

# The resurrection of the indigenous values system in post-apartheid African law: South Africa's constitutional and legislative framework revisited

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## ***Abstract***

A constitution that recognises customary law in South Africa 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 being the pole-cat 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.

A clue to accomplishing this mission could be to develop a theory of re-indigenisation as a counterweight to the distorted jurisprudence that was developed by the discredited repugnancy clause of yester-year. Such

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a theory would persuade legal and constitutional interpreters to mainstream the African life-world to which to anchor the rules, principles, concepts and doctrines derived from the indigenous value system.

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## 1 Introduction

This article seeks to explore the extent to which South Africa's constitutional framework acknowledges the new status of African law, as a distinct and unique component of South African law, as equal to the common law.<sup>1</sup> This equality was introduced by section 181 of the interim Constitution of 1993 in an effort to end the underdog status endured by African law since colonisation and to pave the way towards guaranteeing the system's future application in a democratic dispensation. The changed status of African law was confirmed when it was included in the 34 Principles that were reserved in Schedule 4 of the interim Constitution as one of the non-negotiable principles on which the final Constitution would be founded. Indeed this undertaking was fulfilled when section 211 of the 1996 Constitution appeared guaranteeing recognition of African law's institutions by the state and its application as one of the original authoritative components of the South African legal system in the courts.

This development gained the nation's credence as the dawn of a new era when the interim Constitution became the first authoritative official legal document in South Africa to embody African law's nucleus, the indigenous philosophy of life known as *ubuntu*,<sup>2</sup> in its postamble. When this philosophy of life made its debut it constituted the historic bridge that channelled South Africa's unsavoury past that was ravaged by despair towards the future that was teeming with hope.<sup>3</sup> As such *ubuntu*'s introduction placed African jurisprudence in the mainstream of South Africa's constitutional development without which the country's truth and reconciliation processes could not have seen the light of the day.<sup>4</sup>

In its new role as the instrument for nation building, the philosophy of *ubuntu* provided the transformative process with the flexibility the newly formed Truth and Reconciliation Commission needed in its quest to narrow the divide between the perpetrators of apartheid and its victims and became the basis for their co-operation in the reconstruction of the social fabric of the democratic South Africa. In their practical application *ubuntu*'s transformative qualities proved instrumental in exposing the fundamental incompatibility between the continued application of

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<sup>1</sup>Rautenbach 'South African common and customary law of intestate succession: A question of harmonisation, integration or abolition' (2008) 12 1 *EJCL* 1.

<sup>2</sup>See generally Ramose *African philosophy through Ubuntu* (2002) for the concept of philosophy of life.

<sup>3</sup>*Azapo v President of RSA* 1996 4 SA 671 (CC).

<sup>4</sup>See the Promotion of National Unity and Reconciliation Act 34 of 1995.

such cruel, humiliating and disgraceful forms of punishment as the death penalty<sup>5</sup> and corporal punishment<sup>6</sup> from the list of competent penalties for serious offences in the country's courts. *Ubuntu's* introduction thus propelled the advent of the transformative ethos that exposed the fundamental incompatibility between the depraved moral values of the past era and the aspirations of the new South Africa.

## 2 The constitutional framework for the recognition of African law

When the final Constitution of 1996 was adopted the philosophy of *ubuntu* had already taken root as part of South African jurisprudence since legal and political discourses had taken it to a central position following its debut in the Interim Constitution. Hence the time was ripe in 1996 for the Constitution to cement the African value system as the permanent framework for the recognition of African law. Towards this end section 211 of the Constitution provides:

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

For the purposes of understanding the nature and the ambit of the recognition of African law it is significant that section 211(1) of the Constitution subjects and limits it to functioning 'according to customary law' which accords well with the definition of customary law as the 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.<sup>7</sup> This means that in granting recognition to the indigenous institutions, their functions and application the Constitution paid attention to the social practices and usages prevailing among customary communities in South Africa.

The phrase 'according to customary law' in section 211 of the Constitution, read with 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those

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<sup>5</sup>See *S v Makwanyane* 1995 3 SA 391 (CC) declaring the death penalty unconstitutional.

<sup>6</sup>See *S v Williams* 1995 3 SA 632 (CC) in which the Constitutional Court declared corporal punishment of youths, in terms of s 294 of the Criminal Procedure Act 51 of 1977, unconstitutional.

<sup>7</sup>See the definition section of the Recognition of Customary Marriages Act 120 of 1998.

peoples' in the Recognition of Customary Marriages Act demonstrate the paradigm shift from the practice of the past where non-repugnancy to the codified official version of African law was more important than adherence to the 'living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs'.<sup>8</sup>

This paradigm shift demonstrates the Constitution's resolve to recognise the centuries-old struggles for self-determination waged by the adherents of African law and culture by affirming the version of African law that the communities themselves practise. Hence section 211(2)'s allocation of traditional powers and functions to those traditional authorities that observe and live by a 'system of customary law' accords well with the recognition of traditional authorities and their powers 'according to customary law' in section 211(1).

Ultimately this shift of emphasis from the official version of customary law with its ludicrous statutory requirements that it had to be 'readily ascertainable with sufficient certainty'<sup>9</sup> to the 'living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs' is indicative of the priority given to social practice in the new dispensation. More importantly section 211(3) of the Constitution enjoins the courts, as a matter of imperative, to apply African law in matters that are regulated by that system. This is a constitutional injunction cajoling the courts to apply African law as a dynamic, evolving and living system that is active among the communities.<sup>10</sup> In essence this is an unequivocal shift from the previous emphasis on the official version based on non-repugnancy to western values and the value of ascertainability to a living and dynamic version that conforms to indigenous African moral values.<sup>11</sup>

By granting recognition to the version of customary law currently governing customary communities and its institutions the Constitution has embraced both the communities' right to self-determination and their democratic right to govern themselves through their own 'customs and usages traditionally observed among the indigenous African peoples of South Africa'.<sup>12</sup> In that way the Constitution presents itself as a pace-setter for all legal interpretive bodies, including legislative and judicial authorities, to formulate their opinions on the basis of the current version of African law prevailing in the relevant communities when resolving African law disputes.<sup>13</sup>

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<sup>8</sup>*Pilane v Pilane* 2013 4 BCLR 431 (CC) para 34.

<sup>9</sup>See s 1(1) of the Law of Evidence Amendment Act 45 of 1988.

<sup>10</sup>*Pilane v Pilane* (n 8) par 34.

<sup>11</sup>*Ibid.*

<sup>12</sup>Bennett 'Re-introducing customary law to the South African legal system' 2009 (57) *The American J of Comp L* at 1.

<sup>13</sup>See *Mayelane v Ngwenyama* 2013 4 SA 415 (CC).

### 3 The legislative scheme for the development of the African law

#### 3.1 *The recognition of the Customary Marriages Act*<sup>14</sup>

The legislative scheme designed to implement the above constitutional framework for the recognition of customary law can be seen in the Recognition of Customary Marriages Act which seeks to restore full recognition to customary marriages on the basis of the 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'. To achieve its objectives this legislative instrument is located at the confluence between those indigenous values that are respectable and are actually observed by the communities on the one side and the spirit of the Bill of Rights on the other. As such the Act manifests African jurisprudence as a harmonious norm within the broader amalgam of the law of South Africa's constitutional democracy.<sup>15</sup>

The Act thus fulfils a vital *renaissance* purpose which is to recognise African culture as a system that operates on its own terms under the purview of the Bill of Rights<sup>16</sup> by unapologetically substituting the customary marriage with full marriage status for the erstwhile 'customary union' that had derogatory connotations.<sup>17</sup> The new customary marriage retains its respectable indigenous cultural features of being 'negotiated and entered into or celebrated under customary law' while embracing international human rights by prescribing the minimum age of consent for the spouses. In this regard section 3(1) of the Recognition of Customary Marriages provides:

- (a) the prospective spouses –
  - (i) must both be above the age of 18 years; and
  - (ii) must both consent to be married to each other under customary law; and
- (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

The reference to 'negotiated and entered into or celebrated in accordance with customary law' captures the characterisation of customary marriage as an institution established according to the 'customs and usages traditionally

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<sup>14</sup>Act 120 of 1998.

<sup>15</sup>*Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC).

<sup>16</sup>See *Pilane v Pilane* (n 8) para 32.

<sup>17</sup>*Gumede (born Shange) v President of the Republic of South Africa* 2009 3 SA 152 (CC).

observed among the indigenous African peoples'.<sup>18</sup> By linking the marriage to these indigenous norms the Act succeeds in exhibiting the existence of the synergy that cements the adherents of customary law to their culture. The Act's projection of the marriage institution 'according to customary law' means that it places marriage negotiations in the mainstream of community customs and usages which are vital traditional factors in its formation. So presented the new customary marriage can be seen as an institution that belongs to its adherents because it defines the community's own conception of affinity relations.<sup>19</sup> This is a far cry from the erstwhile 'customary union' of yesteryear that was designed by the state to reflect the status of African communities as colonial subjects, rather than democratic citizens.

Moreover, *ukulobola* negotiations retain the institution's traditional purpose of creating strong mutual relations between two clans through the establishment of a family unit for the procreation of children.<sup>20</sup> In that mode the Act preserves and maintains the customs and usages which traditionally transformed a woman into a wife by locating the *ukulobola* negotiations as a contest between the clans of the prospective spouses. As such the negotiations entail an indigenous request by the prospective husband's clan to the prospective wife's clan for her hand in marriage as a wife of a member of the former clan.

This request is known as *ukucelaintombi* (a request for the 'maiden woman'); followed by the *ukulobolisa* (the response by the woman's clan to the request, detailing their demands), and culminating in the *ukulobola* (delivery of *ikhazi* or marriage goods to the woman's family).<sup>21</sup> Thus the requirement that the marriage must be 'negotiated and entered into or celebrated in accordance with customary law' reflects the observance of the customs and usages of the adherents of African law.<sup>22</sup> This customary law requirement is fulfilled when the marriage has been concluded in accordance with the customs observed in the relevant community.<sup>23</sup>

One of the peculiarities of African law is that it is rooted in an oral tradition where there is no specific moment when it can be said that a customary marriage has come into being. As reflected above, the customary marriage is the culmination of a series of proceedings that evolve from the *ukucelaintombi*; the

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<sup>18</sup>Soga *Intlaloka Xhosa* (1937) 63.

<sup>19</sup>Bennett *Customary law in South Africa* (2004) at 210.

<sup>20</sup>Abiodun 'Towards an African concept of law' 2007 (1) *African J of Legal Theory* 71.

<sup>21</sup>The terms used belong to the isiXhosa language and have their counterparts in the other indigenous African languages.

<sup>22</sup>Section 3(1)(b) of the Customary Marriages Act (n 14). See also *Maluleke v Minister of Home Affairs* (02/24921) 2008 ZAGPHC 129 (9 April 2008) paras 8-16 for an analysis of the requirement that the marriage 'must be negotiated and entered into or celebrated in accordance with customary law'.

<sup>23</sup>See *Mayelane v Ngwenyama* (n 13) at para 23.

*ukulobola* negotiations; the delivery of *ikhazi*; and the conclusion of the marriage through actions of entering into the status or celebration of it. During the period of the proceedings mutual relations between the major players in the negotiation process keep developing along with the status which changes from *onozaku-zaku/ abakhongi* (delegates from both sides during negotiations); the implementation of the agreement by delivering *ikhazi* by the *abayeni* (literally 'the husbands' as the people delivering *ikhazi* are referred to); and the blessing of the marriage by the *abakhozi* (senior in-laws who are parents and people in the position of parents to the spouses) from both sides after the marriage has come into existence).

In the *Maluleke* case Tshiqi J reads the provision that the marriage must be 'negotiated and entered into or celebrated in accordance with customary law' to mean that the reaching of the *ukulobola* arrangements that culminate in the delivery of *ikhazi* is the fundamental stage in the conclusion of the customary marriage.<sup>24</sup> This view is endorsed by Matlapeng AJ in *Motsoatsoa v Roroviev* as follows:<sup>25</sup>

... although the handing over of lobolo is in terms of the Act not listed as a requirement for the coming into existence of a customary marriage, it is intrinsically linked with its existence. It is one of the pillars and an important one in the concatenations of processes leading to marriage. It is difficult to imagine a customary marriage existing in the true African context where any lobolo or part thereof has not been handed over to the bride's family. Thus lobolo or handing over thereof to the bride's family will form part of the evidentiary material to prove the existence of marriage.<sup>26</sup>

Consequently the attainment of the crucial stage of delivering *ikhazi* or part thereof indicates that the parties intend getting married and are advancing beyond mere cohabitation.<sup>27</sup> As indicated above with regard to processes followed in African tradition the Act does not prescribe the content of negotiation but reserves the determination thereof to the living law applicable in the various local customary usages, which are the indicators of the communities' views that the fundamental stage has been reached.

Yet the attainment of these two crucial stages, namely, the *ukulobola* negotiations and the delivery of *ikhazi* on their own, fundamental as they are, do not result in the existence of a customary marriage. The latter may not be attained until the next stage has been reached, namely, the marriage has been

<sup>24</sup>See *Maluleke v Minister of Home Affairs* (n 22) at para 12.

<sup>25</sup>2011 All SA 324 (GSJ).

<sup>26</sup>*Motsoatsoa v Roro* 2011 All SA 324 (GSJ) para 18.

<sup>27</sup>See *Maluleke v Minister of Home Affairs* (n 22) at para 12.

either 'entered into or celebrated', and most importantly, 'according to customary law'. This much is clear from Tshiqi J's following remarks in *Maluleke*:

once it is clear that the negotiations have taken place, the next enquiry, applying the Act is whether there are any factors that show that the marriage was "entered into" or "celebrated".<sup>28</sup>

By requiring the customary marriage to be entered into or celebrated under customary law the Act demands the observance of the relevant customary traditions as the determinants of the conclusion of a valid marriage.<sup>29</sup> Since the Act does not define the term 'entered into' the court has to look at several factors which might assist it in determining the attainment of this final stage.<sup>30</sup> In this regard Tshiqi J makes the analogy of entering into a contract and concludes that the spouses must similarly confirm explicitly or tacitly whether they 'agreed that they were married'.<sup>31</sup>

The two clans including the spouses then started referring to each other in affinity expressions which amount to a consensus that the customary marriage has been 'entered into'.<sup>32</sup> This consensus usually happens at the height of the proceedings involving cultural rituals, dancing and the exchange of gifts taking place in the spirit of celebrations. In the latter event the stages of 'entered into' and 'celebrated' often happen simultaneously. This doubled the possibility of proving the coming into existence of the customary marriage.

An affirmative determination that the marriage has been 'entered into' is conclusive proof of its existence.<sup>33</sup> In that event it becomes unnecessary, for the purposes of determining the validity of a customary marriage, to proceed to prove the alternative requirement, namely, whether it was 'celebrated' under customary law. Once the first requirement ('entered into') is proved the other one ('or celebrated') does not need to be enquired into at all.

In terms of this view the court needs to proceed to prove that the marriage was 'celebrated' only if it is not clear that it was 'entered into'. To pass this stage means the marriage has been proved to have been 'entered into' or 'celebrated' 'under customary law', because the latter phrase constrains the enquiry to social practices that amount to the conclusion of a marriage in a particular community.<sup>34</sup>

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<sup>28</sup> *Ibid.*

<sup>29</sup> See *Mayelane* (n 13) at para 23.

<sup>30</sup> See *Maluleke* (n 22) at para 13.

<sup>31</sup> *Ibid.*

<sup>32</sup> See Bennett *Customary law* (n 19) at 21.

<sup>33</sup> *Ibid.*

<sup>34</sup> See *Ngwenyama v Mayelane* (n 13) at para 23.

Sometimes the two alternative requirements of 'entered into' and 'celebrated' cannot be separated easily as marriages are often 'entered into' during a 'celebration'. In that case proof of the one requirement, say, 'entered into' entails proof of the other, namely, 'celebrated'. At other times people expect all marriages to be 'celebrated' and pay no regard to fact that the particular marriage was 'entered into', and did not need to be also be 'celebrated'. In such a case a claim is made that a marriage that had been properly entered into' is often challenged (wrongly so) on the basis that it was not 'celebrated in accordance with customary law'.

This was the case in *Mabuza v Mbatha*<sup>35</sup> where the validity of the marriage was challenged on the basis that the customary celebration involving the *ukumekeza* ritual without which the customary marriage would be invalid under Swazi customary law was lacking. The challenge was founded on the alleged centrality of the *ukumekeza* ritual in the definition of a Swazi customary marriage in South Africa. Notwithstanding this deficiency the validity of the customary marriage was upheld because it had been properly negotiated and entered into as required by both custom and the Act.

Unfortunately the court simply upheld the marriage without clearly explaining that although the *ukumekeza* ritual could serve to prove that the marriage was celebrated, its absence did not necessarily mean that it was not 'entered into in accordance with customary law'. An attack that the marriage was not 'celebrated' in *Mabuza* was not necessary because the marriage had already been proven to have been properly 'entered into in accordance with customary law'.

Similarly in *Maluleke* the absence of the *imvume* celebrations was not enough to vitiate the validity of a customary marriage that had been properly 'negotiated and entered into'. The stage had been reached where the negotiating parties and the spouses were agreed explicitly or tacitly that they are now married.<sup>36</sup> There was therefore no merit in impugning the validity of that marriage on the basis of the alternative required, namely, that it was not 'celebrated in terms of customary law (*imvume* celebrations)'.

However, where it cannot be determined that a marriage has been 'entered into' because it lacked the 'hype' associated with cultural rituals and celebrations it becomes necessary to enquire further and prove the alternative requirement, namely, that after the marriage was negotiated it was indeed 'celebrated' under customary law. In the *Motsoatsoa* case the prospective husband unfortunately passed away before proceeding beyond the stage of 'negotiated'. Negotiations had just started during which the husband's delegation delivered a portion of *ikhazi* (marriage goods) and were told that they still needed to come back and

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<sup>35</sup>2003 7 BCLR 43 (C).

<sup>36</sup>See *Maluleke v Minister of Home Affairs* (n 9) at para 13.

deliver the outstanding amount of R13 000 to finalise the stage where the marriage would have been 'negotiated'. The husband's death prevented this from happening and consequently the negotiations could not proceed to the next stage of either 'entered' into or 'celebrated'. The latter stages could only follow after or upon the completion of the *ukulobola* negotiations and delivery of the *ikhazi*<sup>37</sup> stages.

Where the two groups have never reached the stage of 'entered into' as was the case in the *Motsoatsoa* case the enquiry proceeds further to determine the alternative process, namely, whether the customary marriage was in any event in some way 'celebrated'. The handing over of the bride or her integration into the bridegroom's family often happens in a celebratory mood and indicates beyond doubt that the customary marriage has been successfully concluded. The prominence of the celebration usually serves to prove the conclusion of the customary marriage without any need to consider the requirement that it was entered into. Hence Matlapeng AJ held:

However, the mere fact that *lobolo* was handed over to the applicant's family, significant as it is, is not conclusive proof of the existence of a valid customary marriage.

The handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has [been] formally and officially handed over to the groom's people there can be no valid customary marriage. In the *Motsoatsoa* judgment the court referred to Bennett who wrote:

Hence, when the *Recognition of Customary Marriages Act* (author's emphasis) provides that, in order to qualify as customary, a marriage must be 'negotiated and entered into or celebrated in accordance with customary law', the form of negotiations, the handing over of a bride and the wedding are all relevant to giving the union the character of a customary marriage. It may then be distinguished, on the one hand, from an informal partnership and, on the other, from a marriage according to other cultural or religious traditions.<sup>38</sup>

This opinion referred to by the court correctly locates the role of celebrating the marriage as having the effect of distinguishing customary marriage from other informal partnerships. It however, unfortunately elevates the handing over of the bride in a prescriptive way to dictate one form of celebrating the marriage above other forms. Care should be taken not to use 'the handing over of the bride' as a substitute for 'celebrating' the marriage. The fact that 'the handing over of the

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<sup>37</sup>See the definition section (s 1) of the Recognition of Customary Marriages Act (n 7).

<sup>38</sup>*Motsoatsoa v Roro* (n 25) at para 20 referring to Bennett (n 19) at 217.

bride' is the most prominent form of celebrating customary marriages does not mean that it must be imposed on all situations even where other forms of celebration are customary.

Various communities use different ways of achieving the integration of the bride where they do not have the tradition of handing her over. Hence the form of celebration should rather be left to the living law as it evolves from time to time and from place to place in social practice. That is why the Act, in prescribing 'celebration' as a requirement, does not prescribe the form the celebration should assume. The reason why the emphasis is on one form of celebration, namely, the 'handing over of the bride' in the *Motsoatsoa* judgment is that it may be understood to be standardising this form of celebration for all cultural communities including those that may not be subscribing to it.

Matlapeng J's elevation of the 'handing over of the bride' to the level of a requirement has unfortunately been replicated by Dlodlo J in *Fanti v Boto*<sup>39</sup> thus:

From the Applicant's own papers it is abundantly clear that there was no handing over of the bride to the Applicant and/ or the latter's family. All authorities are in agreement that a valid customary marriage only comes about when the girl (in this case the deceased) has been formerly transferred or handed over to her husband or his family. Once that is done severance of ties between her and her family happens. Her acceptance by the groom's husband [*sic*] and her incorporation into his family is ordinarily accompanied by well known extensive ritual and ceremonies involving both families.<sup>40</sup>

Central to the *Motsoatsoa* and the *Fanti* judgments was the judges' elevation of pre-constitutional academic opinions which standardised the handing over of the bride as a requirement for the validity of all customary marriages<sup>41</sup> rather than regarding it as only one of the various possible forms of celebration. This approach has become problematic in a free and democratic South Africa where none of the various social practices deserve to be elevated above others within the context of the right to freedom of religion, belief and opinion.<sup>42</sup> Consequently both judgments overlooked the requirements for a valid customary marriage listed in section 3(1) of the Recognition of Customary Marriages Act.

Hence Ndita AJA's argument that the Recognition of Customary Marriages Act leaves the 'how' part of the celebration to living customary law to be

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<sup>39</sup>2008 5 SA 405 (C).

<sup>40</sup>*Id* para 22.

<sup>41</sup>See Bekker *Customary law in Southern Africa* (1989) at 108 and Bennett *Customary law* (n 19) at 213.

<sup>42</sup>See s 15 of the Constitution.

conducted according to the social practices of the relevant customary communities.<sup>43</sup>

In line with the indigenisation ethos of the Recognition of Customary Marriages Act section 2 gives recognition to all customary marriages including those that were denied recognition under the lowly rubric of the so-called 'customary unions'<sup>44</sup> as long as they were entered into according to African law and complied with its requirements. Section 2 of the Recognition of Customary Marriages Act provides:

Recognition of customary marriages

- (1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.
- (2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.
- (3) If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.
- (4) If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.

In addition to giving recognition to customary marriages section 2 affirms its indigenous aspects which were denied over the centuries of successive colonial and apartheid administrations. As a transformative provision the section refers to both pre-and post-recognition marriages as valid customary marriages and discards all reference to 'customary union'. It also eliminates the inequality that existed between Western and African marriages by recognising both monogamous and polygynous marriages.<sup>45</sup> The recognition of customary marriages is particularly transformative for removing the stigma that used to pressurise Africans to convert their marriages into civil marriages to secure legal recognition. The historical significance for the legislative recognition of customary marriages is aptly captured by Ndita AJA in *Ngwenyama v Mayelane* as follows:

In short, the Act marks a significant break from the past when customary, and more particularly polygamous marriages were considered repugnant to public policy. In so doing it seeks to protect and advance the rights of women married in accordance with customary law and tradition. To this end, the Constitutional Court in *Gumede v President of the Republic of South Africa* restated the purpose of the

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<sup>43</sup>See *Ngwenyama v Mayelane* 2012 4 SA 527 (SCA) at para 23.

<sup>44</sup>See *Gumede (born Shange) v President of the Republic of South Africa* (n 17).

<sup>45</sup>See s 15 of the Constitution.

Act as follows: 'The Recognition Act is inspired by the dignity and equality rights that the Constitution entrenches and the normative value systems it establishes. It is also necessitated by our country's international treaty obligations, which require member states to do away with all laws and practices that discriminate against women.'<sup>46</sup>

Significantly, whilst in the past compliance with African legal and social processes and practices proved that the institution was a 'customary union', not a customary marriage, section 2 now declares that such compliance is in fact proof of the existence of a valid customary marriage, and such validity has to be determined according to the notion of marriage prevalent in the relevant customary community.<sup>47</sup>

### ***3.2 Traditional Leadership and Governance Framework Act***

The constitutional recognition of the 'institution, status and role of traditional leadership, according to customary law' in terms of section 211 of the Constitution paved the way for the legislature to enact the Traditional Leadership and Governance Framework Act<sup>48</sup> so as rehabilitate the traditional leadership institution for the democratic South Africa. The preamble to the Act states its aims and objectives as the provision of a statutory framework for traditional authorities and their institutions.<sup>49</sup>

In line with its pedigree as reflected in the constitutional framework for the recognition of African law and its institutions the Traditional Leadership Act seeks to restore the integrity and legitimacy of the institution of traditional leadership according to African law and social practices. The emphasis on 'according to customary law' as the basis for the resurrection of the traditional leadership institution heralds the restoration of the historical participation of its adherents in the identification, recognition and appointment processes of traditional leaders. Any interference by outsiders, which was the feature of South Africa's unsavoury past,<sup>50</sup> would not fit the requirement of 'according to customary law'.

By mainstreaming 'customary law' the Act restores self-determination to traditional communities and their authorities. In terms of section 2(1) of the Traditional Leadership Act a community must first be recognised as a traditional community subject to a system of traditional leadership before it can function as such. The role of the Act is therefore to recognise traditional communities and their traditional leadership living 'according to customary law'. Furthermore

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<sup>46</sup>At para 12.

<sup>47</sup>*Mayelane v Ngwenyama* (n 43) at para 14.

<sup>48</sup>Act 41 of 2003, hereinafter referred to as (Traditional Leadership Act).

<sup>49</sup>See the long title to Act 41 of 2003.

<sup>50</sup>See *Sigcau v Sigcau* 1944 AD 67

section 4(1) prescribes the community's customs as the source of administrative authority. It provides for the administration of the affairs of the traditional communities by elected traditional councils in accordance with the relevant customs. The Act thus plays a *renaissance* role by blending together Western and indigenous notions of democracy. In this way it demonstrates the existence of new possibilities in post-apartheid South Africa where unity can be forged in the midst of diversity.<sup>51</sup>

An unmistakable objective of the Act is its commitment to partnering the principles of Western-oriented local government institutions with the customs and traditions of the customary communities in the new definition of traditional governance in democratic South Africa. This is perfectly reflected in the criteria for the recognition<sup>52</sup> and withdrawal<sup>53</sup> of traditional communities, the establishment of a framework for the recognition of traditional councils<sup>54</sup> and their functions.<sup>55</sup>

Similarly, chapter 3 blends modern and traditional methods for the recognition and appointment of traditional leaders<sup>56</sup> and their removal from office.<sup>57</sup> Chapter 4 establishes houses<sup>58</sup> of traditional leaders modelled as modern legislatures but functioning 'according to customary law'. Chapter 5 is devoted to the functions and roles of houses of traditional leaders as established by provincial and national governments.<sup>59</sup> It also deals with the interaction between traditional leadership institutions and South Africa's Western-oriented organs of state.

Chapter 6 establishes the Commission on Traditional Leadership Disputes and Claims,<sup>60</sup> modelled as a modern commission with its members appointed as such.<sup>61</sup> Yet it must observe the customs and usages of the relevant communities in the performance of its dispute resolution functions. As mandated by the Act the Commission (popularly known as the Nhlapo Commission after its first commissioner Professor Thandabantu Nhlapo) has to date investigated the

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<sup>51</sup>See the Preamble to the Constitution.

<sup>52</sup>See s 2 of the Traditional Leadership Act.

<sup>53</sup>*Id* s 7.

<sup>54</sup>*Id* s 3.

<sup>55</sup>*Id* s 4.

<sup>56</sup>*Id* s 8 lists the recognised positions of traditional leaders as the kingship, senior traditional leadership and headmanship or headwomanship. Section 9 provides for the appointment of kings and queens.

<sup>57</sup>*Id* s 10 deals with the procedure for the removal of kings and queens from office, whilst s 12 outlines the process for the removal of senior traditional leaders and headmen/ headwomen.

<sup>58</sup>*Id* s 16(a) establishes a national house of traditional leaders and s 16(b) establishes local houses.

<sup>59</sup>*Id* ss 19 and 20.

<sup>60</sup>*Id* s 22.

<sup>61</sup>*Id* s 23.

authenticity of the existing traditional authorities and traditional leaders in South Africa. In some instances it has recommended the recognition of previously not recognised traditional authorities. It has also recommended the withdrawal of the recognition of others.

The recent case of *Sigcau v President of RSA*<sup>62</sup> arose from the President's implementation of one such recommendation to withdraw state recognition of the existing king of Eastern Mpondoland and to recognise a new king. Quite curiously, legislation giving powers to the President to implement the recommendations was only promulgated afterwards. When the incumbent king challenged his purported ousting on the basis of the non-applicability of this retrospective legislation the Constitutional Court reversed the presidential determination. The basis for the decision was non-compliance with the principle of legality, namely, that the President could not lawfully apply legislation that was not in place at the time of the making of the Commission's report.<sup>63</sup>

The enactment of the Traditional Leadership Act was clearly motivated by the constitutional recognition of African law, culture and its institutions.<sup>64</sup> The restoration of the role of the royal family and its structures to the appointment process after centuries of being supplanted by colonialism and apartheid bears testimony to this intention. The function of identifying a new traditional leader that the democratic state has now restored to the royal family is a crucial aspect of self-determination that the apartheid regime had usurped. In this regard section 9(1) of the Traditional Leadership Act directs that whenever the position of a king or a queen is to be filled, the following process must be followed:

- (a) the royal family must, within a reasonable time after the need arises for the position of a king or a queen to be filled, and with regard to the applicable customary law –
  - (i) identify a person who qualifies in terms of customary law to assume the position of a king or a queen, as the case may be, after taking into account whether any of the grounds referred to in section 10(1)(a), (b) and (d) apply to that person.

The emphasis on observance of African custom as the source of the royal family's authority in its exercise of its identifying functions is beneficial to the promotion of indigenous institutions. First, restoring the function of identifying a new traditional leader to the royal family has effectively relieved the government of the temptation to install its own spies and puppets to masquerade as traditional leaders. The responsibility of the royal family to identify a new traditional leader

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<sup>62</sup>*Sigcau v President of the Republic of South Africa and Others* 2013 9 BCLR 1091 (CC).

<sup>63</sup>*Id* paras 26-28.

<sup>64</sup>See s 211 of the Constitution.

means that no outsider can be imposed on a traditional community as its traditional leader; which has in turn considerably reduced the possibility of illegitimate traditional leaders being appointed to office.

More importantly this promotes the principle of legality since the constraint to function according to customary law precludes even the most corrupt royal family from identifying a traditional leader who is not indicated for that purpose by custom. As alluded to above, the participation of the traditional communities in these processes also affirmed their democratic citizenship. In addition, by insisting on functions being performed according to customary law the present Constitution recognises the power of the traditional authorities to develop their law to suit the changing conditions in their communities.<sup>65</sup> The phrase 'according to customary law' also reminds the traditional authorities to table all proposed changes before traditional assemblies for deliberation and adoption before amendments can be approved.<sup>66</sup> This is a drastic departure from the colonial/apartheid approach as represented by the *Sigcau* case<sup>67</sup> where all that the royal family and the community could do was to watch the authorities ruining their customs.

In line with the new policy to affirm African law, the *Shilubana* judgment acknowledges the constitutional recognition of the legislative powers of traditional authorities to make, amend and repeal their laws.<sup>68</sup> Consequently the Constitutional Court endorsed the traditional authorities' powers to amend their customs which previously allowed them to appoint males only as traditional leaders. The amendment paved their way to appoint a woman as the *hosi* of the Valoyi community.

However, the traditional authorities' failure to call the assembly of traditional communities to deliberate on this proposal before they adopted it derogated from the requirement to function 'according to customary law'. Such traditional authorities overlooked the fact that the Constitution did not invent the indigenous powers of the traditional authorities to amend their law, but merely resurrected them after decades of suppression under apartheid rule. Historically, African custom demanded that proposed changes to custom should be deliberated by the traditional assembly to guard against allowing the taking of elitist decisions that were not informed by grass roots contributions from the communities. Hence it reserved legislative powers for the assembly to constrain traditional authorities from making uncustomary amendments.

Consequently, the court's approval of the development of customary law contrary to this customary procedure in the *Shilubana* matter shocked both

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<sup>65</sup>See *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC).

<sup>66</sup>Failure to do this was the main cause of misgivings by CONTRALESA in the *Shilubana* matter.

<sup>67</sup>*Sigcau v Sigcau* 1941 CPD 334; *Sigcau v Sigcau* 1944 AD 67.

<sup>68</sup>See s 211(2) of the Constitution.

customary communities and scholars of African jurisprudence. In the absence of the contributions from the assembly the dynamics of appointing a woman were left unexplored. The most obvious omission was the failure to address the fundamental role played by lineage in traditional leadership. A woman is unable to maintain the royal lineage which requires the appointment of a traditional leader who is able to produce an Nwamitwa heir to that position to take over after the death of the leader.

In a mesogamous tradition such as the South African customary law a Nwamitwa male person can only maintain his lineage by marrying outside his own lineage in order to produce a Nwamitwa. On the contrary, a Nwamitwa maiden such as Ms Shilubana can only bear children falling under her male partner's lineage. This poses a threat to the royal lineage which may thereby become endangered since such child, being non-royal, does not qualify for consideration to succeed the mother.

#### 4 The jurisprudential framework for the interpretation of post-apartheid African law

The above constitutional and legislative frameworks provide the basis for a judicial theorisation of the nature of post-apartheid African law in South Africa. In its early days of constitutional adjudication the Constitutional Court observed that African law was no longer shackled to be viewed through the common law lens,<sup>69</sup> but deserved to be understood in its own terms.<sup>70</sup> As such African law was no longer a tenant sojourning in the courtyard of the common law, but an independent component of South African law to be interpreted<sup>71</sup> in light of its own unique value system.<sup>72</sup> In this regard African law's strength was seen in the light of its dynamic and evolutionary features that help it respond to the changing patterns of life within the communities who live by its norms.<sup>73</sup>

This was because African law's nature was such that it would continue to evolve within its normative context consistently with the Constitution,<sup>74</sup> and that inherent in its features of flexibility and adaptability were its consensus-seeking qualities that facilitate dispute resolution and prevent disagreements in family and

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<sup>69</sup>See *Alexkor v Richtersveld Community* (n 15) at para 51.

<sup>70</sup>*Mayelane v Ngwenyama* (n 13) at para 24.

<sup>71</sup>*Ibid.*

<sup>72</sup>See *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) at para 41.

<sup>73</sup>*Id* para 81.

<sup>74</sup>*Id* para 46.

clan meetings.<sup>75</sup> All these characteristics were seen as presenting African law as a system that was amenable to the peaceful running of family structures whose unity '[fosters] co-operation, a sense of responsibility and belonging among its members, as well as the nurturing of healthy communitarian traditions like *ubuntu*.'<sup>76</sup>

The courts see the constitutional and legislative emphasis on African law's indigenous features as the emergence of a distinct component and an integral part of the amalgam called South African law envisioned by the Constitution for the twenty-first century.<sup>77</sup> As an original system, African law is now seen as one of the primary sources of the country's legal system alongside the common law and legislation under the Constitution.<sup>78</sup> In this newly acquired status African law is a vital element of the constitutional system that is fully recognised and protected by the Constitution.<sup>79</sup> In short, African law has come to be seen as a system of law that evolves and develops to meet the changing needs of the community which practises it as a heritage to be transmitted from generation to generation.<sup>80</sup>

This jurisprudential framework touches on the nature of African law in South Africa's constitutional democracy, especially its features and norms as reflected by its own value system. African law's identity as a distinctive component of South African law emerges as a handy guide to legal and constitutional interpreters who are thereby enabled to adopt interpretive methods that are amenable to its own indigenous frame of reference as revealed in its normative values as emblazoned by the spirit of the Bill of Rights.

Moreover, this jurisprudential framework brings forth confidence to legal interpreters to appreciate such features as flexibility, adaptability and evolution as contributing to fostering the sense of responsibility and belonging among its members as well as the nurturing of healthy communitarian traditions.<sup>81</sup> The above judicial framework manifests the possibilities created by South Africa's constitution and the legislative design in generating a jurisprudential basis for the development of a progressive component of the legal system that is compatible with the country's constitutional democracy. A fertile ground has thus been laid for the development of a sound theory of African law's re-indigenisation which would anchor the system firmly to both African values and the Bill of Rights as envisioned by the Constitution.

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<sup>75</sup>*Id* para 45.

<sup>76</sup>*Ibid*.

<sup>77</sup>*Bhe v Magistrate* (n 72) at para 41.

<sup>78</sup>*Mayelane v Ngwenyama* (n 13) at para 24.

<sup>79</sup>See *Pilane v Pilane* (n 9) at para 34.

<sup>80</sup>*Id* para 53.

<sup>81</sup>See *Bhe*; *Shibi* (n 72) at para 45.

Viewing African law in this unique way helps to loosen the tradition of the previous repugnancy jurisprudence that was used to shackle the system to the fixed body of formally classified rules that were imposed through official codes. During those dark days African law got distorted because its evolutionary features of flexibility and adaptability which made it amenable to communal administration were sacrificed for the alien values of ascertainability and non-repugnancy which resulted in the system's fossilisation and marginalisation.<sup>82</sup> The ensuing distortions stunted African law's growth and alienated it from keeping pace with the changing circumstances of its constituencies.<sup>83</sup> The current resurrection is a reaction against these acts of colonial imperialism and is inspired by cultural aspirations to re-indigenise customary law consistently with its values.

## 5 Conclusion

This article captures the design for the restoration of the African value system to its central position by analysing the mechanics of recognition of African law in South Africa's constitutional framework and its legislative scheme. The paper proceeds by examining the emphasis placed by the constitutional scheme on African culture and custom as sources for the legitimacy of any claims based on, access to and practice of customary law and social functions, services and rituals. In particular this analysis reveals a damascene resurrection of African family law and the law relating to traditional leadership in particular from the doldrums of apartheid legalism under the culturally alienating repugnancy clause to a firm foundation anchored to the indigenous African value system.<sup>84</sup>

The resurrection that has occurred in the customary marriage and traditional leadership institutions embodies the *renaissance* envisioned by South Africa's Constitution in which indigenous normative values would be emblazoned by the spirit of the Bill of Rights. This *renaissance* opens space for the planting of academic seeds for the development of a theory of re-indigenisation for mainstreaming the indigenous African value system in the current African law. A firm theory founded on the African life-world would be the starting point for loosening the stranglehold of the discredited repugnancy jurisprudence on South African customary law in the past.

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<sup>82</sup>*Id* para 43.

<sup>83</sup>*Ibid.*

<sup>84</sup>*Ngwenyama v Mayelane* (n 43).