

Editorial note from the chairman of the newly launched Centre for Indigenous Law in the Department of Public, Constitutional and International Law

The Centre for Indigenous Law in the Department of Public, Constitutional and International Law, College of Law, was launched on the Muckleneuk Campus of the University of South Africa (Unisa) as part of the Conference on African Customary Law: Contemporary Issues held on 11 and 12 July 2013.

The dignitaries and guests were welcomed by the Dean of the College of Law, Professor Rushiella Songca, who characterised the conference as an important expression of Unisa's research goal of contributing to South Africa's economic, social, cultural and environmental wellbeing. She spoke passionately of how the launch of the Centre for Indigenous Law could serve as a catalyst for the achievement of the College of Law's strategic objectives within Unisa's broader strategic plan.

Unisa's Vice-Chancellor and Principal, Professor Mandla Makhanya, delivered the opening address pointing out that, situated in the Department of Public, Constitutional and International Law, the Centre for Indigenous Law was uniquely positioned to inform and shape the understanding of how customary law can contribute to socio-legal development in South Africa and Africa. In an apparent reference to the controversy around the stillborn Traditional Courts Bill, the Principal observed the passion with which issues of customary law continued to be debated and contested. This he saw as an indication of customary law's typically South African character where seemingly intractable situations arising from multiple heritages often contest for space in forging of a new, inclusive heritage. Professor Makanya saw in the launch of the Centre, a vehicle for Unisa to provide space for intellectual engagement and discourse in seeking answers to questions of how general legal development be supported by progressive elements of customary law. Professor Makhanya pointed out that the promotion of indigenous knowledge – of which customary law forms a critical element – occupies a central role in Unisa's core business of teaching and learning; research and innovation; and community engagement.

The keynote address was delivered by former Judge-President of the Gauteng High Court and Unisa Chancellor, Judge Bernard Ngoepe, who warned that the intellectual capital housed at the Centre for Indigenous Law has an important task ahead if South Africa and the continent are to avoid being re-colonised by foreign values and ethos. Judge Ngoepe alluded to the practice of laying un-customary atrocities at the door of customary law; one thinks here of the massacre of youths under the guise of initiation into manhood. Incidents such as these have propelled customary law to the forefront and called into question its ability to develop while adapting to and interfacing with the framework established by the Constitution of the Republic of South Africa, 1996.

In his closing address, the then Chairman of the Department of Public, Constitutional and International Law in which the Centre for Indigenous Law is housed, Professor André Thomashausen, thanked all the dignitaries, guests and participants in the conference over the two days of intensive discussion and reflection. In particular, he regarded Professor Makhanya's advice to consider customs and indigenous law from a fresh perspective, as a wakeup call to scholars of indigenous law. He welcomed the assurance of the strategic interest and support for the Centre for Indigenous Law from Unisa's Principal, Professor Makhanya, and the Dean of the College of Law, Professor Songca. As concluding remarks Professor Thomashausen extended the debate to the wider context of the perceived Eurocentric soul of the South African Constitution which he reckoned has just begun, and observed: 'To introduce into this debate reflections on how the nations and people in our part of the world have organised their common lives, their peace and their justice, over many past millennia, is a most legitimate undertaking'. This is particularly true of customary law where so much distortion has resulted from the imposition of foreign values under the guise of civilisation.

Over the two days of the Conference, 27 papers were delivered of which five were considered, successfully peer reviewed, and now appear in this volume of *Southern African Public Law (SAPL)*.

In the first paper Professor Philip Iya, Professor at the Indigenous Knowledge System (IKS) Centre of North West University (NWU), Mafikeng Campus, addressed the highly contested public law issue of the recognition of African values in South Africa with emphasis on the youth. His paper entitled 'Challenges and prospects for traditional leadership in Africa: Towards innovative ideas to enhance African values among the youth in South Africa' revolved around the hypothesis that the youth in Africa generally, but particularly in South Africa, are seldom involved in debates relating to African values, with the instance of African traditional leadership as a case in point. In expanding on this hypothesis he highlighted two different approaches/schools of thought relating to the recognition of traditional leadership. On the one end he positioned the 'traditionalists' with their emphasis on the 'continued existence of traditional leaders' for various

reasons. On the other hand, he positioned the modernists who campaign for the total abolition of the institution of traditional leadership. Professor Iya, however, advocated the adoption of a more pragmatic middle course (an 'inter-entrenched' goalpost). Nevertheless, the central question remains 'how the South African society should move between the two goalposts (between traditionalism and modernism)?' The answer to this question is the challenge. For this reason Professor Iya pleads for

innovative ideas especially from the youth – the future leaders of society in Africa. Any society in Africa will get nowhere if the youth do not engage in debates on culture (and per definition traditional leadership) or if the spirit of the traditional values of culture is left to die a natural death because no one bothers or cares. People who want to destroy society use culture, the glue that binds society.

In her paper entitled 'The constitutional divide of post-apartheid South Africa in the jurisdiction of the traditional justice system', Professor Nomthandazo Ntlama, Dean of Research, College of Law and Management Studies: University of KwaZulu-Natal, argued that the exclusive jurisdiction of the traditional justice system – which in effect is based on racial classification – has been the subject of debate in South Africa since the attainment of democracy in 1994. The debate is drawn from the Constitution, which recognises the general system of customary law, but limits its application to the people who observe it. The debate is further fuelled by the non-explicit recognition of the customary court system within the judicial structure of the Republic. These courts are inferred from the concept of 'any other courts' in the Constitution. The inference of customary courts from 'any other courts', compromises the legitimate status of these courts in the resolution of disputes that arise from the system of customary law – in line with the ideals of the new constitutional dispensation.

Against this background she critically reviews the constitutional status of the customary court system in South Africa and argues that the exclusive jurisdiction of the traditional justice system is a direct racial classification under the guise of the foundational values of the new democratic dispensation. Equally, the status given to customary courts – which is inferred from the concepts of 'any other' – constitutes a manifestation of the historic divide that compromises the legitimacy of these courts in the application of traditional justice. And finally, she reviews the extent to which the exclusive jurisdiction can move towards a system that inclusively reflects the values of the new democratic dispensation.

In his paper entitled 'The resurrection of the indigenous values system in post-apartheid African law: South Africa's constitutional and legislative framework revisited' Dr Dial Ndima argued that a constitution that recognises customary law in South African must prioritise indigenous African values in order to give direction to state institutions in their quest to mainstream the African worldview in legal

interpretation. Its framework must ensure that the recognition of indigenous African institutions restores their cultural meaning which must, in turn, reflect custom and social practice as the roots for anchoring African concepts to their own frame of reference. In order to reverse the effects of cultural imperialism that generated the injustices of the past, South Africa's constitutional framework must also serve as an injunction enjoining state institutions to choose the living version of African law as their point of departure whenever they respond to calls to pronounce upon issues of indigenous African jurisprudence. In the South African context this task must entail effecting a change in the role of interpretive institutions from their pre-constitutional culture of denigrating African culture under the alienating repugnancy dispensation, towards refashioning African law with indigenous values as envisioned by the ethos of transformation. The extent to which the constitutional institutions can contribute towards rehabilitating African law from its role as the polecat of South African jurisprudence, to a credible component of the country's justice system is the measure of their success in this difficult and unenviable mission. He argued further that a clue to accomplishing this mission could be to develop a theory of re-indigenisation as a counter-weight to the distorted jurisprudence that was developed by the discredited repugnancy clause of yester-year. Such a theory would persuade legal and constitutional interpreters to mainstream an African life-world in which to anchor the rules, principles, concepts and doctrines derived from the indigenous value system.

In 'How central is the African Union to the promotion of traditional African values? A critical engagement' Dr Babatunde Fagbayibo invites his audience to engage more extensively and critically with the role of the African Union in promoting 'traditional African values'. In addition to the Charter for African Cultural Renaissance, more or less every instrument of the African Union (AU) underscores the importance of traditional African values. This acknowledgement raises two critical questions. The first relates to the level of implementation of this ideal by member states; the second, the extent to which the AU provides an effective coordinating platform for the promotion of traditional African values. These two interrelated enquiries lie at the heart of understanding how the AU can play an essential role in the promotion of traditional African values. The author then focusses on the institutional perspective of promoting traditional African values through transnational mechanisms. Dr Fagbayibo's central argument is that AU member states should demonstrate the necessary political will to strengthen African Union institutions to be able effectively to coordinate and implement efforts aimed at channelling traditional African values into developmental efforts at both the national and transnational levels.

And finally, Stephen Monye in 'Freedom of expression and traditional communities: who can speak and when?' juxtaposes the constitutional right to freedom of expression with respect for customary law against the backdrop of the Constitutional Court's judgment in *Pilane v Pilane* 2013 (4) BCLR 431 (CC). In his

paper the author argues that the Constitutional Court should have developed the customary law around the *Kgotha kgothe* (general traditional meeting) custom which is pivotal to the exercise of the right to freedom of expression, association, and assembly within traditional communities.

As participants in the Conference and as members of the Centre for Indigenous Law, we appreciate all the words of wisdom that have been voiced in the course of this Conference some of which are reflected in the five papers chosen for publication in this edition of *Southern African Public Law* (SAPL). We regard the fundamental questions that have arisen as helpful in the huge task awaiting us in formulating the centre's programme and agenda.

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