the *Tswana*; the Northern Sotho also known as the *Bapedi;* and Southern Sotho originally from Lesotho and known as Basotho.[66] Thirdly, the Tsonga tribe – is one of the groups that

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57 Seroto, J 'An analysis of the depiction of indigenous people during the early colonial conquest in South African history textbooks' (2015) 14 *Indilinga African Journal of Indigenous Knowledge Systems* 169 170.

58 Seroto, J 'An analysis of the depiction of indigenous people during the early colonial conquest in South African history textbooks' (2015) 14 *Indilinga African Journal of Indigenous Knowledge Systems* 169 170-171.

59 Seroto, J 'An analysis of the depiction of indigenous people during the early colonial conquest in South African history textbooks' (2015) 14 *Indilinga African Journal of Indigenous Knowledge Systems* 169 170-171.

60 R, Elphick *Kraal and Castle: Khoikhoi and the Founding of White South Africa* (1977) 7.

61 GW, Stow *The Native Races of South Africa* (1905).

62 GW, Stow *The Native Races of South Africa* (1905).

63 Seroto, J 'An analysis of the depiction of indigenous people during the early colonial conquest in South African history textbooks' (2015) 14 *Indilinga African Journal of Indigenous Knowledge Systems* 169 171.
Seroto, J 'An analysis of the depiction of indigenous people during the early colonial conquest in South African history textbooks' (2015) 14 *Indilinga African Journal of Indigenous Knowledge Systems* 169 171.

65 JC Bekker & JJJ Coertze 1882 *Seymour's Customary Law in Southern Africa* (Juta Legal and Academic Publishers) *xxvii.* Also Please note that the customs and laws of the Zulu tribe are codified in the Code of Zulu Law and Natal Code of Zulu Law of 1987.

66 JC Bekker & JJJ Coertze 1882 *Seymour's Customary Law in Southern Africa* (Juta

emanates from the Northern parts of the country.[67] Fourthly, the VhaVenda - also known as *Bavenda*, they emanate from the Northern parts of the country.[68] These tribal groups also have their languages officiated under section 6 of the Constitution,[69] to the exclusion of the Khoi and San languages. These mentioned tribes fall under the Bantu-speaking people of South Africa.[70] These tribes mentioned above were primarily considered too primitive to have a legal system worthy of recognition.[71]

2 3 2 Colonial-era (1652 – 1909)

In 1828 Ordinance 50 was passed to free people of colour from slavery. This is where the colonial rule was prominent. Consequently, declaring Roman-Dutch law as the law of the Cape.[72] When Britain annexed the Cape territory in 1843, Roman-Dutch law was again declared the general law of the current colony, but shortly afterward courts were also allowed to apply customary law in disputes between Africans.[73] Recognition of African indigenous law was subject to the repugnant formula that was later to be adopted throughout the colony: 'so far as customary law was not repugnant to the general principles of humanity observed throughout the civilized world.'[74] Therefore the state codified [some part of African indigenous laws] under the Code of Zulu Law, which came in effect in 1869. Much of the customary law on marriage and divorce was merely reduced to writing under this form.[75] Six years later, a complete code was drawn up for the guidance of the courts,[76] and in 1891 an amended version was made binding law.[77] Late in the 1800s, the Transvaal produced specific legislation; Law 4 of

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Legal and Academic Publishers) xxvii.

67 JC Bekker & JJJ Coertze 1882 *Seymour's Customary Law in Southern Africa* (Juta Legal and Academic Publishers) xxviii.

68 JC Bekker & JJJ Coertze 1882 *Seymour's Customary Law in Southern Africa* (Juta Legal and Academic Publishers) xxviii.

69 Constitution of Republic of South Africa, 1996.

70 JC Bekker & JJJ Coertze 1882 *Seymour's Customary Law in Southern Africa (Juta Legal and Academic Publishers)* xxvii.

71 E Brookes *The History of Native Policy in South Africa from 1830 to the Present Day* (1924).

72 SB Burman 'Cape Policies towards African Law in Cape Tribal Territories 1872-1883' (1973).

73 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 4-5.

74 Ordinance 3 of 1849. Also see Bennett Application of Customary Law 79-80.

75 Code of Zulu Law 19 of 1891.

76 Proclamation 2 of 1887.

77 Code of Zulu Law 19 of 1891.

1885, gave courts of native commissioners and certain specially appointed traditional rulers primary jurisdiction over Africans in civil cases.[78] In these courts, customary law was applicable, provided that it was consistent with the 'general principles of civilization recognized throughout the civilized world'.[79] During this recognition in the Transvaal and the Cape, the Supreme Court of the Republic refused to give effect to customary marriages or bride wealth agreements.[80] The Court regarded them inconsistent with the 'civilized' conscience, for one, because customary marriages are polygynous, and also the payment of *lobola/*bride wealth amounted to the sale of a woman.[81] In Bechuanaland, the government was cautious not to interfere in the Tswana people's application of their indigenous law.[82] Even when the British annexed Bechuanaland to the Cape in 1895, no attempt was made to impose the Cape policy of non-recognition of customary law, therefore the traditional rulers retained discretionary powers on civil and criminal jurisdiction.[83] When the government in these regions took a stance to limit the application of African indigenous law, the system saw and regarded African indigenous law as barbarous and backward to function as a viable legal system,[84] African indigenous law was tolerated in areas of borderline significance to the colonial regime, namely, marriage, succession, delict and land tenure.[85] The government considered even the slightest recognition of African indigenous law, as precarious favour bestowed by a conquering power to the uncivilised indigenous communities.[86]

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78 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 4-5.

79 Section 2 of Law 4.

80 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 5.

81 *R v Mboko* 1910 TPD 445 par 447.

82 South African Law Commission, Mahomed, I., & Nhlapo, R. (1998). 'Project 90: The harmonization of the common law and the indigenous law: Customary marriages Discussion paper: South African Law Commission,' 74 (Pretoria: South African Law Commission) 8.

83 Proclamation 2 of 1885.

84 South African Law Commission, Mahomed, I., & Nhlapo, R. (1998). Project 90: The Harmonization of the common law and the indigenous law: Customary marriages Discussion paper: South African Law Commission, 74 (Pretoria: South African Law Commission) 8.

85 South African Law Commission, Mahomed, I., & Nhlapo, R. (1998). Project 90: The Harmonization of the common law and the indigenous law: Customary marriages Discussion paper: South African Law Commission, 74 (Pretoria: South African Law Commission) 8.

86 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post*

a Colonial-era: The Unionisation of Republic of South Africa (1910 – 1947)

In the Unionisation of the Republic in 1910, the position of African indigenous law differed drastically from one part of the country to the other. In the Cape and Transvaal, customary law had no official recognition.[87] In British held territories and to a lesser extent in Natal and the Transkei territories, customary law was regularly applied subject to the supervision of the higher courts.[88] This created a system of confusion and complexities in terms of court application and interpretation because of the fragmented system of African indigenous law. The Supreme Court called for legislative intervention to bring order to `this disordered state of affairs' and to the `curious jumble' of proclamations and colonial Acts,[89] so that the African indigenous law could represent the union of the Republic.[90] The government decided to enact policies that could unify the African indigenous law across the country, and also based on the fears of indigenous peoples revolt, by relaxing the powers granted to traditional leaders and reviving the traditional institutions of the African indigenous communities.[91] In 1927, the Native Administration Act was passed.[92] Although the government's ostensible purpose was to revive African tradition, its actual intention was to establish a separate system of justice to match segregation in land and society.[93] Under the Native Administration Act, a current system of courts was created to hear civil disputes between Africans.[94] Henceforth, approved traditional rulers were given judicial powers

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Apartheid and Living Law Perspective (2014) 5.

87 South African Law Commission, Mahomed, I., & Nhlapo, R. (1998). Project 90: The harmonization of the common law and the indigenous law: Customary marriages Discussion paper: South African Law Commission, 74 (Pretoria: South African Law Commission) 9.

88 South African Law Commission, Mahomed, I., & Nhlapo, R. (1998). Project 90: The harmonization of the common law and the indigenous law: Customary marriages Discussion paper: South African Law Commission, 74 (Pretoria: South African Law Commission) 9.

89 See *Roodt v Lake & Others* (1906) 23 SC 561 par 564 and *Sekelini v Sekelini & Others* (1904) 21 SC 118 par 124, respectively.

90 *Roodt v Lake & Others* (1906) 23 SC 561 par 564 and *Sekelini v Sekelini & Others* (1904) 21 SC 118 par 124, respectively

91 TW Bennett 'Re-introducing African Customary Law to the South African Legal System' (2009) 1 *The American Journal of Comparative Law* 1; also, in *The Application of Customary Law in Southern Africa* 46-7.

92 Native Administration Act 38 of 1927.

93 Henceforth, as the Zion Christian Church observed in response to the Issue Paper, the Act was used principally to suppress the African population.

94 TW Bennett 'Re-introducing African Customary Law to the South African Legal System'

with jurisdiction to apply customary law repugnantly.[95] The Traditional Courts and leaders exercised civil jurisdiction concurrently with native commissioners' courts, which also heard appeals from courts of traditional leaders.[96] At the top of this hierarchy was the Native Appeal Court.[97] Section 11(1) of the Native Administration Act, prescribed the conditions in which African indigenous law ought to be applied by the courts:

> 'Notwithstanding the provisions of any other law, it shall be in the discretion of Commissioners' Courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black law applying to such customs except in so far as it [had] been repealed or modified ...'[98]

The section makes a requirement that any proceedings based on African indigenous law had to involve 'questions of customs followed by Natives' was taken to mean that customary law could be applied only if it contained a rule appropriate to the facts of the case or offered a remedy,[99] this meant actually that African indigenous law could be applied only if it is consistent with Common law.

2 3 3 Apartheid-era (1948 – 1993)

During the advent of apartheid, the systematic oppression of Black indigenous people of South Africa augmented and it also extended to their legal regimes. Customary law was only recognised under a legal exception.[100] Indigenous people lacked autonomy in terms of applying customary law freely. It was only relevant to individuals in disputes

(2009) 1 *The American Journal of Comparative Law* 1; also, in *The Application of Customary Law in Southern Africa* 46-7.

95 Section 12(1) of the Native Administration Act 38 of 1927.

96 South African Law Commission, Mahomed, I, & Nhlapo, R. 'Project 90: The harmonisation of the common law and the indigenous law: Customary marriages Discussion paper: South African Law Commission' (1998) 74 (Pretoria: South African Law Commission) 9.

97 Section 12(1) of the Native Administration Act 38 of 1927.

98 Section 11(1) of the Native Administration Act 38 of 1927.

99 *Muguboya v Mutato* 1929 NAC (N&T) 73 at 76 and *Nzalo v Maseko* 1931 NAC (N&T) 41.

100 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 14.

before the court.[101] This was the apartheid government form of cultural segregation, through enacting of the Bantu Authorities Act 68 of 1951, power was centralised under the tribal rulers, who controlled land and indigenous people, where the tribal ruler was subject to state control and authority.[102] Section 4(1)(d) of Bantu Authorities Act stated that:

> 'A tribal authority shall, subject to the provisions of this Act - generally, exercise such powers, and perform such functions and duties, as in the opinion of the Governor-General fall within the sphere of tribal administration as he may assign to that tribal authority.'[103]

These tribal authorities paved ways for indigenous people to be subjected to further segregation, limited access to their land and freedom of movement.[104] The tribal authorities were responsible for ensuring that indigenous people paid out tribal levies, fees, fines and property profits to the government.[105] They were also tasked with advising the state government in relation to territorial, regional land development that affected indigenous people, this, in turn, benefitted the government where they would further isolate and segregate indigenous people, through the enactment of the Group Areas Development Act 69 of 1955.[106] The Act was enacted for the establishment of urban areas for whites and the creation of townships for Black indigenous people through forced removals.[107] This created overpopulation of indigenous people within the confined township areas and their limited access to land.[108] Due to the uprising by indigenous communities against imposed and authoritarian traditional authorities in the established homelands (Transkei, Ciskei, Venda, Gazankulu, KaNgwane,

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101 *Ex parte Minister of Native Affairs*: In re *Yeko v Beyi* 1948 (1) SA 388 (A).

102 C Himonga & T Nhlapo (eds) 2014 *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (Cape Town: Oxford) 15.

103 Bantu Authorities Act 68 of 1951.

104 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 15.

105 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 15.

106 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 15.

107 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 15.

108 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 15 -16.

KwaNdebele, KwaZulu, Lebowa, and QwaQwa).[109] These homelands were created to segregate Black communities away from the non-Black areas or suburbs.[110] The homelands were further classified by ethnicity, whichever ethnic group you belonged to, Black people have to move to their homeland associated with their culture and/or ethnicity.[111] For example, Lebowa was designated for Bapedi and Northern Ndebele, Ciskei and Transkei were designated for Xhosa, Bophuthatswana for the Tswana tribe, KwaZulu for Zulu tribes, Venda for VhaVenda tribe, Gazankulu for Tsonga tribes, and Qwa Qwa for Basotho.[112] The then government decided to establish the Law of Evidence Amendment Act 45 of 1988. The Act took judicial notice of customary law principles that could be readily ascertainable and apply them where applicable in customary disputes.[113] Even so, the Act placed a repugnancy clause, which gave the presiding officer the legal discretion to either apply customary law or to not, and when both parties to the litigation were African.[114] This clearly placed a limitation on customary law application and development.

2 4 Post-colonial and apartheid era (1994 - Current)

Under the current dispensation, the Constitution recognises the application of customary law by the courts in order to promote the spirit, purpose, and object of the Bill of Rights.[115] Customary law must be applied when applicable, subject to the Constitution, public policy, rules of natural justice and legislation.[116] Therefore customary law can only apply if applicable and parties seeking to apply customary law in court should prove that: there is a tribal connection between the litigants; that a

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109 South African History Online 'The Homelands' 24 January 2019 http://www.sahsitory.org.za/article/homelands (accessed 19 September 2019).

110 South African History Online 'The Homelands' 24 January 2019 http://www.sahsitory.org.za/article/homelands (accessed 19 September 2019).

111 South African History Online 'The Homelands' 24 January 2019 http://www.sahsitory.org.za/article/homelands (accessed 19 September 2019).

112 South African History Online 'The Homelands' 24 January 2019 http://www.sahsitory.org.za/article/homelands (accessed 19 September 2019).

113 Section 1(1) of Law of Evidence Amendment Act 45 of 1988.

114 Mahomed, I 'Project 90 The Harmonisation of the Common Law and the Customary Law: Report on conflicts of Law' (1999) South African Law Commission 33.

115 Constitution of the Republic of South Africa, Act 108 of 1996, s 39(2) & Traditional Leadership and Governance Framework Act 41 of 2003.

116 Section 211(3) of the Constitution of the Republic of South Africa,1996. See also *Bhe v Magistrate, Khayelitsha* (1) SA 580(CC) 150-153; *Hlope v Mahlalela* 1998 (1) SA 449 (T); *Metis v Padongelukfonds* [2002] 1 All SA 291 (T).

particular system of indigenous laws applies; and applicable principles.[117] It is judicious that the courts must satisfy themselves with the contents of customary law and evaluate local customs in order to ascertain the contents of legal rules, bearing in mind that customary law is not uniform.[118] This ascertainment was done through the use of communal leaders and leaders within the royal clan or group, this will apply when the court is ascertaining living customary law.[119] Currently, the major constitutional recognition for the application and practice of customary rules, laws, and principles is contained under sections 39(2),[120] 30,[121] and 31[122] of the Constitution, which affords indigenous people the right to cultural self-determination. Section 39(2) of the Constitution states that:

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117 *Maisela v Kgolane* NO [2000] 1 All SA 658 (T). The case concerned application by the appellant for a rescission of default judgment ordered against him for the return sale of a tractor which was sold and delivered to the appellant by the respondent. The Magistrate issued a rule *nisi* to hear reasons of the appellant on reasons they did not make it to court for the initial hearing on the matter. After the discharged of rule *nisi* the Magistrate refused to grant the rescission of default judgment after application motion; even with good reasons given by the appellant and furthermore the Magistrate proceeded to refuse a special plea made by the applicant based on the reason that indigenous law applied to the case because the litigants were black thus extinctive prescription did not apply. The appellant applied to court for the decision of three issues: (1) whether the magistrate had been wrong to discharge the rule in terms of which the attachment was suspended pending the outcome of the application for rescission of the judgment and to award costs against the appellant; (2) whether the magistrate had been wrong not to set aside the judgment of 3 September 1996 as the appellant had shown good cause and had not been in wilful default; and (3) whether the magistrate had been wrong to dismiss the special plea of prescription, in particular in his finding that indigenous law applied without any mention of it on the papers. In an appeal to a Provincial Division. The court held that the Magistrate was wrong in refusing to grant the rescission of the default judgment; the court further held that the magistrate's application of indigenous law and his consequent dismissal of the appellant's special plea, that it was wrong to adjudicate on a sale that was not governed by indigenous law according to the principles of indigenous law merely because the parties were both black. It was clear that indigenous law could apply in cases of sale only where the principles of indigenous law provided for the sale of the thing sold. It would also be wrong to regard such an agreement as regulated by indigenous law if common law principles not known to indigenous law had been agreed upon by the parties. Please see paragraph 3.2.1.1 on the discussion of *Sengadi v Tsambo* case using common law remedies for customary law disputes.

118 *MM v MN* 2013 (4) SA 415 (CC) par 48-51.

119 C Himonga & T Nhlapo *et al* (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 25-27.

120 Constitution of the Republic of South Africa, 1996.

121 Constitution of the Republic of South Africa, 1996.

122 Constitution of the Republic of South Africa, 1996.

> ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’[123]

This ensures that customary law is under scrutiny constitutionally and if such customary rules and laws which infringe on Chapter 2 of the Bill of Rights in the Constitution, such will be declared unconstitutional. Section 30 of the Constitution further states that:

> ‘Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.’[124]

Section 31 of the Constitution further states that:

> ‘Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community— (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.’[125]

As stated in the provision above cultural rights are important in providing due recognition, advancement, and protection of indigenous customary law. Custom as derived from culture and cultural practice is based on indigenous people's relationship with other human beings and everything natural organism within the land.[126] The concept of culture is derived from indigenous people's connection to the land. In the United Nations, Educational, Scientific and Cultural Organisation (UNESCO) defines culture as:

> ‘[…] spiritual and material activities and products of a given social group which distinguishes it from other similar groups … a coherent self-contained system of values and symbols as well as a set of practices that a specific cultural group

123 Constitution of the Republic of South Africa, 1996.
124 Constitution of the Republic of South Africa, 1996.
125 Constitution of the Republic of South Africa, Act 108 of 1996.
126 A Xanthaki *Indigenous Rights and United Nations Standards: self-determination, culture and land* (2007) 204.

reproduces over time which provides individuals with the required signposts and meaning of behaviour and social relationships in everyday life.'[127]

All the provisions contained in the Constitution give recognition of customary law but limits its application by placing it under the Bill of Rights compliance.[128] With regard to abrogation of customary law, the history indicated under this chapter lays a legal argument made by Ndima in his doctoral thesis when he argues for constitutional advancement of African indigenous law and he further elaborates that:

> '[…] when Africans lost control of their legal system, they had not abdicated sovereignty voluntarily to the newcomers. The validity of the imposition of Western jurisprudence is vitiated by the colonial use of such imperial acts as colonisation, conquest, and annexation as the basis on which the regime of Roman-Dutch law was imposed on South Africa.'[129]

This indicates the effect of history to the historical and current marginalisation of indigenous law. As Shivji further elaborates that, 'Eurocentric discourse either demonise or romanticise precolonial African cultures, ideologies, and philosophies.'[130] This is why the current status of customary law is distorted and misunderstood. As it currently stands, the historic marginalisation of customary law created three forms of customary law as we now know. Firstly, official customary law, which was and is captured in legal precedents and legislation.[131] Secondly, academic law, composing of treaties on customary law referred to by courts when deciding on disputes.[132] Lastly, living customary law, which is developed and applied by indigenous communities who still abide by it, and it is passed on orally and basically uncodified.[133]

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127 A Xanthaki *Indigenous Rights and United Nations Standards: self-determination, culture and land* (2007) 204.

128 Constitution of the Republic of South Africa, Act 108 of 1996, s39(2).

129 DD Ndima 'Re-Imagining and Re-Interpreting African Jurisprudence Under the South African Constitution' unpublished PhD thesis, University of South Africa, 2013 iii.

130 IG Shivji Utu, Usuwa, Uhuru: Building blocks of Nyerere's political philosophy in A Afolayan & T Falola (eds) 2017 *The Palgrave Handbook of African Philosophy* (United States: Palgrave Macmillan) 121.

131 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014)16.

132 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014)16.

133 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 16.

2 5 Conclusion

The historical marginalisation of customary law indicates how customary law has been marginalised over time. Limiting the regulation of customary into single or even uninitiated statute (indicates the disregard of living customary law and the customs that exist within the country). The legal fraternity requires a hands-on approach to eliminate the historical taint that continues to cover customary law. In order to proceed with the development, reform, and codification of customary law to fit the current society. It is still justifiable under the guise of international law imperatives and human rights law, to ignore the effects of colonial law as a replacement of modern law which seeks to cremate the origin of customary law. As much as natural law is considered as God-given law;[134] customary law is the natural law of indigenous people. The ill-fated view is eating away at customary law as indigenous people legal regimes and their identity that governs their customary practices.

[134] F Oakly *Natural Law, Laws of Nature, Natural Rights: Continuity and discontinuity in the History of Ideas* (2005) 3.

CHAPTER 3: Status of customary law under the current dispensation

3 1 Introduction

The South African Constitution provides explicitly for sanctioning the rights of various indigenous communities to maintain their cultural heritage, to practice their religion and use their language.[135] Sections 30 and 31 of the Constitution provides for the recognition and 'assumed' protection of customary law.[136] These entrenched rights are to an extent a way to ascertain the indigenous people's rights to self-determination.[137] The right to self-determination centres on the need to allow indigenous people to exclusively enjoy their own culture, to profess and practice their own religion, or to use their own language.[138] It is internationally pleaded that States to ensure that such communities are not discriminated against and have the right to identify themselves as linguistic, religious or ethnic minorities.[139] Though the supreme South African Constitution recognises the existence of these rights,[140] it can be argued that this does not in entirety cover all the practical aspects of this recognition. The enacted Chapter 9 institution under the Constitution tasked with the development and advancement of customary law of South Africa has been lagging;[141] The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities mandated with the promotion in respect to the rights of cultural, religious and linguistic communities; promoting and developing peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities; and recommending the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.[142] This is the very institution mandated with the development and reform

135 Constitution of the Republic of South Africa, 1996, s 31; Constitution of the Republic of South Africa, 1996, s 30; Constitution of the Republic of South Africa, 1996, s 9(3).

136 Constitution of the Republic of South Africa, 1996, s 30 & 31.

137 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014).

138 Ermacora 'The Protection of Minorities Before the United Nations' (1983) Recueil des Course 246 & International Covenant on Civil and Political Rights of 1966.

139 International Covenant on Civil and Political Rights of 1966, Article 27.

140 Under section 30, 31 and 112 of the Constitution of Republic of South Africa, 2006.

141 Constitution of the Republic of South Africa, 1996, s 181(1)(c).

142 Constitution of the Republic of South Africa, 1996, s 185(1).

of customary law indicates limited activism in attaining the goals mandated with; given the limited involvement in vouching for the creation legal centres or exhaustive research centres tasked with keeping up to date with indigenous people legal regimes, this should be a new focal area of focus for the Commission. The study will not sugar-coat the need for this important legal stance in ascertaining the rights and legal regimes of indigenous people. This also goes out to the requirement under section 39(1)(b) of the Constitution, which states that, when interpreting the Bill of Rights, a court, tribunal or forum; must consider international law.'[143] International law will be used to realise the importance of the call on the argument made in the study. Therefore, this chapter will highlight the current status of indigenous law under the constitutional dispensation and proceed in making an analysis of the judicial and legislative disparity of customary law. Lastly, the proceeding analysis will look at the hiatus of international recognition of indigenous people's legal regimes and human rights.

3 2 National status, recognition, the judicial and legislative disparity of customary law

Realising the importance of the Bill of Rights in ensuring the values of equality, freedom, and dignity especially for the marginalised women and children; which customary law may seek to exclude in terms of succession/ownership of land and property.[144] The judiciary is taking leaps to ascertain the rights of the marginalised groups, and this is commendable oversight, and this will be covered in depth in the proceeding paragraphs. The stance taken by the judiciary also questions the real legitimacy of customary law and the indigenous communities right to self-determination for customary law to apply according to their beliefs and customs. The evidence of the above statement is entrenched in the *Bhe v Magistrate, Khayelitsha,*[145] and *Mthembu v Letsela,*[146] cases. Both these cases indicate the current position of customary law in the constitutional dispensation, both these cases are similar in terms

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143 Constitution of the Republic of South Africa,1996, s 39(1)(b).

144 As illustrated in *Bhe v Magistrate, Khayelitsha* (1) SA 580(CC) & *Maisela v Kgolane* NO [2000] 1 All SA 658(T). Furthermore, this will be discussed further in the paragraphs.

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

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

of customary rule and principle challenged.[147] The cases that are to be discussed below are based on the rules of intestate succession in terms of Black indigenous people of South Africa. Intestate succession in terms of Black law exists on two predominant features. Firstly, it is based on the continuation of a family lineage of the husband as the family head, and is based on rule of male primogeniture, where the eldest male descendant of the deceased will succeed not only the property but also the status, position and standing of the deceased as the head of the household.[148] Then secondly, it is based on the collective and/or communal rights and responsibility with each customary family grouping.[149] Simons explicitly explains the male primogeniture rule and he states that:

> 'the rule of male primogeniture is consistent with the structure and functions of the communal family for indigenous people. The general successor, who succeeds in the office as well as to an estate, must be a male because only a man can be head of the household in the traditional society. Intestate succession through the male line forestalls the partitioning of an estate and keeps it intact for the support of the widow, unmarried daughters, and younger sons.'[150]

In the Supreme Court of Appeal case, in *Mthembu v Letsela*,[151] the Court also came to refrain to interfere with how Black indigenous people dealt with their succession[152] and the court refused to make any decision about the constitutionality of the rule of male primogeniture regulated under section 4(1) Black Administration Act 38 of 1927 and regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks.[153] In the *Mthembu* case, the court was faced with the question whether to recognise Ms. Mthembu and Mr. Letsela, the decease, as married couple; and whether to grant Mthembu her and her shared daughter right to claim

147 See *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) and *Mthembu v Letsela* 2000 (3) SA 867 (SCA).
148 *Mthembu v Letsela* 2000 (3) SA 867 (SCA) par 8.
149 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC).
150 H. J. Simons *African Women: their legal status in South Africa* 1968 (London: Hurst) 239.
151 *Mthembu v Letsela* 2000 (3) SA 867 (SCA).
152 81 of 1987.
153 Made in terms of 23(10) of the Act and promulgated under Government Notice R200 of 6 February 1987.

succession intestate on the property acquired between her and the deceased during the subsistence of their relationship/partnership.[154] The respondent, Mr. Letsela, the deceased father, claimed that Mthembu and the late Letsela were not married in terms of customary law and that the estate of the deceased should devolve to him by the rule of male primogeniture as regulated under the respective above-mentioned statutes.[155] The court refused to grant Mthembu's claim, and the court reasoned that 'it does not believe that the rule of male primogeniture is inconsistent and infringes on the rights entrenched in the Constitution.'[156] Also, the court further substantiated that, 'that the gender discrimination contented by the appellant was not for the court to answer based on the hiatus of its constitutionality.'[157] The court further refused to scrap section 23(4) of the Black Administrative Act which dealt with Black indigenous people succession, the court emphasised that, 'the provision of succession under the Act is a legislative recognition of 'Black' laws and custom,[158] allowing Black people the opportunity to choose how they wish their estates to be devolved upon their death, either by means of customary rules or by means of a will, it would be imposing for the court to declare a provisions unconstitutional based on it being *contra bona mores,* which allowed an individual to choose how to devolve or what to do with their estate after their death.'[159] Summarily the court stated that, 'neither the rule nor the regulation offended the common law. The regulation, it held, is neither unreasonable nor '*ultra vires* at common law.'[160] It merely gives legislative recognition to a well-established principle of male primogeniture according to which 'many Blacks, even to this day, would wish their estates to devolve.'[161] Under paragraph 47 the court reasoned that:

> 'To strike down the rule would be summarily to dismiss an African institution without examining its essential purpose and content.[162] Decisions like these

154 *Mthembu v Letsela* 2000 (3) SA 867 (SCA).
155 *Mthembu v Letsela* 2000 (3) SA 867 (SCA) par 2-3.
156 *Mthembu v Letsela* 2000 (3) SA 867 (SCA).
157 *Mthembu v Letsela* 2000 (3) SA 867 (SCA) par 33.
158 Black Administration Act 38 of 1927.
159 *Mthembu v Letsela* 2000 (3) SA 867 (SCA) par 45.
160 *Mthembu v Letsela* 2000 (3) SA 867 (SCA) par 22-24.
161 *Mthembu v Letsela* 2000 (3) SA 867 (SCA) par 22-24.
162 *Mthembu v Letsela* 2000 (3) SA 867 (SCA) par 47.

can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies.'[163]

The court's reasoning to the judgment was not convincing, it seemed like the judgment was protecting the nature of patriarchy under the customary rule to the disadvantaged minority (women and children). Human rights aside, it is imperative to create a level of fairness in the legal fraternity and even substantive fairness can be employed to ensure that vulnerable minority groups are protected and are not disadvantaged by customary law. If there is a clash between customary law and the standard reason for a fair society, a more flexible approach should be employed, which will be a true reflection of the development of customary.

In the constitutional court case of *Bhe v Khayelitsha Magistrate*, the case is based on the rule of male primogeniture,[164] it is a custom rule where line of succession or inheritance follows the eldest males in the family. In the *Bhe v Magistrate, Khayelitsha* the applicant acting on behalf of her two daughters brought an application to challenge the African customary law rule of primogeniture as well as section 23 of the Black Administration Act.[165] As the applicant wanted to secure the deceased's property for her daughters.[166] Under the African customary law rule of primogeniture as well as section 23 of the Black Administration Act, the house became the property of the eldest male relative of the deceased, in this case, the father of the deceased.[167] The Constitutional Court declared the African customary law rule of primogeniture unconstitutional and struck down the entire legislative framework regulating intestate succession of deceased Black South Africans.[168] According to the Court, section 23 of the Act was archaic since it solidified official customary law and grossly violated the rights of Black South Africans.[169] With regard to the customary law rule of male primogeniture, the Court held that it discriminates unfairly against women and

163 From *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) par 318 H; as discussed in *Mthembu v Letsela* 2000 (3) SA 867 (SCA) under par 47.
164 Black Administration Act 38 of 1927.
165 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 9-20.
166 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC).
167 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 9-20.
168 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 107-108.
169 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 107-108.

illegitimate children on the grounds of race, gender, and birth.[170] The result of the order was that all deceased estates are to be governed, until further legislation is enacted or developed by the legislature, by the Intestate Succession Act 81 of 1987, whereby widows and children can benefit regardless of their gender or legitimacy.[171]

By scrapping out the entire rule/law, the Court overlooked the indigenous communities who still practiced this custom and have embedded it as their custom.[172] In both cases, no other rules of interpretation were followed, unlike how it is done with common law, where rules of interpretation are followed. The purposive rule of interpretation could have been used and applied flexibly to allow consideration of the rule of male primogeniture,[173] Ngcobo J makes that suggestion in his minority judgment in the *Bhe v Magistrate, Khayelitsha*, and he states that, 'the courts have an obligation under the Constitution to develop indigenous law to bring it in line with the rights in the Bill of Rights the right to equality.'[174] Ngcobo J further elaborated that, 'the principle of primogeniture should not be struck down but instead should be developed to be brought in line with the right to equality, by allowing women to succeed the deceased as well.'[175]

The Court in both cases may have reconsidered not only the case at hand but the rest of the indigenous communities who still applied and practiced the law. The protection and advancement of South African indigenous people institution according to the reasoning employed by the *Mthembu v Letsela* case, that 'to [entirely] strike down the customary rule would be summarily to dismiss an African institution without examining its essential purpose and content.'[176] This is an important contention and was substantiated by Ngcobo J in his minority judgment in the *Bhe v Magistrate, Khayelitsha,* and will further be highlighted in the study under the judicial disparity of customary law.

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170 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 107-108.
171 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 108.
172 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 137 – 146.
173 *Notham v London Borough of Barnet* [1978] 1 WLR 220.
174 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 147.
175 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 147.
176 *Mthembu v Letsela* 2000 (3) SA 867 (SCA) par 47.

The Constitution also gives recognition to traditional authorities within the indigenous communities.[177] Section 211 of the Constitution state that: 'the institution, status and role of traditional leadership, according to customary law; 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 customs; [178] the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law are recognised, subject to the Constitution.'[179] These provisions only provide recognition and limits practice and application, they challenge what Tobin said about indigenous people's right to autonomy and the rights to self-determination.'[180] The constitutional recognition of customary law only looks good on the study but still leaves customary law floating and unpreserved in terms of application, the development and codification as evidenced in the cases discussed above. It is argued by Ngcobo J in his minority judgment that customary law is a fragmented piece of law and it was due to the fact that:

> 'In the past [also in the current dispensation as seen by current judicial rulings and legislative enactments].[181] Indigenous law was seen through the common law lens; it must now be seen as part of our law and must be considered on its own terms and not through the prism of common law. Like all laws, indigenous law now derives its force from the Constitution. Its validity must now be determined by reference not to common law but to the Constitution.'[182]

Due to its significance and questionable status customary law has become fragile law that is abrogated through misinterpretation, stasis, and erosion and with that to work with, it is becoming imperious to argue for proper placement of customary law in the

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177 The Constitution of Republic of South Africa, 1996.

178 The Constitution of Republic of South Africa, 1996.

179 The Constitution of Republic of South Africa, 1996.

180 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014) 2.

181 The current cases concerning marriage and succession [i.e. *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC); *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC); *Mthembu v Letsela* 2000 (3) SA 867 (SCA) etc.] and the enactments of legislation in relation to regulating customary law (Black Administration Act and Recognition of Customary Marriages Act), and Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

182 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 148.

hierarchy of the rule of law, as it still applicable and still is significant in terms of application and practice by the indigenous people.[183] The semiotic view of customary law has led to its pluralistic demise and through its development, reform and proper codification, it can legally be scrutinised where the legal regimes of indigenous people are viewed in the lenses of the indigenous people according to their formal practice and application through maintaining social and legal equality in the process. This will be highlighted in the proceeding headings, where the study gives evidence of the legislative-judicial disparity of customary law.

3 2 1 The disparity of customary law and the legislative and judicial preference to settler-colonial law

It is evident from the study's discussion above concerning the constitutional recognition and fictitious protection of customary law under the current dispensation. It is evidenced that the courts have partaken, if not attempting, to view customary law in the lens of the Constitution and common law, this view falls foul in allowing indigenous people regimes to successfully exist under the constitutional dispensation. It has significantly become worrisome to the way the courts and the legislature view customary law. It calls for cause to analyse the judiciary and the legislature's stance when dealing with customary law, particularly when interpreting and developing it. The reason the study seeks to look at this stance is based on the fact that, some courts have come up with ways to either be disinclined to develop customary law, or completely misunderstands its importance to indigenous people or plainly refusing to develop customary law thus failing to provide parties to a customary dispute to successfully seek justice and fairness.[184] It is also evident, as will be shown below, that the legislature has plainly refused to reform customary law by supplementing it with common law and/or making it a reference to common law.

3.2.1.1. The judicial disparity of customary law: Interpretation and

183 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014).

184 As to be seen in *Gumede v The President of the Republic of South Africa* 2009 (3) SA 152; *Mthembu v Letsela* 2000 (3) SA 867 (SCA); *Sengadi v Tsambo* 2019 (4) SA 50 (GJ); *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC).

It can be seen from the cases to be discussed in the study how the disparity seeks to further marginalise and not develop customary law. The judiciary over time since the constitutional dispensation has been constantly alienating customary law based on common law and constitutional interpretation approach. Such approach seeks to view customary law in a narrow view and thus flexible an inclusive approach is sought when seeking to interpret and develop customary law. Sach's J contentions solidify the study's contention:

> 'the secure and liberal development of our legal system demands that it draws the best from all the streams of justice in our country... It means giving long-overdue recognition to African law and legal thinking as a source of legal ideas, values, and practice.'[185]

In the case of *Sengadi v Tsambu,*[186] the court had to consider two aspects of the dispute. Firstly, it was based on the recognition of customary law marriage, and secondly, burial rites in terms of that law.[187] Since customary law marriage rights are regulated by the Recognition of Customary Marriages Act 120 of 1988,[188] the entire judgment complied with RCMA. In the above court case, the applicant sought an interdict order from the court, to prevent the burial of her deceased husband. The Respondent argued that the applicant did not have legal power to bury the deceased due to the fact that the applicant and the deceased were not married, as all the customary marital rites were not observed and thus did not conform to section 3(1)(b) of the RCMA, which provides that, 'all customary marriages must be 'negotiated and entered into or celebrated in accordance with customary law.'[189] Though the defendant in *Sengadi* case relied on the contention that section 3(1)(b) RCMA, in terms of the marriage ceremony was not complied with. For a valid customary marriage, section 3(1) of the RCMA provides that, '(1)(i) both spouses to be above 18 years old; (ii) both parties to consent to the marriage; and that (b) a customary marriage must be negotiated and entered into or celebrated in accordance with customary law.'[190] In

185 *S v Makwanyane* 1995 (3) SA 391 par 364.
186 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ).
187 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ).
188 (hereafter, RCMA).
189 Recognition of Customary Marriages Act 120 of 1998.
190 Recognition of Customary Marriages Act 120 of 1998.

Tswana culture, the handing over of the bride to the groom's family is essential for the valid recognition of customary law.[191] The court took judicial recognition of the customary marriage even when all customary practices were not observed as required under section 3(1)(b) of the RCMA.[192] The court contended that the RCMA creates room under section 3(1)(b) for the entire compliance of the marriage ceremony be viewed flexibly, and since each culture is different, and reliance on the marriage ceremony of handing off the bride as part of the compliance to the marriage celebration under section 3(1)(b) of the RCMA is discriminatory in its disposition.[193] The court contented that why should women be the ones to be handed over for a valid customary marriage to come into existence.[194] The court declared the rule and celebratory rites of handing over of the bride to the groom's family as unconstitutional and infringed on gender equality in the Constitution.[195] The court substantiated that:

> 'the customary law custom of handing over the bride is self-evidently discriminatory on the ground of gender and equality as between the prospective wife and the prospective husband. Because only women, after consenting to enter into a customary law marriage are subject to this unequal treatment by the custom of handing over which overrides the statutory requirements of section 3(1) of the Recognition Act as the essential requirements for a valid customary marriage.'[196]

The way the courts appear apt to view customary law under the common law and constitutional law lens could be influenced by litigation procedures that are highly Eurocentric and westernised. Our courts still would like to follow court procedures that are foreign to indigenous people. This causes a clash between indigenous law and imposed common law. An excerpt from the court's introduction sounds like this:

> '… [In] *Plascon Evans Pints Ltd v Van Riebeek (Pty) Ltd* where Corbett J, it is correct, wherein the proceedings on notice of motion proceedings, [for an interdict], of the facts have risen on the affidavits… The power of the court to

191 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 18.
192 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 37.
193 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 22-23.
194 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 37.
195 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 35-38.
196 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 37.

give such final relief is, however, not confined in such a situation …The denial by the respondent of fact alleged by the applicant may not be as such to raise a real, genuine or bona fide dispute of fact…'[197]

It would seem to imply that the court procedure which is Eurocentric styled are more civilised and tend to ignore and only impose indigenous styled in traditional courts. The psychology behind this view is what leads more indigenous people to seek common law remedies. Similar to, how this was presented in the *Tsambu* case.[198] The case is a customary law dispute case and the remedies sought stem from common law. The psychological view of white semiology still persists, and not in terms of race, but in terms of the perceived view of customary law and in terms of its interpretation and needed development. Roy Campbell poetic description of indigenous people regimes as perceived in a semiotic manner, and the poem goes like:

'The low sun whitens on the flying squalls,
Against the cliffs, the long grey surge is rolled
Where Adamastor from his marble halls
Threatens the sons of Lusus as of old.
Faint on the glare up towers the dauntless form,
Into whose shade abysmal as we draw,
Down on our decks, from far above the storm,
Grin the stark ridges of his broken jaw.
Across his back, unheeded, we have broken
Whole forests: heedless of the blood we've spilled,
In thunder still, his prophecies are spoken,
In silence, by the centuries, fulfilled.
Farewell, terrific shade! though I go free
Still of the powers of darkness art thou Lord:
I watch the phantom sinking in the sea
Of all that I have hated or adored.
The prow glides smoothly on through seas quiescent:
But where the last point sinks into the deep,

197 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 2.
198 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ).

The land lies dark beneath the rising crescent,

And Night, the Negro, murmurs in his sleep'[199]

The poem is based on the creation of the fear of Black people, as observed by someone who do not understand the nature and scope of their customs, this is called a semiotic view.[200] Not only customary law marginalised based on distorted semiology. On another note, customary law is marginalised on the claims that, 'customary law is not static, immutable, rigid and ossified…'[201] 'Contrary to belief, African Customary Law, it is living law because, its practices, customs, and usages have evolved over the centuries and that it should conform to the values of the Constitution and if not there are many aspects and values of traditional African law which will also have to be discarded in order to ensure compatibility with the principles of the new constitutional order.'[202] This contention made by Mokgoathleng J *in Sengadi v Tsambo*,[203] and Sach J in his minority judgment in the *S v Makwanyane*,[204] respectively, is misguided and misinterpreted in relation to the comprehension of customary law, and seeks to assume the worst about customary law, and this can be based on the semiotic interpretation of customary law. Where judges make assumptions based on their perception of what customary law must be under the constitutional guise. This stance removes the 'living' in customary law. Since this is based on a semiotic view, this was evident in the removal of section 32 of the Interim Constitution of South Africa, where the section recognised customary law as a separate legal dispensation.[205] Based on the contention that customary law is basically living law is more reason to view it in a nonconformist, practical and flexible manner. The study does not seek to ignore the importance of the Constitution in making all laws conform to it, as much as the

199 In J Cronin 'Turning around Roy Campbell's "Rounding the Cape".' (1984) 11 *English in Africa* 65.

200 J Cronin 'Turning around Roy Campbell's "Rounding the Cape".' (1984) 11 *English in Africa* 65.

201 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 20.

202 In caveat, Sack J in *S v Makwanyane* 1995 (3) SA 391 par 383.

203 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 20.

204 *S v Makwanyane* 1995 (3) SA 391 par 23.

205 GJ Koyana 'The Indomitable Repugnancy Clause' (2002) 98 *Customary Law Bibliography* 115.

Constitution is solidified by the contentions made in the case of *S v Makwanyane* by Mahomed J, that:

> 'In other constitutional countries, their Constitution seeks to only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is dissimilar: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirational egalitarian ethos, expressly articulated in the Constitution.'[206]

What must be remembered is that the South African Constitution is based on values, ethos, and laws taken from the western origin. The constitutional committee ignored the principles and values of the customary law until the value of Ubuntu was adopted and confirmed as from the interim Constitution of Republic of South Africa[207] in the *State v Makwanyane* and the court confirmed that:

> 'we (judiciary) do not automatically invoke each and every aspect of traditional law as a source of values, just as we do not rely on all features of the common law. Thus, we reject the common law traditions which are inconsistent with freedom and equality, and we uphold and develop many aspects of the common law, which feed into and enrich the fundamental rights enshrined in the Constitution'[208]

This contention by the court seems to imply that customary values are only taken into conscience when common law cannot solve socio-ethical problems. The socio-ethical problems emanate from the longstanding institutionalisation of gender. Moseneke J elucidated on this system and he stated that:

> 'the prominent feature of the law of customary marriage, as codified, is male domination of the family household and its property arrangements. Whilst

206 *S v Makwanyane* 1995 (3) SA 391 par 262.
207 In the preamble of Constitution of Republic of South Africa Act 200 of 1993.
208 *S v Makwanyane* 1995 (3) SA 391 par 383.

> patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case, it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage.'[209]

This is the reason why customary law still lacks in terms of reform and reputable legal development because emphasise is placed on gender inequality as protected under the Constitution.[210] This deviate from the true development of customary law because emphasise is placed on aspects that do not need the application of equality. Handing over of the bride has nothing to do with discrimination. It is based on the wife leaving her home and establishing a new family and integrated within her husband's family. Another issue that arises in terms of interpretation and understanding of customary marriages. In the case of *Bhe v Magistrate, Khayelitsha*,[211] the High Court took judicial recognition of customary marriage concluded by the applicant and the deceased, on the claims that *lobola* was paid even when the marriage ceremony was not concluded. Though the Constitutional Court denied the reliance of the courts a quo's contention to recognise *Bhe* case and the deceased dues on the word that *lobola* was paid.[212] Another decision that proved to be in issue regarding customary ceremonies to be observed for the conclusion of a valid marriage is the prior discussed case of *Sengadi v Tsambo*, where the court took judicial notice of the marriage between the applicant and the deceased regardless of the customary law requirement under the RCMA.[213] The above discussed judicial decisions seek to distort customary law further, due to misunderstanding of customary law, that is why the study states that a practical and flexible approach should be dispensed when approaching and interpreting customary law.[214]

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209 *Gumede v President of the RSA and Others* 2009 (3) SA 152 (CC) as quoted in *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 27.
210 Constitution of Republic of South Africa, 1996, s 9.
211 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC).
212 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 13.
213 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ).
214 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 42.

3.2.1.2. The legislative disparity of customary law

i. Customary marriages

Since the enactment of the RCMA,[215] which came into force on 15 November 2000, there have been quite a few cases that challenged the provisions within the Act. The RCMA was the attempt by the legislature to regulate customary marriage especially with regard to polygynous marriages.[216] The Act came under fire for some of its discriminatory or exclusionary provisions against women to claim their proprietary rights under customary marriages. Specifically, section 7(1) and (2) of RCMA,[217] the court had to consider section 7 constitutional validity in terms of its exclusion for the women who were married before the Act's enforcement.[218] Women in monogamous customary marriages who got married before the RCMA's enforcement, could not claim their proprietary rights because of the matrimonial property system of such marriages were out of community of property.[219] Whilst marriages concluded after the enforcement of the RCMA wherein community of property.[220] This question why did the act not apply retrospectively to protect such women? These provisions were challenged in the case of *Gumede v The President of the Republic of South Africa,*[221] where the applicant concluded a customary marriage with her husband in 1968. The husband instituted divorce. Due to the nature of the customary marriage as classified as out of community of property and challenged the provisions under the RCMA. The applicant claimed that the provisions sought to discriminate wives who concluded their marriages before the enforcement of the RCMA. Section 7(1) of the RCMA stated that, 'It provides that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.'[222] Whilst, section 7(2) stated that, 'marriage entered into after the

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215 Recognition of Customary Marriages Act 120 of 1998.
216 Recognition of Customary Marriages Act 120 of 1998.
217 Recognition of Customary Marriages Act 120 of 1998.
218 AS Louw, & LN Van Schalkwyk, LN. *Introduction to Family Law: Student Textbook* 2nd ed (2019) 83.
219 AS Louw, & LN Van Schalkwyk, LN. *Introduction to Family Law: Student Textbook* 2nd ed (2019) 83.
220 AS Louw, & LN Van Schalkwyk, LN. *Introduction to Family Law: Student Textbook* 2nd ed (2019) 83.
221 *Gumede v The President of the Republic of South Africa* 2009 (3) SA 152.
222 Recognition of Customary Marriages Act 120 of 1998.

commencement of the Recognition Act is a marriage in community of property.'[223] The court concluded that the provisions were indeed discriminatory and declared them unconstitutional.[224] The issue lies with the legislative oversight of the development and the protection of indigenous people with regard to customary law. This is not the only issue with regard to the RCMA, the Act refers to the Matrimonial Property Act 88 of 1984, for customary marriages concluded in community of property according to the default system in South Africa.[225] This means that if married in community of property, you are bound by Matrimonial Property Act, this questions the relevance of the RCMA, because the Act does not establish its own identity in terms of the regulation of Black people customary marriages. This leads back to the semiotic interpretation and view of customary law. This the blind spot that customary law finds itself under the current dispensation.

ii. Succession in terms of customary law

Due to indigenous people's unfamiliarity with drafting Wills to regulate their estate, this status quo has raised a lot of disputes regarding the rights of wives married under customary rites to inherit intestate without an express contract akin to that. One must remember that the aspect of Wills and the devolvement of the estate of indigenous people is a foreign concept and arises from common law. Only indigenous people who have money, resources, and knowledge about the devolvement of one's estate are able to make an informed choice.[226] The judge in *Mthembu v Letsela* erred in assuming that indigenous people understand the concept of succession. Where most indigenous communities devolve their intestate and also based on the rule of male primogeniture.[227]

What the judiciary and the legislature understand is that indigenous people tend to make death bed wishes or emphasise on the male primogeniture for succession purposes. This indicates the importance of maintaining the head of the family household. The aim is to ensure a male head of the family, is able to take care of the

223 Recognition of Customary Marriages Act 120 of 1998.
224 *Gumede v The President of the Republic of South Africa* 2009 (3) SA 152.
225 Recognition of Customary Marriages Act 120 of 1998.
226 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 66.
227 *Mthembu v Letsela* 2000 (3) SA 867 (SCA).

household and the family, thus creating communal households.[228] The distortion comes at the advent of selfish acts of designated male successors, through mismanagement of the households or money-making schemes through the sale of the property of the deceased. Succession under customary rest on the principle of the acquisition of the status and family property of the deceased over their lifetime as the head of the household.[229] The successor will acquire the rights duties and obligations of the person he succeeded.[230] Unlike common law succession which focuses on inheriting or succeeding the deceased assets, profits or property.[231] The main Act which regulated customary succession, Black Administration Act 38 of 1927, was challenged in the case of *Bhe v Magistrate Khayelitsha,*[232] and *Ramuhovhi v The President*.[233]

In the *Bhe* case, the court observed whether extra-marital children and domestic partner of the deceased could inherit interstate. The court declared the provision unconstitutional, which discriminated against gender and children with regard to succession and remedied the unconstitutionality by making the Intestate Succession Act,[234] applicable to indigenous people.[235] Balancing the rights of the children under section 28(2) of the Constitution, where the best interest of the child is of paramount importance and ensuring the protection of women against gender discrimination.[236] The flexible and practical means sought by the court are commendable, but the judgment further marginalised and subordinated customary law to common law. The court's negation to reform and develop customary roved the existential crisis that customary law finds itself under the constitutional guise.

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228 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 160.

229 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 162.

230 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014)162.

231 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014)162.

232 2005 1 BCLR 1 (CC) par 9-20.

233 2018 (2) BCLR 217 (CC).

234 81 of 1987.

235 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 66.

236 The Constitution of Republic of South Africa, 1996.

The declaration of unconstitutionality with regard to the provisions under Black Administration Act,[237] and the rule of male primogeniture came under heavy criticism in the minority judgment of Ngcobo J. The Judge reiterate that, 'it is first important to understand the nature and scope of application of the rules established under customary law.'[238] Customary law in terms of interpretation must be sufficiently ascertainable and that no doubt must exist in terms of its practices and application by the indigenous people, and as such to its acceptability, expert evidence must be adduced in court.[239] The judge further reiterated that, 'Indigenous law is a dynamic system of law which is continually evolving to meet the changing circumstances of the community in which it operates. It is not a fixed body of classified rules.'[240] Therefore normal interpretation rules and textbook approaches should be discarded, and a more practical and flexible approach must be adopted to ascertain the indigenous people's legal regimes.[241] Additionally, the judge stated that, 'the background and social context of the development of customary law succession must be observed and ascertained.'[242] Ngcobo J further stipulates that:

> 'the rules of indigenous law, in particular, the rule of primogeniture, have their origin in traditional society. This society was based on a subsistence agricultural economy. At the heart of the African traditional structure was the family unit. The family unit was the focus of social concern. Individual interests were submerged in the commonwealth. The system emphasised duties and responsibilities as opposed to rights. At the head of the family, there was a patriarch or a senior male who exercised control over the family property and members of the family. The family organization was self-sufficient. Within this system, the position of each member of the family was based on an equitable division of labour'[243]

This customary position indicates the misunderstood nature of customary law. That is why during its reform, development, and protection, the legislative and judicial stance

237 38 of 1927.
238 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 147.
239 *Bhe v Khayelitsha Magistrates* 2005 1 BCLR 1 (CC) par 150.
240 *Bhe v Khayelitsha Magistrates* 2005 1 BCLR 1 (CC) par 153.
241 *Bhe v Khayelitsha Magistrates* 2005 1 BCLR 1 (CC) par 155.
242 *Bhe v Khayelitsha Magistrates* 2005 1 BCLR 1 (CC) par 155.
243 *Bhe v Khayelitsha Magistrates* 2005 1 BCLR 1 (CC) par 155.

must change to support and supplement the marginalised areas of customary law. One cannot objectively and successfully rule on what they do not understand and have not ascertained.

Whilst in the *Ramuhovhi v The President*,[244] the court had to considered wives in polygynous marriages and their rights to succeed under the RCMA. The RCMA Act only recognised polygynous marriages entered into after the Act's enforcement. The stance by the Act, excluded and discriminated against wives who concluded polygynous marriages before the enforcement of the Act, as their marriages were regulated under customary law. Therefore, women in polygynous marriages were unable to succeed to the household and the estate of the deceased husband. The Constitutional Court gave a suspensive and resolute order, and ordered that:

> 'Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, and these rights shall be exercised as follows: (i) in respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.'[245]

The court allowed the legislature to remedy the constitutional order, and currently as it stands the court accepted the Recognition of Customary Marriages Amendment Bill, which proposes that:

> 'the ownership and other rights and rights of management and control over the matrimonial property. The rights as contemplated must be exercised: in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family until constituted by the house concerned; and in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses; Each spouse retains exclusive rights over his or her personal property.'[246]

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244 2018 (2) BCLR 217 (CC).
245 *Ramuhovhi v The President* 2018 (2) BCLR 217 (CC) par 71.
246 Recognition of Customary Marriages Amendment Bill, 2019.

This is a milestone for minorities disadvantaged by stringent and un-transformative customary law, which sought to create an unfair advantage to males at the loss of the unknowing wives, but this is still a setback for the development and reform of customary law. Piecemeal understanding of customary law can no longer be accepted as a norm.

iii. Legislative references: the legislative semiology

The persistence of apartheid and segregating Black people is indicated in the Matrimonial Property Act,[247] which regulates the proprietary system of people married under civil rights/marriages. The Act still persists on the fact that the Act applies to whites, coloured and Asians as on 2 November 1984 and for Blacks as on 2 December 1988 with regard to the regulation of the married spouse's property system.[248] The fact that the legislature still allows the Act to state such discriminatory and demeaning titles and the fact that the judiciary is still interpreting this Act, this indicates the illusive semiology to how indigenous people are viewed and still viewed in the current dispensation. The persistence of apartheid laws and legislation indicates the backward view that the country is still under the apartheid prison dilemma. Mere declaration of unconstitutionality on several discriminatory provisions under the Act is not a solid solution.[249] An entire amendment of the Act must be made to revise the matrimonial property system of all South Africans to apply uniformly to all parties entering into civil marriages without race classifications or differentiation.

3 3 International status and recognition of indigenous law

Within the new era of rule of law, indigenous law no longer exists in isolation or away from the rest of the world. South Africa, as a signatory of the Universal Declaration of Human Rights. Universal Declaration of Human Rights (hereafter, UNDHR) has created a world that has to hold to account any hint of discrimination or unfair rule of

247 Matrimonial Property Act 88 of 1984.

248 Matrimonial Property Act 88 of 1984.

249 Recently the court declared the discriminatory provision, sections regulating the Matrimonial system of Black people which stated that marriages concluded before the Act were out of community of property, unconstitutional. See News24 https://www.news24.com/SouthAfrica/News/discriminatory-apartheid-era-black-marriage-law-reversed-in-high-court-20200127 (accessed 07 February 2020).

law; such laws have to conform to the United Nations Human Rights Declaration.[250] International bodies have by far showed interest in many aspects of the rule of law of indigenous people, this includes the mentioned Universal Declaration of Human Rights and the Convention on Biological Diversity,[251] which originates from the Agreement on Trade Related Aspects of Intellectual Property (TRIPS),[252] it is intended to ensure the protection and fair trade of indigenous knowledge and resources.[253] Furthermore, decisions by treaty bodies, national courts, and regional divisions have shown legislative willingness and preparedness to interpret and apply indigenous people's customary rights in an expansive fashion.[254] This arises from the 1980 Native Title, recognising Canadian and Australian indigenous communities and their laws and practices.[255] Although there are diverse indigenous people dispersed around the world, their common characteristics and common history of discrimination and systematic oppression have led to a shared claim within the international sphere.[256] Article 27(1) of the Universal Declaration of Human Rights state that: 'everyone has the right freely to participate in the cultural life of their community, to enjoy the arts and to share in scientific advancement and its benefits.'[257] The right given in the UDHR is not limited by any right, the only infringement which is not allowed is when such enjoyment and practice seek to infringe on another's rights, freedom, and security.[258] Since the prevalence of indigenous law-related cases, the Commission Drafting Group of United Nations proposed for the passing of the Declaration on the Rights of Indigenous Peoples.[259] During its ratification 144 states voted for its passing (this

250 Universal Declaration of Human Rights 1948.

251 The Convention on Biological Diversity (CBD) was opened for signature at the Earth Summit in Rio de Janeiro on 5 June 1992 and entered into force on 29 December 1993.

252 The Trade-Related Aspects of Intellectual Property Rights (TRIPs) is one of the multilateral treaties adopted at the end of the Uruguay Round in 1994.

253 O Dean & A Dyer (eds) *Dean and Dyer Introduction to Intellectual Property* 2014 (Oxford Academic Press: Cape Town) 332.

254 A Xanthaki *Indigenous Rights and United Nations Standards: self-determination, culture and land* (2007) 1-2.

255 J Dugard *International Law: A South African Perspective* 2016 (Cape Town; Juta) 100 – 120.

256 A Xanthaki *Indigenous Rights and United Nations Standards: self-determination, culture and land* (2007) 1.

257 Universal Declaration of Human Rights 1948.

258 Universal Declaration of Human Rights 1948.

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

includes South Africa), and only 4 countries voted against it (Australia, Canada, New Zealand, and the United States), with only 11 countries abstaining from voting (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine).[260] This was due to the persistence and call by the indigenous communities for the recognition of their legal regimes and independence by seeking autonomy from colonial laws and decolonisation from the colonial influence.[261] Specifically, South Africa, the systematic discrimination which still enforces colonial governance style and adoption of principles and rules within state institutions, has been found to still exist within higher learning institutions. The call for decolonisation within learning institutions means to root out colonialism that still persists in state learning institutions.[262] The saying that, 'if you learn you become,'[263] is the reason where decolonisation is sought to be eradicated from South African learning institutions. The recent call by students and University of Free State management to phase out Afrikaans as a teaching medium in the case of *Afriforum v The University of Free State*,[264] is what radical transformation was sought by the affected parties.[265] In the case of *Afriforum* made an application to the Constitutional Court to advance the rights of students who wanted to be taught in Afrikaans.[266] The dual-medium system of learning in the University of Free State at that time created direct discrimination and segregation between students;[267] the dual-medium learning instruction divided students by race. It was indicated in the University Council report that it was evidence of this racial division due to the fact that Afrikaans students where majority white and those who opted for English where majorly students of colour,[268] including international students; also classified as the minority in the higher learning institutions.[269] The council stated further that it posed not only racial discrimination but

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260 United Nations: Department of Economic and Social Affairs 'United Nation Declaration on the Rights of Indigenous Peoples' (2007) http://www.un.org/development/desa/indgenouspeople/declaration-on-the rights-of-indigenous-peoples.html (accessed 20 September 2019).

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

262 *Afriforum v The University of Free State* 2018 (2) SA 185 (CC) par 1.

263 NL Morudu. LLB (University of Pretoria: 2018); Master's in law (University of Pretoria: 2019).

264 *Afriforum v The University of Free State* 2018 (2) SA 185 (CC).

265 *Afriforum v The University of Free State* 2018 (2) SA 185 (CC) par 47.

266 *Afriforum v The University of Free State* 2018 (2) SA 185 (CC).

267 *Afriforum v The University of Free State* 2018 (2) SA 185 (CC) par 15.

268 *Afriforum v The University of Free State* 2018 (2) SA 185 (CC) par 17.

269 *Afriforum v The University of Free State* 2018 (2) SA 185 (CC) par 17.

also tend to disadvantage students who opted for English as a learning medium, especially indicated by the fact that most of the students where English second additional language, whilst, students who took Afrikaans were home language speakers and learners.[270] In response to the policy framework developed by the Minister of Education, which was in compliance with section 3 of the Higher Education Act,[271] the University of Free State created a single medium language instruction to create uniformity and as part of their radical transformation policy.[272] This stance was not only with effect to the University of Free State, but major Universities (i.e. University of Pretoria, Potchefstroom University and Stellenbosch University) also established prior to the constitutional dispensation maintained this *status quo* with regard to dual-language instruction. [273] Currently, some of those universities are restructuring their language policies, proceeding the *Afriforum* case.[274] This indicates the action from indigenous people to call for recognition of their human rights and advancement and fair application of their legal regimes, in South Africa, it came as the decolonisation of academic state institutions. Due to international calls by indigenous communities and bodies representing indigenous people, United Nations saw it fit to enact the United Nations Declaration on the Rights of Indigenous Peoples[275] to address the issues of indigenous people's right to self-determination and autonomy from colonial laws that sought to eradicate their legal regimes.[276] Article 34 of the United Nations Declaration on the Rights of Indigenous Peoples states that:

> 'Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.'[277]

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270 *Afriforum v The University of Free State* 2018 (2) SA 185 (CC) par 18.
271 101 of 1997.
272 *Afriforum v The University of Free State* 2018 (2) SA 185 (CC) par 15.
273 GJ Gerwel 'Report on the position of Afrikaans in the University System' 14 January 2002.
274 A Areff, 'English to be main language of instruction at Stellenbosch University' http://m.nws24.com/SouthAfrica/News/Eglish-to-be-main-language-of-instructionat-stellenbosch-university-20151113> (accessed 2 November 2019).
275 United Nation Declaration on the Rights of Indigenous Peoples, 2007.
276 J Dugard *International Law: A South African Perspective* (2016) 100 102.
277 United Nation Declaration on the Rights of Indigenous Peoples, 2007.

Tobin states that, 'these are the instruments that affirm the status of customary law as a source of law that must be taken into consideration by states in the development of any law and policy affecting the rights and wellbeing of indigenous people.'[278] The study implores to differ; in the first place why such instruments have to exist in application and recognition of laws, rules, and customs that existed before colonialism? These international declarations may cause the eradication of mostly indigenous practices and customs, due to the fact that most indigenous rules are based on their norms on patriarchy systems and are against the non-discriminatory articles under the UNHRD.[279] This is the reason why it is imperative for South Africa to develop customary law, to the benefit of the indigenous people who conform to customary principles and law. Because if customary law is to be developed strictly according to the requirements under human rights law it would infringe on communities who still and are comfortable with the rule of system, the study is not denying the possibility of emancipation from the system of patriarchy as imposed by customary law. It is suggested that customary law development should incorporate a flexible approach and giving due consideration to equality and fairness. Development should benefit the indigenous people involved. Internationally, most countries prefer the adopted common law or settler-colonial laws over customary law.[280] Therefore, countries are not inclined to create a space for both the existence of western law and indigenous law, practically, so to say.[281] As the study stated earlier, that customary law is important in recognising indigenous people's rights to land; resources; guiding with the decision on the exploitation of their customs and resources or on their land; re-defining the relationship between the state and third parties and scoping decision making.[282] These can also assist in international peace missions, adopting some of customary norms assist in better ways to solve disputes instead of the western way (i.e. restorative justice, social justice that is community-based and human centred; transformative justice based on involving all parties and families and community in

278 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014) 1-2.

279 Preamble and Articles covered in the Universal Declaration of Human Rights 1948.

280 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014) 4.

281 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014) 4.

282 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014) 4.

dispute resolution; the need to create a system of rehabilitation through dialogue and community service and not incarceration of perpetrators, etc.)[283] Seeking to ensure that indigenous peoples customary laws are a solid body of law and not just habitual practice in order to ascertain customary law internationally and nationally and vouching for its development so that is can apply alongside the Bill of Rights through its considerate development, application, and preservation.

3 3 1 The protection of indigenous people legal regimes through the United Nations Declaration on the Rights of Indigenous Peoples

Under international recognition to ascertain the legal regimes of indigenous people the UNDRIP sets the scene for the recognition of indigenous people's legal regimes. The preamble sets the scenery for that recognition and it states that the UN Assembly seeks to with the above declaration:

> 'the UN Assembly is affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such; affirming also that all peoples contribute to the diversity and richness of civilisations and cultures, which constitute the common heritage of humankind; the UN General Assembly is concerned that indigenous peoples have suffered from historic injustices as a result of, *inter alia*, their colonisation, and dispossession of their lands, territories, and resources. Thus, preventing them from exercising, in particular, their right to development in accordance with their own needs and interests; Recognising that respect for indigenous knowledge, cultures, and traditional practices contributes to sustainable and equitable development and proper management of the environment.'[284]

Even at the global marginalisation of indigenous people legal and human rights regimes the UN General Assembly:

> 'recognise the respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper

283 T Nhlapo "The judicial function of traditional leaders: A contribution to restorative justice?" Paper presented at the conference of the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) 14-17 March (2005) 2.

284 In the Preamble of United Nation Declaration on the Rights of Indigenous Peoples, 2007.

management of the environment, virtue of which they freely determine their political status and freely pursue their economic, social and cultural development; Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.'[285]

Given the general recognition of indigenous people legal regime internationally it is with due regard to give effect to call given by the UN General Assembly, not only this ascertainment of the indigenous people rights and legal regimes be a façade it must reflect the current social-moral and economic aspects and also observe the human rights as stated in the UNHRD. As it is stated under the preamble of UNHRD that, 'The Universal Declaration promises to all the economic, social, political, cultural and civic rights that underpin life.'[286] Given the discussion above and identified legislative and judicial interpretation, South Africa has a long way to go in order to comply with directives under the mentioned international instruments.

3 4 Conclusion

As evidenced by the judicial and legislative disparity of customary law, the current dispensation still has not caught up to the requirements as set out by the international instruments covered in the study. The study still wants to garner for the exclusive pluralistic interpretation of customary law and also successful compliance of international law instruments. Denoting that South African customary law to be interpreted in ways which are beneficial to the indigenous people involved in the dispute. In relation to customary marriages, the court in *Gumede v The President of the Republic of South Africa* emphasised that, 'customary marriages must not be seen through the prism of the property system of civil marriages. Customary marriages must be understood within their own setting,'[287] it holds true for the entire customary law, it should be viewed as its own special rule of law, not in the essence of common law. In light of this, is it possible to create that indigenous pluralism, especially considering

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285 In the Preamble of United Nation Declaration on the Rights of Indigenous Peoples, 2007.

286 Universal Declaration of Human Rights 1948.

287 *Gumede v The President of the Republic of South Africa* 20093 SA 152 (CC) par 43.

international requirements as noted under section 39(1)(b) of the Constitution which inclines the judiciary to consider international law when interpreting customary law,[288] and the legislature to follow through in terms of the development and reform off customary law?

288 Constitution of Republic of South Africa, 1996.

CHAPTER 4: Creating indigenous pluralism: Possible or not?

4 1 Introduction

Given the historical and modern version of customary law, it surmises to indicate South Africa embeds a diverse society.[289] The element of cultural diversity is what questions the relevance of reforming and developing customary law. Observing this mass diversity begs the question of whether the state's legal institutions reform can and develop customary law, especially taking into consideration living law, which is considered fragmented and unstable due to its constant development according to urbanisation and modern life. Whilst, urbanisation is defined as the rise in the proportion of people living in towns and cities.[290] People mostly migrate from rural areas to cities and towns to find work/financial opportunities. In the cities and/or urban areas more indigenous people who migrated option to settle their disputes using common law rather than customary law, since the influence of common law is patent within state law pluralism.[291] Modernism, as linked to urbanisation and to this study, is when indigenous people abandon their customs in favour of common law. This is highlighted within the court systems which settle disputes based mostly on common law.[292] When indigenous people migrate to urban areas and seek to resolve their disputes based on common law remedies. This exists due to the popularity of the imposed common law, as this is an adopted system, it would be expected that under the current constitutional dispensation legal reform will settle the historic marginalisation by reforming, developing and protecting indigenous people's legal regimes. As indicated by the adopted legal system, South Africa's legal pluralism exists as a result of the predominance of cultural pluralism,[293] meaning that the state's legal culture is un-transformative with regard to giving predominant development and

289 G Van Niekerk, 'The endurance of the Roman law tradition' http://studia.law.ubbcluj.ro/articol.php?articolId=474 (accessed 26 July 2015) p 1/8.

290 Internet Geography http://www.geography.learntheinternet.co.uk/topics/urbanisation.html (accessed 18 June 2019).

291 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014).

292 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014); the argument is covered in the introduction of the book.

293 G Van Niekerk, 'The endurance of the Roman law tradition' http://studia.law.ubbcluj.ro/articol.php?articolId=474 (accessed 26 July 2015) p 2/8.

reform to customary law. Moreover, legal pluralism refers to a situation where a population observes more than one law.[294] Legal pluralism decentralises state law and draws attention to and understanding of the multiple legal systems that exist officially and unofficially within the single legal order. Griffiths extends the definition by stating that, 'legal pluralism is associated with a multicultural society in which various legal systems are observed, that it is the result of the prevailing cultural pluralism'.

4 2 State Law pluralism

State law pluralism refers to laws that are recognised by the state and such are promulgated as law,[295] this implies that living customary law is not recognised in this instance. Weak legal pluralism is the recognition and regulation by the state of a plurality of legal order.[296] Since South Africa is a democratic country. The supreme law of the Republic is the Constitution of Republic of South Africa, it oversees all the other laws adopted from the pre-constitutional era.[297] Van Niekerk observes the current state recognition of other law which are not supreme but subordinate to the Constitution, it is also historically observed that:

> 'the autonomous legal tradition was introduced into the Southern African region during the seventeenth century when the Dutch imposed Roman-Dutch law on the existing African customary legal systems of the Cape of Good Hope. The indigenous African populations had no desire to receive the imposed foreign law into their customary laws.'[298]

This was recognised as South Africa's state law at that time. State law pluralism is currently at the subordinate existence of the supreme Constitution. All the rights and obligations offered by other law other than the Constitution is strictly limited and under

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294 G Woodman, 'Legal pluralism in Africa: The implications of state recognition of customary laws illustrated from the field of land law' (2011) 1 *Acta Juridica* 35.

295 C Himonga & T Nhlapo *et al* (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 45.

296 C Himonga & T Nhlapo *et al* (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 45.

297 B Berkink, *Principles of South African Constitutional Law* 2nd ed (2015).

298 G Van Niekerk, 'The endurance of the Roman law tradition' http://studia.law.ubbcluj.ro/articol.php?articolId=474 (accessed 26 July 2015) p1/8.

the Constitution.[299] This imposes a stringent interpretation of customary law, as indicated in the above discussion of *Sengadi v Tsambo* case, that the rights entrenched within the Constitution are used to disqualify customary law and rules as practiced by indigenous people without an in-depth investigation into the nature and scope of the customary rule challenged.[300]

4 3 Foreign comparative analysis in terms of the adoption, status, and development of customary law

To successfully understand the scope and the importance of customary law for indigenous people, comparative analysis needs to be adopted to ensure that nothing is left to question. Learnings from countries that have successfully maintained the rule of indigenous law post-colonialism are both admirable and call for guidance to South Africa. The study would like to look at foreign countries that seek to maintain and protect the indigenous people's legal regimes, based on the fact that, most of these countries still want to abide and follow indigenous law, and not seek common law remedies for their indigenous related disputes. The comparative study is not exhaustive in which the comparative analysis will look only at the maintainability and the legislative processes adopted by the selected countries for analysis.

4 3 1 African colonialism and the status of indigenous law for comparative analysis

African colonialism washed over and significantly marginalised indigenous law for African inhabitants. South Africa was not alone in the advent of colonialism, the rest of African indigenous people legal regimes were subordinated to colonial settlers' law, such imposition of settler's colonial law was evident in the disposition of one of the jurisdictional governors in Britain, specifically, Governor of New South Wales. They ensured that all the African indigenous people under their country of jurisdiction were their subjects and subjected to settler's colonial rule and laws.[301] In the directives

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299 Section 36(2) of the Constitution of Republic of South Africa, 1996. The section states: 'Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

300 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ).

301 Report by Grey 'Method for Promoting the Civilization of Aborigines, Enclosure in

issued by the Colonial Office, the Governor's-General per jurisdiction were let known that:

> '[as submitted], therefore, that it is necessary from the moment the Aborigines of this Country are declared British Subjects they should, as far as possible, be taught that the British Laws are to supersede their own, so that any native, who is suffering under their own customs, may have the power of an appeal to those of Great Britain, or, to put this in its true light, that all authorized persons should in all instances be required to protect a native from the violence of his fellows, even though they be in the execution of their own laws.'[302]

This was severely common in African common-wealth countries, where British rule was significant and responsible for the marginalisation of indigenous law, rules, and principles that governed and are the locus of the cultural application and practice of the indigenous communities.[303] Across these countries, the basic principle of the recognition and application of indigenous law was that indigenous law has to be proven by evidence unless it has by frequent proof become sufficiently renowned to be judicially noticed. Consequently, customary law was and is treated substantially as if it were a question of fact, for the purpose of proof, with regard to South Africa this is evident in the Law of Evidence Amendment Act 45 of 1988,[304] this also applies significantly to independent African countries or post-colonial African countries. For example, the Nigerian Evidence Act 1945 states similar facts about the interpretation and application of indigenous law.[305] In the case of *Angu v Attah in* 1916, at that time the court stated that:

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correspondence, Lord John Russell to Sir George Gipps' (1840) 1 *HRA* 35.

302 Report by Grey 'Method for Promoting the Civilization of Aborigines, Enclosure in correspondence, Lord John Russell to Sir George Gipps' (1840) 1 *HRA* 35.

303 Report by Grey 'Method for Promoting the Civilization of Aborigines, Enclosure in correspondence, Lord John Russell to Sir George Gipps' (1840) 1 *HRA* 35.

304 Subsection (1) states that, 'Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of *lobolo or bogadi* or other similar custom is repugnant to such principles.'

305 Section 1 of Nigerian Evidence Act 1945, 'A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. The burden of proving a custom shall lie upon the person alleging its existence.'

> ‘As is the case with all indigenous law, it has to be proven in the first instance by calling on witnesses who are acquainted with the native customs, until the particular customs have, by frequent proof in the court, become so notorious that the courts will take judicial notice of them.’[306]

This is the issue with post-colonial African countries, in that they do not serve as an appropriate comparative reference in terms of the reform, development, and codification of indigenous laws in their countries. This places a problem since only two countries, Liberia and Ethiopia, are the only countries that were never colonised.[307] Liberian was formed as a country by the United States of American emancipated slaves.[308] The founders of Liberia brought with them common law, alongside the institution parliament and democracy.[309] Currently, Liberia has a dual legal system, where they recognise both common law precepts and indigenous law as a source of law.[310] This is significant because the comparative analysis cannot be used looking at Ethiopia as currently there are civil unrest and governmental state fail of and similar legal reference to South Africa in terms of Liberian legal source. Nevertheless, some of the post-colonial African countries have adopted a pluralistic legal structure/system similar to South Africa.[311] In that under their constitutional dispensation, common/positive law is applied concurrently with indigenous law. Other African countries have, since independence, have elected and integrated legal systems, partly in response to the indigenous people's demands of nation-building, and partly as a reaction and in contrast to pluralism as a system of separate development of indigenous law.[312] Some of the states, for instance, Nigeria abolished customary

306 *Angu v Attah* (1916) Gold Coast Privy Council Judgments (1874-1928) 43, 44.

307 Cambridge Online Dictionary, http://dictionary.cambridge.org/dictionary/english/diversity (accessed 16 March 2017).

308 H Kabbar ‘A guide to the Liberian Legal System and Legal Research’ Hauser Global Law School Program http://www.nyulawglobal.org/globalex/LIBERIA.htm (accessed 1 November 2019) par 2.

309 H Kabbar ‘A guide to the Liberian Legal System and Legal Research’ Hauser Global Law School Program http://www.nyulawglobal.org/globalex/LIBERIA.htm (accessed 1 November 2019) par 2.

310 H Kabbar ‘A guide to the Liberian Legal System and Legal Research’ Hauser Global Law School Program http://www.nyulawglobal.org/globalex/LIBERIA.htm (accessed 1 November 2019) par 12-13.

311 Australian Law Reform Commission, ‘Report 31: Recognition of Aboriginal Customary Law – Changing Policies Towards Aboriginal People’ (2010) par 795.

312 Australian Law Reform Commission, ‘Report 31: Recognition of Aboriginal Customary Law – Changing Policies Towards Aboriginal People’ (2010) par 795.

courts, preferring that customary law be applied in the ordinary courts.[313] Tanzania, Uganda, Zimbabwe, and Kenya have also opted for integrated court systems.[314] The Northern State of Nigeria, conversely, has retained customary courts and worked on improving them,[315] therefore, their strides in the reform and development of indigenous law are in legalistic progress and not conclusive. Other African countries have excluded customary law completely or modified its recognition to meet their new constitutional dispensation or socio-economic and political situation.[316]

Since these developments will not serve the needs and the arguments made in the study, and the initial need for the indigenisation of South African customary law and the ascertainment of indigenous people legal regimes, therefore, would not be in the best interest of the study to adopt a comparative analysis of post-colonial African countries. Therefore, the study will focus on pacific countries that are able to establish a strong legal and pluralistic presence, reform and development of indigenous law. The study selected the countries of Vanuatu and Papua Guinea as sources of comparative analysis.

4 3 2 The country of Vanuatu

Since Vanuatu is also a post-colonial country, its legal system was also based on the imposed positive law brought by colonial settlers, since its independence Vanuatu promptly changed its legal structure to place their indigenous law above common law.[317] In relation to land matters, the customs practiced are given a higher status and preference, for an established mechanism of chiefly authority, dispute resolution and compensation in terms of sale and appropriation.[318] The preamble of the established Vanuatu constitution stipulates that, 'the new Republic of Vanuatu is 'founded on traditional Melanesian values'.[319] Section 93(3) of the Constitution provides that

313 HF Morris & JS Read *Indirect Rule and the Search for Justice* (1972) 131.
314 HF Morris & JS Read *Indirect Rule and the Search for Justice* (1972) 131 & Zimbabwe Customary Law and Primary Courts Act 1981.
315 EI Nwogugu 'Abolition of Customary Courts — The Nigerian Experiment' (1976) 20 *JAL* 1.
316 TW Bennett 'The Application of Common Law and Customary Law in Commissioners Courts' (1979) 96 SAFLJ 399 in Australian Law Reform Commission, 'Report 31: Recognition of Aboriginal Customary Law – Changing Policies Towards Aboriginal People' (2010) par 795.
317 H Bule 'Law and Custom in Vanuatu' (1985) 1 *QITLawJ* 129.
318 H Bule 'Law and Custom in Vanuatu' (1985) 1 *QITLawJ* 129.
319 Constitution of the Republic of Vanuatu.

'customary law shall continue to have effect as part of the law of the Republic.'[320] Section 45(1) Constitution seeks to elevate and place custom above any other law or subordinate to and the section states that, 'if there is no rule of law applicable to a matter before [a court], the court shall determine the matter according to substantial justice and whenever possible in conformity with custom'.[321] It is evident that the laws established under the umbrella of the Melanesian custom serve as a guiding rule to interpretation and application of the indigenous law of Vanuatu. Not completely removing the influences and recognition of British and French law.[322] The courts takes judicial notice of the British and French and further notices that, 'British and French laws in force or applied before the day of independence continue to apply to the extent that they are not expressly revoked or are incompatible with the independent status of Vanuatu and wherever possible to take due account of custom.'[323] To ensure that Vanuatu's living customary law is properly ascertained, section 49 of the Constitution places a duty on the courts and the legislature to, 'provide for the means on the ascertainment of relevant rules of custom, particularly to provide for competent assessors, who are knowledgeable in custom and having advisory functions to sit with the judges of the Supreme Court or the Court of Appeal and to take part in its proceedings in both Civil and Criminal cases.'[324] This ensures that differing judgments or distorted judgments due to the misinterpretations of the indigenous law are avoided. To ensure the advancement and the protection of the legal regimes of the indigenous people of Vanuatu, the Constitution provides for the election of the National Chief Council, where regional and custom Chiefs are elected by their peers, sitting in Regional Councils of Chiefs.'[325] The Council has general competence to discuss all matters relating to custom and tradition and may make commendations for the preservation and promotion of Vanuatu culture and languages'.[326] Furthermore, the land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants, and the rules of custom form basis of usage and land ownership.'[327]

320 Constitution of the Republic of Vanuatu.
321 Constitution of the Republic of Vanuatu.
322 H Bule 'Law and Custom in Vanuatu' (1985) 1 *QITLawJ* 129.
323 H Bule 'Law and Custom in Vanuatu' (1985) 1 *QITLawJ* 129.
324 Constitution of the Republic of Vanuatu.
325 H Bule 'Law and Custom in Vanuatu' (1985) 1 *QITLawJ* 130.
326 Chapter 3 of the Constitution of the Republic of Vanuatu.
327 Section 72 of the Constitution of the Republic of Vanuatu.

To indicate the importance of indigenous law and the protection and advancement of custom in Vanuatu the locally decided case is evidence to that placeholder. In the case of *Public Prosecutor v George Lingbu,* the respondent resided in the Island of Ambrym; whilst visiting the urban village of Vila, she had three different boyfriends. This promiscuous lifestyle of the applicant was considered by the chiefs of Ambrym, to be misbehaving and against the custom of Ambrym. The appellant, a Chief, was instructed by other chiefs to have the respondent sent back to Ambrym. The Chief acted according to the order and with the help of two other men they sent the respondent back to Ambrym. Upon returning to Vila the respondent took the matter to Court and the Chief was charged with aiding and abetting the offense of false imprisonment of the respondent as a young girl, contrary to section 118 and section 30 of the Penal Code. The Magistrates Court found the appellant guilty and sentenced him to a fine of VT 10.000 ($Aus. 100.00) or one month's imprisonment for aiding and abetting the arrest of the respondent without lawful authority. On appeal to the Supreme Court before the Chief Justice, the decision of the lower court was upheld but the fine was reduced to VT 5.000 ($Aus50.00) or two weeks' imprisonment.[328] The court case demonstrates that written indigenous law takes precedence over unwritten indigenous law. This is an aid to indicate the positive stance that South Africa can take in terms of reforming and developing through codification customary law. This could be viewed as a guideline for the codification of South African customary law, in order to provide for the ascertainment of customary law.

4 3 3 The country of Papua New Guinea

Papua New Guinea (hereafter, New Guinea) serves an acclaimed comparative analysis in terms of the reception and legal recognition of indigenous law. New Guinea multicultural diversity where the demographic society consists of more than 800 hundred different languages and more than a thousand different customs found.[329] Each area in New Guinea has its own customary laws that govern its people in their

328 *Public Prosecutor v George Lingbu* Appeal Case No.3, 10 March 1983.

329 MH Kamongmenan 'Status of Customary Law Within Papua New Guinea's Legal System' (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (Accessed 12 July 2019).

way of life and ensures the wellbeing of the entire community.[330] New Guinea was no exception to colonialism.[331] Where early colonial settlers thought that the indigenous people of New Guinea were primitives and lived without order. However, after much inclination of the people of New Guinea to follow their culture and customs, the early colonisers realised that notwithstanding the fact that there was no 'established' legal system, different places have their own rules and practices that guide them.[332] After their colonial independence and placed under the Australian territorial administration, the need to recognise and protect the indigenous people regimes, two legislation, was enacted for this purpose, Laws Repeal and Adopting Ordinance 1921 and Native Administration Regulation 1924, this was the foundation of when the status of custom gradually began to be recognised as a source of law post-colonialism, and over time through further legal developments, it made way into being part of the legal system of New Guineas.[333] New Guinea has adopted a dual legal system where two court systems exist, the customary court systems and the formal court system. This is due to the fact that more indigenous people rely on indigenous law dispute agencies. To respond to need to ascertain and maintain indigenous people legal regimes, there is a pipeline legal philosophy that needs to be developed into legal statutes, namely, Indigenous Melanesian Jurisprudence where it is based on the diverse custom, culture, and traditions of the people of New Guinea, where, indigenous law is to be the object of law reform, and as a basis of a legal system in New Guinea.[334] This is a legal stance that South Africa can adopt as part of the indigenous law reform and development. It can create legal certainty with regard to South African marginalised customary law. This jurisprudence is based on the view that holistically indigenous

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330 MH Kamongmenan 'Status of Customary Law Within Papua New Guinea's Legal System' (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (Accessed 12 July 2019).

331 MH Kamongmenan 'Status of Customary Law Within Papua New Guinea's Legal System' (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (Accessed 12 July 2019).

332 MH Kamongmenan 'Status of Customary Law Within Papua New Guinea's Legal System' (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (Accessed 12 July 2019).

333 MH Kamongmenan 'Status of Customary Law Within Papua New Guinea's Legal System' (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (Accessed 12 July 2019).

334 MH Kamongmenan 'Status of Customary Law Within Papua New Guinea's Legal System' (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (Accessed 12 July 2019).

law, as a source of law, it is an entirely distinctive source. Indigenous law has always operated in the past as a system of legal regulation in the organisation of indigenous communal society, and dependent in that sense it never needed any formal enforcement agencies such as the courts, legislature, police, etc.[335] The proposed jurisprudence is brought due to the indigenous people's need for self-determination from colonial oppression, legal distortion of their legal regimes and social inequality brought by imposed systems and structures.[336] The proposed Indigenous Melanesian Jurisprudence will basically lead the results that, the laws of New Guinea would be immersed with ethical values and traditional principles of customary law and therefore creating a legal system with custom as its basis.[337]

a Papua New Guinea and 5th National Goals and Directive Principle

The preamble of the constitution of Papua New Guineas seeks to entrench indigenous law into the constitutional dispensation without eradicating and seeing it as insignificant. The preamble states that, 'We accordingly call for–

> recognition that the cultural, commercial and ethnic diversity of our people is a positive strength, and for the fostering of a respect for, and appreciation of, traditional ways of life and culture, including language, in all their richness and variety, as well as for a willingness to apply these ways dynamically and creatively for the tasks of development; and traditional villages and communities to remain as viable units of Papua New Guinean society, and for active steps to be taken to improve their cultural, social, economic and ethical quality.'[338]

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335 MH Kamongmenan 'Status of Customary Law Within Papua New Guinea's Legal System' (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (Accessed 12 July 2019).

336 MH Kamongmenan 'Status of Customary Law Within Papua New Guinea's Legal System' (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (Accessed 12 July 2019).

337 MH Kamongmenan 'Status of Customary Law Within Papua New Guinea's Legal System' (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (Accessed 12 July 2019).

338 Constitution of the Independent State of Papua New Guinea.

This incorporation and ascertainment of indigenous law in Papua New Guinea's constitution was necessary since this was the means to ensure that indigenous law secures its place in the constitutional dispensation.[339]

b The idea of underlying law and the hierarchy of laws

To place importance in the status and recognition of indigenous law in New Guinea enacted the Underlying Law Act 2000 under the constitutional directive,[340] which places and recognises that custom is a source of law and also, how it is given preference over common law in terms of the order of application, interpretation in courts and development of the underlying law (common law).[341] Section 6 of the constitution further orders that:

> 'Subject to this Act, in dealing with the subject matter of a proceeding, the court shall apply the laws in the following order: a) Written law; b) The underlying law; and c) The customary law; d) Common law.'[342]

This indicates the preference and sequence of the importance of the application of indigenous law. The provision elucidates that common law has to be consistent with indigenous law of Papua New Guinea before it can be applied as part of the underlying law, and if a court applies common law instead of indigenous law, it has to supply reasonable and sufficient reasons for refusing to apply indigenous law.[343] Henceforth, when comparing the status of the above-mentioned sources of the underlying law, indigenous law takes precedence over common law. This was also established in the case of SCR *No 4 of 1980: Petition of Somare*, the court quantified that:

> 'the suggested requirement that a court must positively decide that a custom is inapplicable before it can proceed to consider the common law carries with it

339 MH Kamongmenan 'Status of Customary Law Within Papua New Guinea's Legal System' (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (Accessed 12 July 2019).

340 Section 20(1) of the Constitution of the Independent State of Papua New Guinea

341 MH Kamongmenan 'Status of Customary Law Within Papua New Guinea's Legal System' (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (Accessed 12 July 2019) and Underlying Law Act 2000.

342 Constitution of the Independent State of Papua New Guinea.

343 Constitution of the Independent State of Papua New Guinea.

the obligation to commence the case with comprehensive inquiry into all possible relevant custom.'[344]

Sufficient and reasonable ascertainment of related custom is important. This stride made by the judicial and legislative system of New Guinea is commendable and inspirational. The stance taken by Papua New Guinea in ascertaining the legal regimes of their indigenous people indicates the importance and respect awarded to the indigenous people residing there.

4 4 Indigenous pluralism: Creating an indigenous legal pluralism

In consideration of the South African state pluralism and where customary law is placed, it suffices to seek ways in which the indigenous people's legal regimes can be ascertained. Customary law must find its place to eradicate its long-life marginalisation.

It is positively stated by Hemmet that:

> 'Customary law emerges from what people do or [more precisely] – from what people believe they out to do, rather than from what class of legal specialists considers they should do or believe. The ultimate test that should be done by the courts is not what the judge says but rather what do the participants in the law regards as the rights and duties that apply to them.'[345]

Living customary law is an evolving system of law which requires modern discourse if it is to be developed, reformed and codified according to modern social aspects.[346] It can be seen in the historical era that customary law was not recognised as general law by itself due to its living and sporadic nature, it was view in the common law lenses and applied in exceptional circumstances. The historical marginalisation has shown how we still view customary law in the lenses of common law,[347] as indicated in the *Bhe* case covered in the preceding chapter.[348] It is about time to stop ignoring the

344 *SCR No 4 of 1980: Petition of Somare* [1981] PNGLR 265.

345 C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 28.

346 G Woodman, 'Legal pluralism in Africa: The implications of state recognition of customary laws illustrated from the field of land law' (2011) *1* Act*a Juridica 35-58.*

347 *Ex parte Minister of Native Affairs*: In re *Yeko v Beyi* 1948 (1) SA 388 (A).

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

prevalence of customary disputes in the constitutional era, and customary law has a place in the constitutional dispensation for better advancement. Though the study cannot ignore the conflicts posed by the uncodified living law; the conflicts arise in terms of interpretation and the fact that the law it a potential risk factor for its distortion and its spasmodic nature. Its evolving nature means that the living customary law rules evolve in an unregulated manner, which new rules emerge, and old norms cease to be observed.[349] The main culprit is urbanisation and lifestyle.[350] Whilst the courts are forerunning common law rules and principles in court procedures,[351] even unwilling parties to disputes have to seek common law remedies. The system of our courts is heavily reluctant to apply living customary law in higher courts because of its unwritten and its evolving nature.[352] In the advent of this argument against living customary law the UNDRIP[353] recognises, 'the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.'[354] Even with the stance of this argument, there is still no certainty to how living customary law can be ascertained. Ngcobo J states ways in which that can be done:

> 'There are at least three ways in which indigenous law may be established. In the first place, a court may take judicial notice of it. This can only happen where it can readily be ascertained. Section 1(1) of the Law of Evidence Amendment Act says so, and it states that, '[any] court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or

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349 Himonga C & Nhlapo T (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspective* (Cape Town: Oxford 2014).

350 Tobin B. *Indigenous people, customary law and human rights – why living law matters* (2014) ii-iv.

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

352 S Mnisi, (2010) 'The Interface between Living Customary Law(s) of Succession and South Africa State Law' PhD thesis University of Oxford 175-79.

353 On 29 June 2006, the United Nations Human Rights Council adopted the Declaration on the Rights of Indigenous Peoples.

354 In the Preamble of United Nations Human Rights Council adopted the Declaration on the Rights of Indigenous Peoples.

bogadi or other similar custom is repugnant to such principles.'[355] Where it cannot be readily ascertained, expert evidence may be adduced to establish it.[356] Finally, a court may consult textbooks and case law.'[357]

Not denying the guidance provided, also if resources are pulled in by the state government, legal institutions and legal academic institutions they can provide further and extensive research to ascertain the unpopular living customary and also the current official law; which is filled with a lot of unconstitutionality.[358] This is an indication of the need to provide for the ascertainment of customary law to attain the proposed argument in the study for the indigenisation of customary law.

4 5 Conclusion

Since the study seeks deep indigenous legal pluralism it is recommended that the South African legal institutions can take into conscience the importance of ascertaining the legal regimes of the indigenous people of South Africa. This is not only for the benefit of the future generation but also for indigenous communities who still comply and apply customary law. Simple negation is not an appropriate approach to the reform and development of customary law. Factors beyond the knowledge of the legislature and the judiciary should be considered from a foreign perspective as contemplated under section 39(1)(a) and (c) of the Constitution which elucidates that, 'when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom and may consider foreign law.' In contention, within the study, this relates to taking in the learnings from foreign countries which have indicated their willingness to maintain the legal regimes of indigenous communities. These are guiding principles and not mere formalities that South Africa courts can consider, but imperative

355 Law of Evidence Amendment Act 45 of 1988, s 1(1).

356 *Masenya v Seleka Tribal Authority & Another* 1981 (1) SA 522 (T); *Hlophe v Mahlalela & Another* 1998 (1) SA 449 (T) at 457E-F.

357 *Alexkor Ltd and Another v Richterveld Community and Others* 2003 (12) BCLR 1301 (CC) at para 56.

358 AS Louw & LN Van Schalkwyk *Introduction to Family Law: Student Textbook* 2nd ed. (2019) 78 – 83.

principles which can be adopted to ensure consistency and remove the repugnancy that further marginalises customary law in South Africa.

CHAPTER 5: The legislative protection of indigenous knowledge and resources to create customary law pluralism within the current dispensation

5 1 Introduction

Considering the cultural identity of the indigenous people, it is important when considering whether customary law has abrogated or not. It also seeks to redefine the study's arguments in terms of whether it is worthy to seek to develop, reform and preserve the customary rules and laws that guide the daily lives and existence of the indigenous people. Cultural identity allows one's to trace where one is and where one is going, just like how the current legal society tends to look at the past so that we do not repeat the future.[359] Cultural identity adopts the same analogy. The link between cultural identity and indigenous knowledge and resources is one of the same coins. Indigenous resources and knowledge forms part of the indigenous people's right to cultural identity.

The study will seek to advance the argument of indigenisation by looking at the current development and amendment of customary by creating an indigenous legal pluralism. Since South Africa is claimed to have a deep legal pluralism; a strong form of legal pluralism as it recognises multiple normative orders which may coexist even without belonging to a single, unified state system or emanating from the same source/authority.[360] This implies that customary law and positive law can and may coexist within one legal state system. This means that the limitation in the application of customary law is lessened and allows more freedom for indigenous communities to practice and apply customary law. This coexistence is not as superficial as currently evident in South Africa. However, it allows the indigenous communities their indigenous human rights and any human rights infringements as interpreted in a corrective manner and without distorting the indigenous people's legal regimes.[361] This also implies that legal centralism theories are ignored.[362] Legal centralism claims

359 Similar sentiments were made in the paper by P Langa 'Transformative Constitutionalism' (2006) 17 Stellenbosch Law Review 351.

360 C Himonga, & T Nhlapo (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspective* (2014) 44-45.

361 C Himonga C & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 30-32.

362 C Himonga C & T Nhlapo (eds) *African Customary Law in South Africa: Post*

that law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions.[363] Therefore, the study seeks to achieve indigenous legal pluralism for South African customary law. This approach is to ascertain customary law legal regimes without the burden of the legal procedures which wishes to distort customary law,[364] this implies that customary law can be applied by the courts when the legislature has properly developed and codified customary law to coexist, not superficially, but realistically alongside common law within the constitutional dispensation.

5 2 The protection of indigenous resources: Identity and land

Through a progressive society, one will mistake the fact that cultural principles, laws, and practices are made to disenable one from progressing in the modern era, but the study seeks to not view customary law in that light. Through constant development and reform of rules adopted from common law sources; customary law deserves the same kind of view.[365] The study is not denying some of the rules which go against the postmodern societies of what is to identity and how does one have to redefine themselves within the world filled and affected by pop culture. Pop culture is a culture adopted by the current youth based on self-identity, there is a social call to recognise people who identify themselves (i.e. LGBTQ+) and also more defining characters and standards are built.[366] People want to redefine themselves; they want to see themselves in a different narration. Land and resources are what forms part of the indigenous people's cultural identity. South African indigenous people are no different due to the legacy of apartheid and the systematic forced removals,[367] left them without land to claim. Biodiversity/traditional resources are important to aboriginal communities as they form part of their customs and practices adopted through time.[368]

Apartheid and Living Law Perspective (2014) 41.

363 C Himonga C & T Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2014) 45.

364 As discussed in Chapter 3.

365 Similar argument advanced in C Himonga C & T Nhlapo (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspective* (2014).

366 *Minister of Home Affairs v Fourie* 2006(1) SA 524 (CC).

367 See Chapter 2 for detailed discussion.

368 Similar points raised in S Von Lewinski *Indigenous Heritage and Intellectual Property: Genetic resources, traditional knowledge and folklore (*2004) 5.

These are the traditional resources that are used for medicinal purposes, ancestral practices (i.e. ancestral resting place and rituals) and a form of traditional identity. Land as an aspect for indigenous people is important as it forms part of the traditional identity of indigenous people.[369] The land which harbours resources has always been a way of expression and traditional practices (i.e. the San and Khoi clans who always used to travel around Southern African always used land and its resources to find a home or place to connect with themselves and spiritual being).[370] Therefore, in compliance with the International Labour Organisation Convention 169 (hereafter, ILO) which states that:

> 'states have an obligation to give due regard to indigenous people customs and customary laws and requiring states to recognise and protect indigenous peoples' social, cultural, religious and spiritual values and practices and to respect the integrity of their institutions.'[371]

In response to these international guidelines, South Africa has enacted the National Environmental Management Act (NEMA, hereafter),[372] and National Environmental Management Biodiversity Act (NEMBA, hereafter),[373] to deal with the protection of such biodiversity. Though both the Acts exclude the mention of indigenous people, the Biodiversity Act allows the public to have a say any expropriation activities concerning conserved land.[374] The legislature needs to reform these statutes to recognise that traditional authorities and communities have a say, especially if that land tends to serve a traditional and indigenous purpose.

5 2 1 The National Environmental Management Act and the National Environmental Management Biodiversity Act: What to protect?

369 D Lea *Property Rights, Indigenous People and Developing World: Issues from Aboriginal entitlement to intellectual ownership rights* (2008).
370 A Gagiano 'By What Authority?' Presentations of the Khoisan in South African English Poetry' (1999) 1 *Alternation* 6 155.
371 International Labour Organisation.
372 National Environmental Management: Biodiversity Act 10 of 2004.
373 National Environmental Management Act 107 of 1998.
374 National Environmental Management Act: Biodiversity Act 10 of 2004, s 100.

Since the groundwork is laid by the ILO for the protection of biodiversity, the South African legislative framework that regulates this aspect has earned its reputation. The legislative framework ensures that indigenous communities that depend on land for resources are able to claim the protection of the biodiversity that exists within the geographic area of that land.[375] Section 81 of NEMBA states that:

> 'no person without a permit is allowed to; engage in the commercialisation phase of bioprospecting involving any indigenous biological resources; export from the Republic any indigenous biological resources for the purpose of bioprospecting or any other king of research.'[376]

The Act ensures that genetic indigenous resources are not exploited. The problem with this is the focus area is only on government-owned/held land, and the government identified conservation areas.[377] The Act still excludes the importance of indigenous people's role in ensuring the protection of cultural land. NEMA as the enabling Act allows the public participation process, the Act state that, 'it is a process by which potential interested and affected parties are given opportunity to comment on, or raise issues relevant to, the application for a permit for any activities related to biodiversity extraction or appropriation.'[378] The Acts should highlight the importance of protecting biodiversity for the benefit of indigenous people and not government-held or conserved land only, as this also forms part of the indigenous people's legal regimes. Indigenous people are still marginalised in terms of public participation when it comes to the legislative process, and this undermines the legitimacy of indigenous people's legal regimes. If the law-making institutions still ignore the importance of indigenous people in public participation during the legislative process, this proves redundancy of the development and codification of customary law to the benefit of the indigenous people.

Whilst indigenous resources form part of traditional knowledge, the aspect of traditional medicine preparation and use is part of traditional resources (these resources also broadly covers traditional artefacts which will be discussed below); this is what informs the genetic or scientific use of traditional resources or scientifically

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375 See both National Environmental Management Biodiversity Act 10 of 2004 and National Environmental Management Act 107 of 1998.

376 National Environmental Management Biodiversity Act 10 of 2004.

377 National Environmental Management Biodiversity Act 10 of 2004.

378 National Environmental Management Act 107 of 1998, s 1.

coined biodiversity.[379] Issues which relates to commercial or scientific use of genetic resources and traditional knowledge systems without informed consent seems to undermine the existence of traditional communities and their practices,[380] issues such as; carrying out activities related to mineral extraction; forestry activities; establishment of protected areas and conservation programmes; fishing around coastal areas; leasing and purchasing of indigenous/ancestral land.[381] Section 11(1)(n)(i) of NEMBA calls for sustainable use of indigenous biological resources.[382] All this knowledge belonging to the indigenous community needs protection and should form part of and be expansive to customary law. The legislature should include indigenous communities when it concerns the use of indigenous biological resources falling within the jurisdiction of an indigenous tribe or community, this should not only rest with the government, indigenous communities/tribes' interest must be advanced and protected when such issues arise. This stance will ensure uniformity and a new appreciation of indigenous communities and their legal regimes and the advancement of their human rights.

5 3 The protection of indigenous knowledge through Intellectual Property Laws Amendment Act 28 of 2013

5 3 1 The international plea

The international legal stance on the protection of indigenous people knowledge through IPLAA is sanctioned under Article 27(2) of the UNDHR ascertains the right for indigenous people right to their knowledge, the article states that, 'Everyone has the right to the protection of the moral and material interests resulting from any scientific literary or artistic production of which he is the author.'[383] Indigenous traditional knowledge is defined as a cumulative body of knowledge, know-how, practices, and representation maintained and developed by people with extended histories of interaction with the natural environment; the knowledge, skills, and practices that are developed, sustained and passed on from generation to generation within a

379 O Dean & A Dyer (eds) *Dean and Dyer Introduction to Intellectual Property* (2014) 334.
380 O Dean & A Dyer (eds) *Dean and Dyer Introduction to Intellectual Property* (2014) 333.
381 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014) 5.
382 National Environmental Management Biodiversity Act 10 of 2004.
383 Universal Declaration of Human Rights 1948.

community, often forming part of its cultural/spiritual identity.[384] As mentioned above that traditional knowledge is important to indigenous people and forms part of their practices and custom, which means it forms part of customary law holistically. South Africa took a stance after the Trade Related Aspects of Intellectual Property Agreement,[385] which sets minimum standards and requirements for the protection of intellectual property based on indigenous knowledge and practices. Such recognition and protection have been long overdue especially in terms of cultural artefacts appropriated for commercial gain.[386] It has been presently evident at how fashion business and movie business expropriate culture for commercial gain without giving due regard to and receiving informed consent from original creators; which are indigenous people. It is to what it was witnessed with regard to the use of Basotho people blanket in the movie Black Panther, and how constantly Luis Vuitton appropriates cultural artefacts and art inspirations/cultural prints to create their merchandise without giving monetary and public regard to indigenous creators or communities who have exclusive rights to use of such art and artefacts.

5 3 2 The legislative response

Intellectual Property Law Amendment Act.[387] The statute seeks to protect and give recognition to the manifestation of all indigenous knowledge systems as a species of intellectual property, including; verbal expressions such as folklore tales, dances, poetry and riddles; musical expressions; expressions by action such as folklore dances, plays, artistic rituals; tangible expressions such as drawings, paintings, carvings, sculptures, pottery, mosaic, instrument and architectural forms.[388] IPPLA grants exclusive rights to indigenous communities that have the right to use such traditional/indigenous knowledge systems.[389] IPLAA recognises that the indigenous community as a juristic person's which makes them eligible to take legal action against anyone who or any organisation that unlawfully appropriates their indigenous knowledge systems.[390] But this could be limiting as there are several rights that a

384 O Dean & A Dyer (eds) *Dean and Dyer Introduction to Intellectual Property* (2014) 333.
385 (hereafter, TRIPS).
386 Trade Related Aspects of Intellectual Property Agreement.
387 Intellectual Property Laws Amendment Act 28 of 2013 and (hereafter, IPPLA).
388 O Dean & A Dyer (eds) *Dean and Dyer Introduction to Intellectual Property* (2014) 333.
389 Intellectual Property Laws Amendment Act 28 of 201, s28.
390 Intellectual Property Laws Amendment Act 28 of 201, s 8B.

juristic person cannot claim under (such as the right to hurt feeling and physical-integrity). This stance limits the indigenous communities' right to access justice to ascertain their legal regime and their human rights.[391] Such personality infringement is inevitable because a sense of respect and recognition forms part of the identity of indigenous communities; this is similar to the disgruntled feelings of the Xhosa tribe which felt insulted by the movie that displayed the traditional practice of Xhosa tribe initiation schools, the movie also made historical reference without consulting history books, and claimed the sexuality of Shaka Zulu as homosexual, which offended the Zulu tribe. Therefore, if a claim is brought in court, such claim be opposed on the fact such communities are recognised as juristic persons and there are certain personality rights they cannot claim unless the court adopts a flexible approach, this is highly debatable and does not form part of my argument in this study. Another oversight by the South African institutions is enacted within the Constitution, application of common to customary law disputes. Section 8 of the Constitution excludes the possibility of indigenous communities being classified as juristic persons. Section 8 of the Constitution holds that:

> 'when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court— (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).'[392]

The study seeks to view the advancement and development of law protecting indigenous knowledge as an aide that allows the law-making institutions to give attention to the legislative protection and development of customary law. The IPLAA Act allows protection claims for any infringement of traditional knowledge systems registered in their database.[393] The IPLAA Act requires more awareness and communal education. At that point, there is a need for the elucidation of indigenous

391 Section 34 of the Constitution of Republic of South Africa, 1996. The section states that 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

392 Constitution of Republic of South Africa, 1996.

393 Intellectual Property Laws Amendment Act 28 of 201, s 8B.

peoples' human rights which Tobin list them as; self-determination and autonomy; land; territory; resource rights; rights to culture and cultural heritage; access to generic resources and protection of traditional knowledge; and the recognition of the issues on the conflict between human rights and customary law, and the future of customary law within the national and international legal pluralism.[394]

The above-mentioned Acts are in the right place, but there is more it needs to cover and bring to the front, so that legislative authority may realise the deeper existence and importance of indigenous law; and that it is not abrogated through disuse but its application and importance to those who submit to it and bound by it; and that its 'influence is growing not receding.' The development of the said Acts should serve as a guide to the law-making authorities that indigenous people custom is a wide aspect and recognising not only their resources and traditional knowledge but also their laws and practices can allow their legal regimes to existing under the current dispensation.

5 3 3 Indigenous languages to disseminate information: what it means to Intellectual Property Laws Amendment Act?

The aspect of language and language advancement should be bespeaking to the nature of indigenous people's legal regimes. In relation to how indigenous information and knowledge is passed on; it is an important aspect to be covered by the study. It is already given knowledge that section 6 of the Constitution advances and protects indigenous people's languages.[395] Section 6(1) of the Constitution ascertains that, 'the official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.'[396] Section 6(2) further recognises that, 'the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.'[397] This is a marginal recognition of their existence and legal regimes. As the study indicated there is more that needs to be done by legal institutions in South Africa in this respect. Those

394 B Tobin, Indigenous *people, customary law and human rights – why living law matters* (2014) 3.
395 Constitution of Republic of South Africa, 1996.
396 Constitution of Republic of South Africa, 1996.
397 Constitution of Republic of South Africa, 1996.

involved in postmodern studies states that realities do not exist independent of their observational processes. [398] They claim that realities are shaped and constructed through language.[399] The realities referred to are seen as functions of a situation in which people live.[400] They further claim that realities are part of stories as told through the use of language and thus creating meaning.[401] Based on social construct it is assumed that language, concepts, and knowledge are historically and culturally bound. This assumes that indigenous knowledge protection and advancement are another way to ensure the national recognition of indigenous people's legal regimes. The indigenous people's claims on collective rights are a way to ascertain social constructs.[402] This maintains equality not through means but through social interactions based on information receptions and dissemination. Indigenous people claim to advanced knowledge is valid and requires further attention and research. They are not as savage as the legal fraternity seeks them out. The rules and laws that bind indigenous people exist due to their social constructs and it is through that they assert their own meaning. This creates a semiotic view in the eyes of the observer (thus the courts and the legislature). As the study already discussed how language was/is seen as a way to further discrimination in the case of *Afriforum v University of Free State*.[403] This is not only based on the decolonising state institutions and claiming the rights to self-determination and identity, by the indigenous people, it is also meant to create a definitive identity, existence in the post-apartheid systems and constructs of laws as adopted by our current dispensation. It is up to the legal fraternity to respond to these claims by the indigenous people of South Africa.

5 4 Conclusion

The reform, development, and amendment of the above-mentioned statues serve as guides and ides to indicate the importance of the need for the continuous development of indigenous people's legal regimes. To ensure that the indigenisation of the

398 DS Becvar, & RJ Becvar *Family Therapy: A systematic Integration* (2013).
399 DS Becvar, & RJ Becvar *Family Therapy: A systematic Integration* (2013).
400 DS Becvar, & RJ Becvar *Family Therapy: A systematic Integration* (2013).
401 DS Becvar, & RJ Becvar *Family Therapy: A systematic Integration* (2013).
402 S Von Lewinski *Indigenous Heritage and Intellectual Property: Genetic resources, traditional knowledge and folklore* (2004) 14.
403 *Afriforum v The University of Free State* 2018 (2) SA 185 (CC).

indigenous people regimes takes fruition and the legal structures minimises the marginalisation. The aspect of cultural property is embedded in the nature and scope of indigenous people's legal regimes. The relationship between land and the indigenous people is significant and compared to none other. Cultural exploitation for capitalistic gain is what withholding the indigenous people from asserting their human rights and claims to their original and traditional work, ideas and inventions. Their human rights to the entitlement of land, the protection of their knowledge and resources, the ascertainment of their legal regimes and importantly understanding their uniqueness and importance in the values and norms they hold. What is viewed uncivil by a bystander, is viewed by a native who seeks to be bound by that custom as civil. Dereliction of indigenous people regimes is a perception that is still governed by the colonial view, that indigenous law in unreserved and uncivil. We live in a world where choice dictates laws and ways of living why are indigenous people still ignored and their legal regimes are still not ascertained. Why does the wold view indigenous law in the lenses of common or western law, or attempt to understand it in a western manner? Not only the protection of indigenous law is needed, by the entire indigenous aspects related to indigenous people need to be protected and elevated to a meaningful place.

6 1 Introduction

6 1 1 Scope and purpose

Given the historical marginalisation of customary law and its constant battle to remain relevant and applicable for the indigenous communities, it has come to the need to ascertain indigenous people of South Africa are afforded their human rights through the development, reform, and codification of their legal regimes. This contention is based on living customary law, special legal reform is imperative in this regard. The study introspectively looked at the status of customary law in South Africa, and how it is handled, interpreted and understood by the legal fraternity, specifically the judiciary and the legislature. The study trailed along the road before the current dispensation. The historical view gave a specific look into how customary law was viewed and treated by the colonial and apartheid government. This leads the study to consider how now customary aw is viewed, interpreted and indorsed. This was a daunting task as legislative and judicial inconsistencies and discrepancies were found to exist. Dismantling legislative frameworks dedicated to the advancement and development of customary law, and questioning judicial judgments based on the semiotic interpretation of customary law. The study trailed the international sphere and its call for better laws and protection of indigenous people regimes and advancing their rights to self-determination. This allowed the study to analyse South Africa's progress in ensuring compliance of the directives given by the United Nations Conventions and declarations.[404] In some aspects, the country failed, but on a positive note, there are some progressive legislative frameworks which the country adopted to the indirect benefit of indigenous people regimes. On this note, the study ended the analysis employed. It was necessary to not only highlight the issues in the marginalisation of customary law but to also assess the positive and the strides made by the legislatures in ascertaining some of the human rights of indigenous people.

404 United Nation Declaration on the Rights of Indigenous Peoples, 2007; United Nations Declaration of Human Rights, 1948; Trade Related Aspects of Intellectual Property, 1994; International Labour Organisation Convention.

6 2 Chapter Overview

Chapter 1: The study introduced the reader to the research, it covered the research proposal and aims of the study. This was an overview of what is to follow in the rest of the study. The research methodology adopted by the study was strictly qualitative. The overall aim of the study is to create an indigenous legal pluralism, where customary law does not superficially exist in the current dispensation but is ascertained, interpreted, developed and reformed to the advantage of indigenous people who are bound and abide by it.

Chapter 2: The study took a historical view of the status of customary law. The study explored the colonial and apartheid regimes and how customary law was viewed. It was not to the state government to recognise and codify customary law to the benefit of the indigenous people of South Africa, but to further assert their power and advance laws to further marginalise and segregate against indigenous people. The study did not stop there; it took a glimpse into the current dispensation. Customary law is constitutionally recognised but not advanced and developed according to the needs of the indigenous people's legal regimes.

Chapter 3: The study further analysed the legislative and judicial development and interpretation of customary law. Legislative frameworks enacted to the benefit and regulate indigenous people and their regimes, were ignorant of the difference between customary law and common law. The legislative enactments were based on common law provisions. The judicial judgments also had their inconsistencies, in terms of interpretation, ascertaining and understanding customary law. This analysis further strengthened the study's argument for the continued marginalisation of customary law under the current dispensation. The study further looked at the international directives which South Africa is a signatory to. This allowed the study to analyse the status and recognition of indigenous law on an international level. This could also shed light on whether South Africa is keeping up with such directives and declarations

Chapter 4: The study explored the possibility of creating an indigenous legal pluralism. Taking the current status of customary under the legislative and judicial guise, the study looked into the possibility of such pluralism. Since South Africa is based on state pluralism, deep pluralism was implored as the first argument, but the concept of deep pluralism is contentious and the study opted for indigenous legal pluralism; which

places emphasis on the ascertaining the legal regimes of indigenous people, developing, codifying and reforming customary law. This submission was based on properly placing the needs and human rights on the table and ensuring that indigenous people of South Africa are not further marginalised in terms of the laws they choose to be bound by. The study, furthermore, analysed foreign countries and how such countries were able to maintain the indigenous people's regime and advance and ascertain their indigenous law. The study saw how these countries strengthen those legal regimes giving effect to the rights of indigenous people, this was something that South Africa can take precedence from.

Chapter 5: The study finished on a positive hiatus. Imploring the protection of indigenous people's knowledge and resources. This was meant to show that not everything is doom and gloom, but there are some international directives that South Africa is to follow to ensure the advancement of customary law. The adoption of intellectual property and land conservation legal framework is a brilliant stance and South Africa needs to follow through in-depth and further the rights and legal regimes of indigenous people.

6 3 Recommendations

The *legislative* approach should be based on understanding and the imposed intention of customary law. Further understanding of what customary law seeks to achieve and the values and norms it held dear by the indigenous people of South Africa, should be interpreted in a socio-traditional manner and a flexible approach must be employed to ascertain customary law in its true light, nature, and scope. Reform and codification of customary law must be understood o the cultural tenets and customs. A single statute that holistically regulates all aspects of customary law (i.e. marriage, land rights/ownership, succession, customary legal procedure, remedies, legal recourse, etc.). this will ensure that no doubt is left when customary disputes are in court. Furthermore, the legislative approach should be flexible and non-discriminatory to the legal regimes of the indigenous people of South Africa. The first point of departure is to remove all laws that seek to discriminate and still segregate indigenous people. The repugnancy clause under the Law of Evidence Amendment Act should be revisited

and amended.[405] The view that was included in the Interim Constitution of South Africa, should be revisited for further understanding. It is true that customary law must be viewed as a separate legal dispensation and not as stoic law that needs to be reformed according to the tenets imposed under western/common law, such foreign-imposed ideologies are what dismantles the legality of customary and further distort its intention.

The adopted semiology which emanates from the historical marginalisation still currently persist under the current dispensation. The way the judiciary approach customary law is based on the view that customary law can be fitted under the constitutional guise, through that, customary law will be abrogated according to the satisfaction of the judiciary and the parties who hold dear the law they chose to abide by are left with no remedy or forced to apply common law. State law as imposed by the Constitution dismisses customary law, if not most but to its entirety, due to the fact that customary law cannot and does not conform to the tenets as envisaged by the Constitution under the Bill of Rights. The recommendation does not propose to overlook the Bill of Rights, but the interpretation of fairness and justice is not cutthroat, just like customary law is not your average law which can simply conform and reform without being completely eradicated, to the Constitutional rights. It is a legal dispensation that needs to be upheld to its title and according to its eligibility and the application by the indigenous people who conforms to it on a choice basis.[406] Its interpretation must be purposeful for attaining social justice for the parties in dispute. Employing means to understand and not just dismiss customary law is what the legislature should seek to achieve in terms of reform of customary law. The first step for the realisation and ascertainment of customary law is to remove and lessen *judicial* disparity, and in the words of Ngcobo J, 'to ascertain customary law, firstly, courts must take judicial notice of it and it must be taken with sufficient certainty; secondly, if on *prima facie* basis it cannot be established, expert evidence must be adduced; and finally, with caution the courts may consult textbooks and case law.'[407] The legislature also requires a more forward-thinking and flexible approach to codify and reform

405 Law of Evidence Amendment Act 45 of 1988.

406 As proposed in GJ Koyana 'The Indomitable Repugnancy Clause' (2002) 98 *Customary Law Bibliography* 115.

407 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) par 150.

customary law to the need of the affected indigenous people. The fact that enacted legislation such as the Matrimonial Property Act 88 of 1984 which still segregates Black people of South Africa still persist is the ensuing problem. Legislation such as the Matrimonial Property Act 88 of 1984 and Intestate Succession Act 81 of 1987 cater only and for the benefit of non-Black and non-religious people. The currently enacted legislation (RCMA) seeks to regulate indigenous people's succession and marriages in light of how common law does. This is a flawed perception and the illusion that indigenous law can be reduced to the same application and interpretation as common law. A practical and flexible approach is needed to ensure that customary law is not further distorted and misunderstood by the judiciary and in fact, it is not substituted with common law when it seeks to not offer a legal remedy that is favourable in the eyes of the judiciary. As it was comparatively observed by the study, the independent country of Papua New Guinea, drafted a system of principles and rules which the courts follow when interpretation indigenous law, therefore, when interpreting and applying indigenous law, 'the court shall: consider the submissions made by or on behalf of the parties concerning the indigenous law relevant to the proceedings; refer to other published materials on indigenous law pertinent to the proceedings; refer to statements and declaration of indigenous law by any authority established by legislation; consider information and evidence concerning the indigenous law relevant to the proceeding presented to it, by a person whom the court is satisfied has knowledge of the indigenous law relevant to the proceedings; and of its own motion, obtain evidence, information and the opinions of persons as it thinks fit.'[408]

The indigenous people's *legal regimes* need to be maintained for the purpose of identity, cultural development, and reform. Not viewing customary law with a constrict attitude, but then holistically analyse the current status of customary law to the benefit of the current society and communities and also the future generation. Not only questioning its status and its constant marginalisation, but also seeking its preservation, protection, reform, and development. In the aspect of the focus of this study, reform is based on the idea of reforming customary law in correlations to modern society's moral aspects. Where it is found that customary law is contrary to basic human rights,[409] it shall be reformed in a manner that does not eliminate the rule

408 Section 16(2) of the Underlying Law Act.

409 Covered in Chapter 2 Bill of Right in the Constitution of the Republic of South

without proper legal interpretation and only eliminating aspects that are contrary to basic human rights and morality aspect.[410] The reform also seeks to ensure the continuous codification and amendment of customary which truly reflects indigenous people's legal regimes; the aspect of reform also seeks to look at the preservation and creation of indigenous pluralism also synonymously coined term 'indigenisation' of customary law. Therefore, legal development in relation to customary law and the focus of this study means, the judicial and legislative development of customary law. This aspect means that the judiciary and the legislature are tasked to ensure that customary law is preserved and developed to fit and suit the modern social aspects of the indigenous people, whether urbanised or in a rural setting. The world, social anthropologists and the legal academic fields should accept and acknowledge the contribution of traditional-scientific research and knowledge in medicine that traditional doctors pass on. This is forms part of customary law and should be recognised as that: as it is part of the custom and practices of indigenous people. Likewise, third parties such as researchers, corporate bodies, international institutions, and private stakeholders need to be aware of the importance, growing influence, and role that customary law plays in local, national and global legal order,[411] and that customary laws, norms and principles could be a guide to most of the global and national disputes that cannot be solved by western/common/positive law; this indicates the importance and significance of customary law when viewed holistically.

An international legal discourse based on the status and reform of customary law is indicated in the UNDRIP, this international declaration should be used to appreciate and ensure that the legal regimes of indigenous people are elevated and are acclaimed in a non-discriminatory fashion. The incorrectly unfounded criticism of indigenous law and indigenous people are the reason why it is difficult to attain indigenous pluralism to successfully exists in the current dispensation. That is why countries that voted against the adoption of UNDRIP, were based on the ideologies of current legal pop-culture. Where it is viewed that indigenous law does not look cool under the imposed western ideas and reformed laws. The importance lays in the

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Africa,1996 and UNDHR.

410 As argued by Ngcobo J in *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC); see his minority judgment.

411 B Tobin *Indigenous people, customary law and human rights – why living law maters* (2014) 10.

indigenous communities who still want to conform and be bound by indigenous law to the exclusion of positive law. Current mutual respect of the indigenous ideas, knowledge, and resource should be the State's approach to better understand indigenous people and their traditional regimes.

6 4 Conclusion

The strides in South Africa are commendable and this should be expanded to indigenous people's legal regimes and not only their traditional regimes. As well as it was said by Van De Westhuizen J, that, ‘‘Legislation has to be formulated to substitute the current inadequate requirements for the validity of a custom. These requirements must reflect the changing face of custom and grant this norm-structure its rightful place in jurisprudence,’[412] no better than the study could say.

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

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