‘This Is Us, Three Decades Later’: Implementing Living African Customary Law in South Africa Through the Flexibility Approach

Nicholene Nxumalo
https://orcid.org/0000-0002-1109-9232
Rhodes University, South Africa
nicholene.nxumalo@ru.ac.za

Abstract

The article discusses the challenges faced by the development of African Customary Law (ACL) in the post-democratic South African legal system. It highlights issues such as Eurocentric bias, the distortion of official ACL and the judicial misunderstanding of ACL. The proposed solution is a ‘flexibility approach’, which addresses imbalanced jurisprudence and curbs inconsistencies in judicial interpretation. The approach involves a three-phase process: assessment, sifting and feasibility study. The aim is to accommodate both ACL values and constitutional values equally. The approach is community-centered, ensuring development is rooted in the lived realities of the people and not assimilated into common law. However, its application is limited to the living version of ACL and must balance African values with legal certainty and vested rights.

Keywords: living customary law; African customary law; flexibility approach; right to cultural recognition; primogeniture rule; gender discrimination

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Introduction

Post-democratic African Customary Law (ACL) jurisprudence overwhelmingly favours the Western, individualistic interpretation of constitutional provisions such as sections 9 and 10, equality and human dignity. However, this approach disregards sections 30 and 31 (the right to culture and cultural association), which also deserve equal consideration when harmonising the entire Bill of Rights. Consequently, many celebrated ACL development decisions fail to enrich the ACL value system. For this reason, South African courts have been criticised for failing to 'Africanise'[1] their decisions when developing ACL rules.[2] African people possess moral and societal values to regulate interpersonal relationships and maintain community cohesion, requiring the observance of certain standards or norms.[3] This informs the African value system, and the reintegration of the marginalised ACL value system into the legal system is arguably best achieved through ACL development. However, the courts have not entirely succeeded in this respect. Baase attributes this to the inherent 'Eurocentric bias' embedded in South Africa's legal culture.[4] The missed opportunities of the courts to 'Africanise' decisions have led to the need to review outdated judicial methods to advance ACL development. This paper proposes that the flexibility approach[5] is the key to solving the issue of imbalanced value-based jurisprudence in ACL development, while curbing the inconsistencies in judicial interpretation and development of ACL repugnant rules.

The Right to Development

The introduction of the Constitution led to the separation of living ACL from its official version. Prior to this, the Constitutional dispensation, ACL was in a state of confusion. While its official version remained impenetrable, dissecting it revealed the traditions and culture of the African people existing alongside manipulated ACL rules. The former is a true representation of the lived realities of the agrarian African society, while the latter is the state-legislated law that regulates the lives of African people. The most significant provision of the Constitution is section 39(2) of the Constitution of the Republic of South Africa, 1996, which states that 'when interpreting legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' This is because the

1 In this context, Africanisation is an anti-colonial measure that draws on its 'emancipatory qualities' to appropriate knowledge, among other things, see R Suttner, "'Africanisation", African Identities and Emancipation in Contemporary South Africa' (2010) 36(3) Social Dynamics 515–530, 516.

2 M Baase, 'Chastisement and the Consideration of African Customary Law in Child Law Matters' (2021) 11 Constitutional Court Review 207–228, 207.

3 S Awoniyi, 'African Cultural Values: The Past, Present and Future' (2015) 17(1) Journal of Sustainable Development in Africa 1–13.

4 Baase (n 2) 220.

5 The flexibility approach is a mechanism designed to assist the South African courts in achieving judicial interpretation and development of repugnant ACL rules through a uniform standard that considers ACL values and constitutional values equally.

Constitution introduces values that underpin the South African legal system—values that were not adhered to in the pre-constitutional era.[6] Against this background, ACL is currently recognised by the Constitution, as a fully-fledged component of the amalgam of South African law, based on its own values and norms.[7] Furthermore, the Constitution protects the right to culture and the right to participate in cultural activities.[8] The Constitution's vision is for the courts to consider all these features when developing ACL, ensuring that, in its recognised form, ACL embraces the principles of the democratic dispensation.[9] However, when exercising their mandate prescribed under section 39(2) of the Constitution, South African courts have not always conducted themselves satisfactorily. Instead, they have compromised the development of the patriarchal features of ACL, including the rule of male primogeniture. Until recently, maleness has been upheld as a sufficient criterion for appointing beneficiaries for a deceased estate.[10] The majority of victims of these flawed judicial decisions have been women, younger males, children and illegitimate children. However, the ACL value system has also been significantly undermined. Over the past 30 years, various customary law values have been brought before the courts in relation to a variety of matters, yet the judiciary has repeatedly approached their development with a conservative mindset.

The Right to Cultural Recognition

In South Africa, cultural recognition[11] is crucial for ending the existential crisis faced by non-white South Africans. The concept of ACL is rooted in the historical marginalisation and distortion of various cultures. To address its discriminatory impact, the South African judiciary must unravel the official version of ACL. This approach must be tailored to ACL specifically and remain consistent with the Bill of Rights.[12] The Court in *Bhe* makes it clear that the official version, which emerged from the colonialist and apartheid eras, no longer reflects the day-to-day lives of African people. This is because ACL has not been interpreted within its specific context. Instead, it has

6 The Constitution of the Republic of South Africa, 1996, s 1 reads in part: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, the supremacy of the Constitution and the rule of law, universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

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

8 Constitution, s 30 and s 31.

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

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

11 The Constitution, in s 30 and s 31 guarantee the right to culture and cultural association of choice.

12 Section 39 (2) of the Constitution, 1996.

become marginalised and stuck in the past.[13] Living ACL, a system of cultural norms and values, has been identified as a viable medium for development because it aligns with the lived experiences of its people.[14] Living ACL is dynamic[15] and flexible, existing in dual forms: oral and written.[16] However, it is difficult to ascertain due to its dynamism and the fact that it is open to interpretation from community to community. Development according to living ACL must be conducted on a case-by-case basis, not holistically.[17] The marginalisation of ACL as a system that regulates personal relationships has contributed to this issue. Therefore, an alternative judicial interpretation approach is needed to accommodate both belief systems without assimilating one into the other or contravening human rights.

The South African Judicial Context of Living ACL

In carrying out their duty to develop ACL, courts must differentiate between the living ACL and its distorted official version, using the living version as the basis for the official version. They must ensure equal attention to sections 9 and 10, 30 and 31, without a hierarchy of rights, resulting in judicial decisions rich in constitutionalism and Africanisation.

Development in the legal context has an end goal of advancement of ACL. There are two instances that warrant ACL development by the superior courts of South Africa.[18] The first instance is where ACL needs to be modified to fit the altered conditions in the community where the law operates.[19] This form of development is community-reliant and, therefore, rooted in the living version of the law.[20] In the second occasion, ACL contravenes the Bill of Rights and must be brought into alignment with it.[21] Generally, it is the official distorted version of the law that is inconsistent with the Bill of Rights. Lehnert offers his own classification for the above instances; he refers to the former as 'passive development' and the latter as 'active development'.[22] Moreover, the advantage of passive development is that communities are more inclined to accept a development emerging from an existing rule, rather than a new rule altogether.[23]

13 *Bhe v Magistrate Khayelitsha* (2005 (1) SA 580 (CC) para 43.
14 *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (4 June 2008) para 74.
15 *Bhe* (n 13) para 86.
16 A Kerr, 'The Nature and the Future of Customary Law' (2009) 126(4) SALJ 677–689, 679.
17 W Lehnert, 'The Role of the Courts in the Conflict Between ACL and Human Rights' (2005) 21(2) SAJHR 241–277, 251.
18 Constitution s 173.
19 *Bhe* (n 13) para 216.
20 *Bhe* (n 13) para 219.
21 *Bhe* (n 13) para 218.
22 W Lehnert, 'The Role of the Courts in the Conflict Between African Customary Law and Human Rights' (2005) 21(2) SAJHR 241, 251.
23 ibid 254.

The Merits and Demerits of Courts Developing Customary Law Principles

Since the development mandate began operating in South African courts, it became apparent that there is one technical limitation which must be noted. This is where the need for development only arises on a case-by-case basis.[24] Therefore, courts cannot unilaterally embark on developing customary law or principle unless a need is identified. However, it is worth noting that this limitation does not affect the willingness, or reluctance of the judiciary to develop ACL when the occasion arises. Other limitations include inflexible judicial attitudes, a shortage in judicial understanding with regards to ACL and the replacement of it with common law. This is what has created an imbalanced value-based jurisprudence in ACL development.

Inflexible judicial attitudes

The Constitution's normative vision is that both section 8(3) and section 39(2) should cater for the development of ACL. However, the former remains silent and only refers to common law development. Rita infers that this unilateral reference to common law makes its supremacy official.[25] Likewise, the judiciary needs to be cleansed of such judicial attitudes so that the vision of the Constitution is fulfilled. In the past, the official ACL was partially codified to ensure that it would be 'readily ascertainable'.[26] Arguably, this process triggered the distortion of this official version. In the matter at hand, the Court in the majority decision reasoned against development by stating the following:

> There is however insufficient evidence and material to enable the Court to do this. The difficulty lies not so much in the acceptance of the notion of 'living' customary law, as distinct from official customary law, but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights.[27]

The Court failed to come to terms with the fact that the living ACL did not have the 'readily ascertainable' feature that the official version possessed. Rather, the living version was dynamic and flexible in nature. The courts had been conditioned to accept formal law (especially Western-oriented lenses) that could be easily tested. Despite their warm embrace for living ACL, their reluctance to accept the invitation to develop meant they were unable to trust the spontaneous developments that had occurred in the community.[28] The judges in the majority indicated that without the 'readily ascertainable' feature which served as a crutch, the default reaction was to keep to the procedure they were accustomed to. This demonstrates the legal conservativism of the judiciary in this case, as the majority decision was consumed by the traditional ideas

24 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 33.
25 R Ozoemena, 'Living Customary Law: A Truly Transformative Tool?' (2016) <http://www.saflii.org/za/journals/CCR/2016/8.pdf> accessed 28 November 2017.
26 L Mbatha, 'Reforming the Customary Law of Succession' (2002) 18 SAJHR 259–286, 263.
27 *Bhe* (n 13) para 9 [emphasis added].
28 *Bhe* (n 13) para 84.

and attitudes regarding the treatment of ACL. In fact, to a certain extent, it seems like the recognition of ACL was temporarily revoked.

Inadequate judicial understanding

The judges of the Constitutional Court in the majority decision seemed to be suffering from a lack of sufficient understanding with regards to ACL. Himonga asserts that the efforts of the majority in *Bhe* did not amount to an interpretation of the issues before the Court, rather the Intestate Succession Act (ISA) was brought in as a solution without due consideration of the 'grounded reality'.[29] To begin with, the Court was not on the same page in terms of classifying whether the law in dispute was rooted in inheritance or succession. Mnisi-Weeks notes in agreement as follows:

> Likewise, it shows the need for improved tools for state courts to understand and give expression to what is happening in terms of living customary law so that they can develop official customary law with reasonable understanding.[30]

The majority decision conflated inheritance with succession, which was not only an error, but it further indicated the judges had insufficient clarity on this subject matter. In the early stages of his argument, Ngcobo J took the opportunity to dispel the belief. He explains that contrary to the Western concept of the 'heir', the *indalifa* cannot elect to claim the right to inherit property, separate of all other responsibilities.[31] Thus, it is greatly concerning how the fate of ACL development rests in the hands of a judiciary that still interprets ACL with a common law lens.

The replacement of ACL with common law

The replacement of ACL with common law by the Court in *Bhe* was narrow and regrettable.[32] The majority judgement failed to consider that ACL is still being nursed back to health, following the lengthy period of judicial marginalisation. This action is in contrast with transformation, and it casts a serious doubt on the equal status of ACL and common law, which was given by the Constitution.[33]

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29 C Himonga, 'Reflection on *Bhe v Magistrate, Khayelitsha*: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa' (2017) 32(1–2) SAPL 1–18, 8.

30 S Mnisi-Weeks, 'Customary Succession and the Development of Customary Law: The *Bhe* Legacy: Part III: Reflections on Themes in Justice Langa's judgments' (2015) 1 Acta Juridica 215–255, 218.

31 *Bhe* (n 13) para 160.

32 S Mnisi Weeks, *Access to Justice and Human Security: Cultural Contradictions in Rural South Africa* (Routledge 2018) 248, 249. The legal transplant was done under the guise that the male primogeniture rule still existed in patriarchal and untransformed manner. However, the results on the ground reveal its flexible application allowing women to assume significant roles with regards to inheritance and becoming heirs in their own right. As a result, some families have elected to consolidate both customary and civil aspects of inheritance.

33 N Ntlama, '"Equality" Misplaced in the Development of the Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)' (2009) 2 Stellenbosch Law Review 333–356, 352.

These limitations imposed by the courts reveal how they approach the development of customary law principles. On close inspection, the following principles have been watered down, undervalued, eroded or misunderstood in the process.

The concept of in-community of property

The principle of in-community of property is arguably incompatible with ACL. In the *Gumede* case,[34] 'new' customary marriages, in which the spouses have equal shares in the marital assets and liabilities, were introduced by the Recognition Act of 2000.[35] This seeks to eliminate the husband's marital power and change spousal relationships. In the case of 'ancient' customary weddings, like the *Gumede* marriage in 1968, customary law dictated the proprietary ramifications. This patriarchal framework frequently resulted in unjust racial and gender discrimination. A few clauses were ruled to be unconstitutional by the High Court. ACL values dictate that family property is not owned by anyone but kept in custody of the family head, hence such a decision has taken an individualistic approach, rather than developing the rule in question.

The male primogeniture rule

According to certain provisions under section 23 of the Black Administration Act,[36] Miss Bhe's children were precluded by the male primogeniture rule from inheriting because they were junior and female. In the *Bhe* case, the ACL position regarding the male primogeniture rule remains unclear. The Court in the majority decision struggles with balancing ACL principles with the common law principles to provide relief for African women. The majority decision by Langa DCJ, found that the societal transformation was proof of the irrelevance of this rule in its official form. It paid due consideration to the history, nature and significance of the rule and whether it amounted to discrimination. Langa DCJ further clarified that the official rules of succession had no place for extra-marital children. The requirements for eligibility to inherit were even more strenuous to meet. Inheritance was primarily reserved for marital children. This meant the immediate disqualification from inheriting from the paternal side, because for all intents and purposes, such a child is regarded as (*ingane ezalelwe ekhaya eyako ninalume*) belonging to the mother's family. Accordingly, the child would take the mother's surname. Likewise with the maternal family, succession is governed by the male primogeniture rule, meaning that extra-marital children are unlikely to inherit within that family as well. Thus, the Court had to address the position of such children. Instead of the courts addressing these issues related to the ACL value system, it created more chaos and confusion through the replacement of ACL with common law. The ISA was simply not an ideal solution in this matter for the following reasons. The Court's justification of the substitution of ACL with common law based on its constitutional

Ntlama argues that ACL is portrayed as incapable of independent development, as its ranking is diminished to that of a 'useful accessory'.

34 *Gumede (born Shange) v President of the Republic of South Africa* (CCT 50/08) [2008] ZACC 23.

35 The Recognition of Customary Marriages Act 120 of 1998.

36 Act 38 of 1927.

compliance, was unsatisfactory. The ISA by design is a Western policy, which was imposed on an unsuspecting culture. Interestingly, it was originally crafted to suit 'all' intestate estates, excluding those of Black Africans, however, such legislation had to be modified to now include African estates. Arguably, the Court should have rather invested in developing the official rules of succession already adapted to the lived realities of the African people. Furthermore, the ISA seeks to protect individual rights while group rights are neglected. As such, the replacement policy has only but scratched the surface with regards to the protection of women and other surrounding issues of succession at the grassroots level.

Lineage

The *Shilubana v Nwamitwa* case[37] involved the male primogeniture rule, where the only child of the deceased chief, Fofoza, was a female, Philia Shilubana.[38] The official ACL dictated a male heir, and her uncle, Mr Sidwell Nwamitwa, would be the most qualified.[39] Ms Shilubana brought this application under the equality clause, because according to this rule of primogeniture, she was not eligible to succeed to traditional leadership.[40] In contrast, the Court failed to show the equal treatment of rights in the case of Shilubana. Under the Constitution, section 9, section 30 and section 31, are all equal, since there is no hierarchy of rights.[41] Thus, the decision of the Valoyi traditional authorities to allow female traditional leadership, which was concluded in terms of section 211(2), was in favour of the development.[42] The Court's role post development was significant. This is because the development mandate envisioned that the right to equality would be reflected 'equally alongside African values.' The balancing act included that when modernising ACL in terms of equality (section 9), the African value system (sections 30 and 31) should not be ignored. In this instance, the African values system puts forward the significance of lineage based on the following:

37 *Shilubana v Nwamitwa* [2008] ZACC 9 (n 14). The High Court ruled in favour of Mr Nwamitwa, primarily because the Valoyi tribe had not adhered to African customary law in appointing Ms Shilubana. The SCA decided differently stating that the rule should stand as it was and a resolution should be found within the rule. The CC found in Shilubana's favour citing that 'official customary law is not fossilised to the point that it is unchangeable, and it is not immune to the equality claim.' Van der Westhuizen J reiterated this, noting that South Africa's status as a signatory of international human rights created an obligation to protect the rights of women. He mentions that, among other reasons, culture has historically been hostile to woman's equality, and therefore cultural practices must sometimes yield to constitutional guarantees. The practice of culture is subject to the Constitution. Of all the critiques of the case, the most significant was that the protection of culture by the Constitution should not be pursued at all costs; it is not absolute.

38 *Shilubana* (n 14) para 3.

39 ibid.

40 *Shilubana* (n 14) para 1.

41 Constitution.

42 Constitution.

> The preservation and the protection of the chieftaincy title—the male successor ensured that the royal bloodline (which informed their identity) remained intact.[43]
>
> It advanced marital values—female children were encouraged to get married and bear children for their marital family, who would carry that surname.[44]
>
> At all times, the future of succession would be determinable—there was certainty of the continuation of lineage.[45]

The court recognised Ms Shilubana's right to succeed to a leadership position, free from gender discrimination. At the same time, it sought to preserve the lineage-based nature of traditional leadership and the unique importance of the chieftaincy. The introduction of a woman as *hosi* must be done responsibly, given the distinctiveness of the role. Ntlama[46] argued that the male primogeniture rule in succession should be reformed to recognise and accommodate women, while Mmusinyane[47] argued for restorative measures to ensure women's eligibility to serve as *hosi*.

The head of the family within the context of lobola negotiations

The traditional role of the 'head of the family' in customary law, particularly concerning marriage and lobola negotiations, has evolved, particularly when circumstances deviate from the norm. The father or male guardian traditionally provided the lobola for the bride's first wife, allowing him to consent to the marriage and participate in negotiations. However, in practice, mothers can negotiate for and receive lobola and consent to their daughters' marriages, especially when the husband abandons the family. This recognition aligns with the spirit, purport and objects of the Constitution of the Republic of South Africa. In the case of *Mabena v Letsoalo,*[48] the Court found that the respondent's mother was legally entitled to negotiate for and receive lobola and act as

43 Ntlama (n 33) 349.

44 ibid.

45 *Shilubana* (n 14) para 90. 'The second point is that Ms Shilubana does not apparently intend that her own daughter shall succeed her. It has been indicated that a "sociological" child, born of the male Nwamitwa bloodline, will succeed her instead. If this will be the position, however, it does not amount to gender discrimination. For one thing, it would follow equally from this decision that the sons of Ms Shilubana would not succeed her either. For another, there is nothing to show that Ms Shilubana could not be succeeded by a woman, albeit not her own daughter. That a decision might have been made to keep the chieftainship in a certain family line reflects, not gender discrimination, but an attempt to combine the preservation of royal bloodlines with measures designed to oppose gender discrimination.' This decision by the Court resulted in uncertainty regarding the future of succession, post the end of Ms Shilubana's reign.

46 Ntlama (n 33) 351. Ntlama insists that the Court in *Shilubana* should not have left such a void in the development unfulfilled.

47 B Mmusinyane, 'The Role of Traditional Authorities in Developing Customary Laws in Accordance with the Constitution: *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC)' (2009) (12)3 Potchefstroom Electronic Law Journal 136–161, 150.

48 *Mabena v Letsoalo* 1998 (2) SA 1068 (T).

her daughter's guardian and consent to her marriage.[49] The role of a 'man' still legitimises lobola negotiations in many traditional communities, even in cases where a father is absent, as is increasingly common with women raising children alone. Therefore, the development was warmly received as a progressive step, allowing the mother to provide consent. Beyond that, however, it is still significant to validate the role of a man or men presiding over lobola negotiations. These could include fathers, distant relatives, male elders of the same surname or a respectable male figure in the family. This practice reflects the communal relations of ACL. For instance, under isiZulu customary law, negotiating lobola directly with women is unacceptable, although women still play a significant role in the process. The court missed an opportunity to emphasise this aspect, without necessarily framing the issue entirely in terms of gender equality.

Therefore, this paper argues that the development of customary law by South African courts has been hampered by technical limitations, judicial biases and a tendency to replace rather than genuinely develop ACL principles. This has led to the watering down or misunderstanding of crucial customary law concepts, impacting issues from property rights to succession and traditional leadership.

Implementing the Flexibility Approach

Up to this point, this paper has demonstrated that ACL is recognised as an equal and valid legal system alongside common law in South Africa. Consequently, it is entitled to judicial development that strongly considers its cultural rights. The paper emphasised the merits and demerits and highlighted a few missed opportunities to incorporate an African perspective into the decisions. It now suggests taking a flexible approach to ACL development, ensuring equal attention is given to sections 9, 30 and 31 and that no hierarchy of rights is established.

A three-pronged flexibility approach

The flexibility approach states that values, principles, policies and customs must be deconstructed to look at the best interests of those it serves. The task to develop African customary law primarily belongs to the courts, likewise the design of the flexible approach is in line with the court's duty. This approach comprises three phases to be conducted by the courts which will be discussed below.

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

Stage 2: This is the sifting phase, which will indicate how people have become more flexible and practical in how they perform customs and practices. In this phase, the court is required to deconstruct the policy or custom to reveal the value or principle that is an

49 ibid paras 3 and 4.

integral part of people's lives, which needs to be kept intact. Essentially, the flexible approach requires innovation from the courts. Aspects such as how customs and practices are performed can then be altered to remove the contravention due to this flexible feature. Furthermore, the court in this stage is permitted to invite a friend of the court and consult empirical research to clearly ascertain African values that are integral to the community. The role of such advisers has since evolved to include public interest representation, and this can be expanded to provide the court with feedback from the interaction with the people it serves in ACL matters.

For example, when examining the custom of lobola delivery, the underlying principle of providing lobola has persisted over time even as its performance has shifted from the delivery of cattle to monetary payment.[50] This illustrates how communities have adapted the practice of lobola to meet the needs of contemporary society.

The court's role is central to the realisation of constitutional dreams for ACL to be developed and has allowed for the establishment of jurisprudence aimed at upholding African values.[51] The flexible approach is community-centred, which is essential because it would be challenging to ascertain the living version of the law without referencing the relevant community for contextual background. Himonga[52] noted in agreement that to ensure appropriate judicial interpretation, judges need to gain a proper understanding of the living ACL of that specific community. Particularly, for the purposes of development, this understanding must be rooted in the lived reality of that specific community.[53] Furthermore, the community's past practices become the primary source for the harvesting of development. Hence in the *Bhe* case, the court's resolution did not amount to a development because it was completely removed from the practices of the people and deeply rooted in Western patterns of inheritance.[54]

Under Stage 3, the element of cultural feasibility is extremely important.[55] The court would be required to engage in a feasibility study of the proposed development on the community concerned. This should occur prior to the development being legitimised. As such, the feasibility study will be directed at assessing whether the proposed development will encounter any resistance or rejection from the community. Such an

50 *Bhe* (n 13) para 175.

51 Mmusinyane (46) 3. Previously this was not a concern for the judiciary, as African customary law was not the law of the people but that of the judiciary. *Alexkor* (n 7) para 53. In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history, it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.

52 Himonga (n 29) 3.

53 ibid.

54 *Bhe* (n 13) para 229.

55 P Atwell, 'The Feasibility Study of a Culture' <https://smallbusiness.chron.com/feasibility-study-culture-73479.html> accessed 23 October 2018.

assessment is vital to the determination of the viability of the proposed development, its limitations and whether there are aspects that need to be revised to align with the Constitution and the law of the living ACL of the people. This would enable the courts to assess the development for compatibility with the cultural system and its practice within the relevant community. It is important to establish whether the proposed development will allow for the continuation of the custom, principle or value in question. Furthermore, if the proposed development results in the termination of the existing custom, principle or value, then the court should revise it. An example is the *Shilubana* decision, which resulted in uncertainty with regards to the future of succession. Despite this shortfall, the *Shilubana* precedent is celebrated for other successes such as gender empowerment in traditional leadership.

The flexibility approach is mainly applicable when 'passive development' is conducted by the court,[56] or when passive development is performed by the community[57] concerned. This approach is not restricted to matters based on the male primogeniture rule, although the current case developments have been centred on this subject.

As previously noted, the flexibility approach is born of the flexible nature of living ACL. Ngcobo J in *Bhe* clearly indicated where the development of official ACL can be affected by removing a deviation, the court can simply do so to bring it in line with the Bill of Rights.[58] As such, the flexibility approach could have been used to accommodate the changes in society that recognise a woman as the head of the family. In contrast, the *Shilubana* case demonstrates that the court can 'delegate' the task of development to the community concerned.[59] This is part of their autonomy as envisioned by section 211(2).[60] The Valoyi traditional authorities illustrated this when they developed the male primogeniture rule to recognise a woman as a traditional leader.[61] Their decision was coherent with the changing lived experiences of the community that was initially reflected in the endorsement of the royal family.[62] Most importantly, this development was in line with the objectives of the Bill of Rights.[63]

The benefits of the flexibility approach

The flexibility approach is crafted with the uniqueness of the African legal system in mind. It caters for monogamous and polygamous marriages, as well as matters of inheritance and succession. Furthermore, it offers South African courts the opportunity to resuscitate African values through decisions that have a direct bearing on the lived

56 *Bhe* (n 13) para 222.
57 *Shilubana* (n 14) para 60.
58 *Bhe* (n 13) para 222.
59 *Shilubana* (n 14) para 75.
60 Constitution.
61 *Shilubana* (n 14) para 70.
62 ibid para 73.
63 ibid para 60.

realities of people.[64] This is reliant on appropriate judicial interpretation. Himonga discusses the importance of the *Bhe* case as an interpretative tool in ACL.[65] She mentions that had the court entertained the use of the flexible approach, the rule of primogeniture could have been developed.[66] However, Himonga does note that there are elements in the majority judgement of *Bhe* that reveal an understanding of living ACL, which could have been advanced to promote interpretation and development that is not far removed from the lived reality of the people.[67]

Arguably, the flexibility approach is most beneficial to South African courts. When courts facilitate the passive development of ACL, they can also respond with flexibility in procedures.[68] The development mandate does not impose any rigid development procedure on the courts, except for the fact that the development must be coherent with the Bill of Rights, and that equal attention is paid to the rights concerned.[69] In addition, the flexibility approach steps in to resolve the court's inability to develop ACL, by facilitating the development.[70] Likewise, the community derives a substantial benefit from the flexibility approach, as it is solidified as a source of living ACL.[71] It also leads to the flexible application of a development by the people on the ground, as evidenced in the empirical research of Mnisi-Weeks.[72]

This research contains evidence disproving the effectiveness of the majority decision of *Bhe*, and how it has a varying impact on the lives of the people who are regulated by the ISA. The *Mayelane*[73] case was equally instrumental in expanding the definition of living ACL for judicial interpretation. This stems from the Constitutional Court's development of the requirement for the consent of the first wife to enter further Tsonga customary marriages. The court in this matter used constitutional values of human dignity and equality to arrive at the development. Since living ACL is community specific, the use of constitutional values has a binding effect on all South Africans, and it expands the boundaries of the effect of such a development to apply to ACL across the spectrum.

The *Mayelane* case revealed the relationship of interdependence between the flexible feature of ACL and the diversity that is found in the living version of the law of communities.[74] The empirical research presented to the court demonstrated that two practices existed in the context of polygamous marriages in the Valoyi community.

64 DD Ndima, 'The Resurrection of the Indigenous Values System in Post-Apartheid African Law: South Africa's Constitutional and Legislative Framework Revisited' (2014) 29(2) SALJ 311.
65 Himonga (n 29) 3.
66 ibid 6.
67 ibid 3.
68 *Shilubana* (n 14) para 75.
69 Constitution, s 39(2).
70 *Bhe* (n 13) para 110.
71 *Shilubana* (n 14) para 74.
72 Mnisi-Weeks (n 30) 248.
73 *Mayelane v Ngwenyama* (CCT 57/12) [2013] ZACC 14.
74 *Mayelane* (n 72) para 43.

There were people who practised the rule of seeking permission from the first wife before entering further marriages, while there were others who thought it was sufficient to merely inform the first wife of an impending marriage.

For flexibility to produce the desired development, the following is important to note:

> a) The courts must be willing to entertain the living version of ACL without substituting it or assimilating it with common law.
>
> b) The courts must be able to accept empirical research from the community concerned that will reveal the diverse past practices. The practices must have been ongoing for a reasonable period to be considered binding as ACL of that community.[75]
>
> c) The courts must use the flexibility approach, which comprises three phases, to interpret which of the past practices is in line with the constitutional values of human dignity and equality.
>
> d) Finally, the courts will be able to develop the past practice that is coherent with the Constitution while keeping the values of the community intact. Thereafter, the development will have an umbrella effect on all ACL in South Africa.

The challenges and limitations of the flexibility approach

The flexibility approach is limited to the development of living ACL. This is primarily because the flexibility feature is only found in the living version of the law.[76] Currently, judicial interpretation and development have been done in a manner that encourages assimilation while eroding African values. The repugnancy clause lies at the discretion of courts, where courts must consider the internal limits that exist within ACL.[77] Thus, it is worth noting that the flexibility of African values and norms must be weighed against legal certainty and vested rights to promote development.[78] For example, in *Shilubana*, if Nwamitwa was already a sitting *hosi* at the time of the dispute, the court would have had to consider such internal limitations.[79] The role of the court in that instance was to balance the need to develop the male primogeniture rule against Nwamitwa's vested rights.[80]

75 Kerr (n 16) 682.
76 *Bhe* (n 13) para 110.
77 T Nhlapo 'Customary Law in Post-Apartheid South Africa: The Vexed Question of Cultural Diversity, Women's Rights, Living Law, and Appropriate Law Reform' (2014) <www.nylslawreview.com/wpcontent/uploads/sites/16/2014/11/Nhlapo.pdf> accessed 30 October 2017.
78 *Shilubana* (n 14) para 47.
79 *Shilubana* (n 14) para 78.
80 ibid.

The case of *Mthembu*[81] reveals institutional challenges with regards to interpretation and development. Section 39(2) is very clear and instructive about how development must reflect the objects of the Bill of Rights. The development mandate is imperative in terms of literal interpretation. In the *Bhe* case, Ngcobo J holds an opposing view to that of Langa CJ. He reiterates that in accordance with section 39(2), development is mandatory, and the courts therefore cannot treat this duty as optional.[82] Furthermore, he mentions that section 39(2) and section 173 are not mutually exclusive, as where section 173 fails to advance the aims of section 39(2), the court's duty is classified as a 'general obligation' to ensure that appropriate development takes place.[83] Thus, any defect that is disharmonious with the Bill of Rights must be removed via development. As such, Ngcobo J was displeased with the finality of striking down this rule of ACL, as it was observed by many people, who will continue to practise the rule.[84]

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

The flexibility approach is limited to normal succession processes. According to *Sigcau v Sigcau,*[85] there are two parallel systems involved in ACL succession matters. The first includes the appointment of a traditional leader by the royal family.[86] The second refers to the Commission of Traditional Leadership Disputes and Claims, which becomes involved when a claim is lodged or a dispute arises regarding the appointment of traditional leaders.[87] In *Sigcau,* the royal family had a decade-long succession dispute that led to confusion following the death of *ikumkani Mpondombini Sigcau*.[88] The Commission appointed Zanozuko as the next *ikumkani* and the President had to recognise him by issuing a notice of recognition and a certificate of recognition.[89] The crisis erupted when the Commission erred by appointing Zanozuko under the wrong statute, which meant that the President could not recognise his appointment.[90] Later, the royal family showed their disapproval for the Commission's appointment of Zanozuko

81 *Mthembu* 1998 (n 10).
82 *Carmichele* (n 24) para 39.
83 *Bhe* (n 13) para 214.
84 ibid para 215.
85 *Sigcau v Sigcau* 2013 (9) BCLR 1091 (CC).
86 ibid para 14.
87 ibid para 5.
88 ibid para 7.
89 *Sigcau* (n 84) para 6.
90 ibid para 10.

by appointing their own candidate, the late *ikumkani Mpondombini's* daughter, Wezizwe.[91]

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

The *Sigcau* case shows how institutional challenges should be considered when implementing the flexibility approach. In this matter, the members of the community complained that the approach used by the Commission to 'prove' the customs and traditions of particular communities, on a few occasions, was displeasing.[92] This suggests that the people did not identify with their procedures and the Commission's findings. Despite the Constitution's reassurance that the community's cultural interests remain at the core of traditional leadership disputes, such dissatisfaction raises a concern worth noting.[93]

For example, the use of the flexibility approach by the community to achieve development, particularly in the third phase, requires the establishment of a strategic plan resembling an empirical study. This plan guides the collection of information directly from the people in the community concerned. It further identifies specific target audiences in the community, taking into consideration which information is given more weight because it can be corroborated. Essentially, the strategic plan must be crafted carefully without excluding community members from participating, as living ACL recognises the people as the primary source of law. Thus, the flexibility approach would benefit from establishing a blueprint for quality control when ascertaining the content of living ACL. Likewise, the courts may receive opposing views on the content of living ACL, during the use of the flexibility approach to achieve passive development.[94] As such, it would be a shame if the courts responded as they did in the majority decision of the *Bhe* case. Therefore, establishing a viable solution to overcome this challenge is a matter of priority.

91 *Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs and Others* 2018 (12) BCLR 1525 (CC) para 8.

92 ibid para 17.

93 ibid.

94 *Alexkor* (n 7) para 54.

Conclusion

In summary, the article underscores the critical need for a nuanced and culturally sensitive approach to developing ACL in South Africa. The proposed flexibility approach offers a structured yet adaptable framework to navigate the complexities of harmonising traditional practices with constitutional imperatives, thereby fostering a more equitable and representative legal system that truly serves the lived realities of the African people. Its successful implementation requires a concerted effort from the judiciary to shed Eurocentric biases and actively engage with the dynamic nature of living ACL, ensuring that judicial development is a collaborative process rooted in community values and aligned with the Bill of Rights.

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