

# Freedom of expression and traditional communities: Who can speak and when?

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*To find out who rules over you,  
simply find out who you are not allowed to criticise.*  
(Voltaire)

## **Abstract**

*In 'Freedom of expression and traditional communities: who can speak and when?' the author 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 article 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.*

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## **1 Introduction**

On the 28 February 2013, the Constitutional Court of South Africa delivered a judgment in the case of *Pilane v Pilane*.<sup>1</sup> The case provides a classic example of the dilemma faced by traditional communities when they want to exercise their right to freedom of expression guaranteed by the Constitution of South Africa on the one hand and, on the other, respect for customary law. The case also highlights the difficulty faced by the court when confronted by a dispute arising from a traditional community where an issue is raised in the context of common

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<sup>1</sup>(CCT 46/12) [2013] ZACC 3; 2013 4 BCLR 431 (CC).

law, yet, where customary law, in this regard the *Kgotha kgothe*<sup>2</sup> custom, is the basis of defence.

An attempt will be made in this article to argue that the Constitutional Court should have developed customary laws 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. It is commonplace in our constitutional jurisprudence that customary law must be applied where it is applicable, and that it must be developed, if necessary, to comply with the constitutional mandate. It is, therefore, argued that, where custom is used to limit freedom of expression in traditional communities, such a custom should be developed within the confines of the Constitution of South Africa to ensure full enjoyment of the right, and, more importantly, the fulfilment of our constitutional mandate to achieve a free, fair, and just society based on human dignity.

## 2 Traditional communities and freedom of expression: brief background

Traditional communities have a unique way of expressing their views. This is largely manifested in the structure of the community itself which accepts hierarchy.<sup>3</sup> Whereas it is generally accepted and understood that every person can, and indeed should, express his/her opinion on any matter, such expression of opinion follows certain structures in traditional communities. The structure starts within the nuclear family, and then moves to the *kgoro* (*sub-clan*), then to *dikgoro* (clans). The *dikgoro* forms the core of the tribe with *dikgosana*<sup>4</sup> as its

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<sup>2</sup>'Kgotha kgothe', a general traditional meeting or gathering which, in Setswana, stems from an adage that 'Morafe o kgobokanngwa ke mong wa ona.' Freely translated, this means that 'a tribe or traditional community may only be convened or assembled in a Kgotha kgothe by the owner(s) of that tribe'. See n 1 at para 84 and see further comments below at 6.1.

<sup>3</sup>This can be deduced from the Traditional Leadership and Governance Framework Act 41 of 2003 which recognises the *Kgosi* as the main leader in traditional affairs/communities. The *kgosi/kgosigadi*, in terms of the North West Traditional Leadership and Governance Act 2 of 2005, means the person who in accordance with the laws and customs of a particular traditional community is recognised as the hereditary head of such traditional community and who is a citizen of the Republic of South Africa.

<sup>4</sup>In terms of s 1 of the North West Traditional Leadership and Governance Act 2 of 2005 this means a hereditary traditional leader who, '(a) is under the authority of, or exercises authority within the area of jurisdiction of, a senior traditional leader in accordance with customary law'.

leaders. Kgosi<sup>5</sup> is the leader of the tribe, and the tribe owes its allegiance to him/her.<sup>6</sup>

Any matter that affects the well-being of a community is referred to *Kgosi* for resolution and guidance. This could be done through a *kgotla* if the matter is about adjudication or the settlement of a dispute. *Kgosi* has unfettered powers to settle disputes, pronounce on tribal customs and traditions, and rule on matters concerning the tribe, in consultation with its members. Disputes about governance are usually left to the *Khuduthamaga*<sup>7</sup> which alone presides and decides the matter before such a matter is put before the *Pitso*. A *Pitso* is normally called to debate and to decide over a matter of community interest. During such a *Pitso*, everyone is invited to express an opinion on the matter fearlessly.<sup>8</sup> The decision taken at such a *Pitso* is binding on all members of the tribe. The custom is in line with the adage that '*lefoko la kgosi le agelwa mosako*'.<sup>9</sup> Consequently, *Kgosi* is

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<sup>5</sup>*Kgosi* is the ruler amongst the Batswana tribes; it has the same meaning as *Khosi*, *hosi*, *Kgosikgolo*, and in this paper *Kgosi* will be used when the ruler of a tribe is referred to irrespective of the tribe.

<sup>6</sup>This is perceptively captured in the saying '*Kgosi ke kgosi ka morafe wa gagwe*' which roughly translated means '*Kgosi* is *Kgosi* owing to his people/tribe'.

<sup>7</sup>Coertze *Die familie-, erf- en opvolgingsreg van die Bafokeng van Rustenburg* (1971) at 109. The *khuduthamaga* should not be confused with what is regarded as the Royal family, in Setswana '*Ntlo ya bogosi*'. 'Royal Family' is defined in s 1(1) of the The North West Traditional Leadership and Governance Act 2 of 2005 as, '... the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family.'

<sup>8</sup>This is captured in the prologue '*lefoko la motla pitsong*' (the word of an invitee). In fact most of the time speakers from the floor would preface what they want to say with the words '*tla ke latlhele la motla pitsong*' which roughly translated means: 'as an invitee let me put forward my thoughts'; it is also understood that in '*Kgosi ke thothobolo o o lela matlakala*', in this instance, *Kgosi* is equated to the rubbish bin. In essence it implies that *Kgosi* should be more tolerant as a leader to what his people present him with. During the traditional meeting (*pitso* or *kgothakgothe*), everyone who has attended the meeting is free to say whatever he/she wishes to say on the issue discussed. At the same time, *Kgosi* should exercise restraint, patience, tolerance, and maturity to rise above every criticism and discontent, if any, shown towards him. These are the characteristics and qualities of a *Kgosi*; hence the adage that he is a *Thothobolo* (bin or dumping site) that *o lela* (takes) *matlakala* (rubbish).

<sup>9</sup>Loosely translated it means, 'The word of *Kgosi* is final and must be respected' Schapera *A handbook of Tswana law and custom* (1955). The adage comes into operation immediately after a *Kgosi* has taken or made a ruling on the issue and not before or during the discussions at the traditional meeting (*pitso*). See Comaroff and Roberts *Rules and processes: The cultural logic of dispute in an African context* (1981) 26. They wrote 'the chiefly decisions announced at the end [of a dispute] are expected to reflect the weight of manifest opinion ... such decisions are binding as the chief's word is law. Writing on a different matter Lekoko 'A generation in jeopardy: Sexually active women in patriarchal cultural settings and HIV and AIDS' in Maundeni *et al*, in *Male involvement in sexual and reproductive health: Prevention of violence and HIV and AIDS in Botswana* (2009) explains that *lefoko la kgosi le agelwa mosako* means that whatever the chief

the embodiment of power and strength in his community. His word is final, and it must be respected.

In sharp contrast to this practice<sup>10</sup> are the rights to freedom of expression (s 16 of the Constitution of the Republic of South Africa, 1996 (the Constitution), assembly (s 17), and association (s 18). The rights as enshrined in the Constitution are to be enjoyed by every person in the country. The traditional authorities seem to find it difficult to provide a clear path to how the rights can be exercised within a communal environment.

### 3 A general overview of the right to freedom of expression

Section 16 of the Constitution provides and guarantees the right to freedom of expression. It guarantees the right to express oneself freely, which includes the freedom to receive or impart information or ideas.<sup>11</sup>

Freedom of expression is an important fundamental right in every society. According to Govindjee,<sup>12</sup> it is a vital ingredient of dignity, equal worth, and freedom.<sup>13</sup> Without freedom of expression many people will find that their issues are neither addressed nor heeded. More importantly, there will be no realisation and enjoyment of other fundamental rights<sup>14</sup>, including the rights associated with the right to freedom of expression such as the right to freedom of assembly and the right to freedom of association.<sup>15</sup> This will diminish 'the public interest in the

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says must be done and cannot be rejected by his followers (at 85). The writer was referring to how *Dikgosi* could be used to assist in the fight against HIV/AIDS.

<sup>10</sup>In this instance, it is noteworthy to indicate that the word is used in its customary law context. Customary practices are defined by Bennett as 'social practices that the community concerned accepts as obligatory' and customary law as the body of law derived from these practices, which 'in its most pristine form, it is unwritten; an oral repertoire' Bennett *Customary law in South Africa* (2004) at 1.

<sup>11</sup>Freedom of expression

Everyone has the right to freedom of expression, which includes

(a) ...

(b) ... freedom to receive or impart information or ideas ...'

<sup>12</sup>Govindjee (ed) *Introduction to human rights law* (2009) 119.

<sup>13</sup>*Ibid.*

<sup>14</sup>This is because it is regarded as the 'life blood of an open democratic society cherished by our Constitution' in *Dikoko v Mokhatla* 2006 6 SA 235 (CC) at para 92. In *Falati v Mandela* 1995 1 SA 251 (W) at 259 it was described as 'the freedom upon which all the other freedoms depend; it is the freedom without which the others would not long endure'.

<sup>15</sup>Assembly, demonstration, picket and petition

17 Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

Freedom of association

18 Everyone has the right to freedom of association.'

open market-place of ideas ... in this country<sup>16</sup> which we need for development as a nation that respects human rights. The surfeit of these ideas gives credence to our constitutional vision of being a nation 'united in our diversity'. The diversity referred to in this regard relates to different thoughts and ideas on various issues, amongst others on how to resolve the diverse issues affecting our daily lives, however controversial they might be.<sup>17</sup> Sharing ideas and views are the basis of this right. Currie and De Waal<sup>18</sup> believe correctly, I submit, that there are two mutually inclusive defences of the right. They refer to the two defences identified by Dworkin which are 'the instrumental and the constitutive', with the former emphasising that allowing people free speech is 'not because they have any intrinsic moral right to say what they wish but because to do so will produce good effects for the rest of us',<sup>19</sup> while the latter emphasises what is it worth to be a human being. According to Dworkin, freedom of speech is valuable, not because of its virtuous results but<sup>20</sup> 'because it is an essential and "constitutive" feature of a just political society that government treats all its adult members ... as responsible moral agents'<sup>21</sup>. This is because 'morally responsible people' are capable of insisting on and 'making up their own minds' about what is right or wrong. Moreover, it is an 'insult for government' to decree that people cannot be trusted to be exposed to opinions 'that might persuade them to dangerous or offensive convictions'.<sup>22</sup> People, furthermore, retain their 'dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it'.<sup>23</sup> The writers further observe that the two conceptions of the protection of the

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<sup>16</sup> *S v Mamabolo* 2001 3 SA 409 (CC) para 28. In *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Shaik* 2007 2 BCLR 167 (CC) the Court said, at para 23, that freedom of expression 'is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters'. See, too, *NM v Smith (Freedom of Expression Institute as amicus curiae)* 2007 7 BCLR 751 (CC) at paras 145–146 where O'Regan J cites, with approval, Scanlon 'A theory of freedom of expression' (1972) 1 *Philosophy and Public Affairs* 204, stressing the importance of the 'morally autonomous' human being who requires that she tests the judgement of others in terms of the evidence of both sides. This represents a very individualistic view of the autonomous human as opposed to an individual within community.

<sup>17</sup> See *South African National Defence Force Union v Minister of Defence* 1999 4 SA 469 (CC) – a case concerning the question whether it was constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions.

<sup>18</sup> Currie and De Waal *The Bill of Rights handbook* (2013) at 339.

<sup>19</sup> *Ibid.* However, see also n 10.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

right are important in South Africa. In the first place, the instrumental conception is important for its quest to overturn an authoritarian polity and establishing a democracy.<sup>24</sup> Secondly, the intrinsic conception of the right re-enforces the dignity of an individual/people.<sup>25</sup>

The importance of the constitutional guarantee of freedom of expression was confirmed in the South African context by O'Regan J in *South African National Defence Union v Minister of Defence*.<sup>26</sup>

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

In *NM v Smith*<sup>27</sup> O'Regan J, in a minority judgment, added the following to the analysis of the right:

Freedom of expression is important because it is an indispensable element of a democratic society. But it is indispensable not only because it makes democracy possible but also because of its importance to the development of individuals for it enables them to form and share opinions and thus enhances human dignity and autonomy.

As such, the right to freedom of speech should be vigorously protected. Kriegler J<sup>28</sup> suggested, to my mind correctly, that 'we should be astute to outlaw any form of thought control, *however respectably dressed*'.<sup>29</sup>

It is submitted that the traditional practice of *kgotha kgothe* as presently practiced offends or limits the right to freedom of expression and needs to have been developed by the Constitutional Court to put it in line with our constitutional mandate.

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<sup>24</sup> *Id* 340.

<sup>25</sup> *Ibid*.

<sup>26</sup> 1999 4 SA 469 (CC) para 7(n 16).

<sup>27</sup> *NM v Smith* para 145.

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

<sup>29</sup> *Ibid*, my emphasis

## 4 Limitation of rights in brief

The right to freedom of expression, as with virtually all rights, is not absolute.<sup>30</sup> As with virtually all rights, it allows for limitation. Crucially such limitation is to be done in 'an open and democratic manner'<sup>31</sup> that gives effect to any 'laws of general application'.<sup>32</sup> The laws of general application include legislation, both common and customary law as applicable in South Africa<sup>33</sup>.

## 5 The constitutional mandate for the development of laws

The courts in South Africa are enjoined to respect the Constitution of the country and to give effect to its values. Any law, therefore, which is in conflict with the Bill of Rights in the Constitution, should be declared unconstitutional to the extent of its unconstitutionality.<sup>34</sup>

Section 8(1) makes it clear that the Bill of Rights applies to all laws and binds the judiciary.<sup>35</sup> Section 39(2) of the Constitution gives the courts the power to interpret the law, common or customary, in a manner that develops such laws.

Section 39(2) provides that, when interpreting any legislation, and when developing common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights which primarily is to create a country for all who live in it, a country that gives respect and promotes equal protection and enjoyment of rights to its citizens.<sup>36</sup> It is, therefore, required

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<sup>30</sup>The Constitutional Court in *Phillips v DPP, Witwatersrand Local Division* 2003 3 SA 345 (CC) at para 17, corrected the view wrongly held by the trial court that the right allows a *laissez-faire* approach to the right to freedom of expression. The court said, correctly so, that the right to freedom of expression cannot be regarded as absolute. The Constitution s 16(1) right may be limited by a law of general application that complies with the provisions of s 36. In other words, the Constitution expressly allows the limitation of expression that is 'repulsive, degrading, offensive or unacceptable' to the extent that the limitation is justifiable in 'an open and democratic society based on human dignity, equality and freedom'.

<sup>31</sup>The restriction should be for reasons that are acceptable to the society based on human dignity, equality, and freedom. See *Currie and De Waal* (n 18) 163-172.

<sup>32</sup>*Ibid.*

<sup>33</sup>*Id* 169-174.

<sup>34</sup>Section 172 (1)(a)(b), of the Constitution of South Africa, 1996. See also discussion of the section in *Currie and De Waal* (n 17) 190.

<sup>35</sup>*Ex parte Chairman of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 18.

<sup>36</sup>See *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC para 41, where the court stated that an equal society accords all its members as human beings 'equal dignity and respect regardless of their membership of particular groups'. See also *Fraser v Children's Court, Pretoria North* 1997 2 SA 218 para 55, where the court said, 'the country in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their

that, when customary law is not in line with the realisation of a constitutional right, it must be interpreted in such a way that the customary law rule is consistent with the provisions of the Constitution. The development needs to enhance our constitutional values.

Section 211<sup>37</sup> requires that customary law *must* [my emphasis] be applied where it is applicable. This section is thus peremptory in nature.

## 6 Development of customary law in South Africa

The development of customary law in South Africa is predominantly dictated by the Constitution. Section 211 is the leading section in this regard. It requires that customary law must be applied when applicable.

In the case of *Alexkor Ltd v The Richtersveld Community*<sup>38</sup> it was held:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law ... In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.

The significance of the section was outlined in *Shilubana v Nwamitwa*<sup>39</sup> by Van der Westhuizen J as follows:

The import of this section, in the words of Langa DCJ in *Bhe*,<sup>40</sup> is that customary law “is protected by and subject to the Constitution in its own right”. Customary law, like any other law, must accord with the Constitution. Like any other law, customary law has a status that requires respect. Further that as it was held in the *Alexkor* case that customary law must be recognised as “an integral part of our law” and “an independent source of norms within the legal system”. It is a body of law by which millions of South Africans regulate their lives and must be treated accordingly.

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fundamental rights and freedoms’.

<sup>37</sup>Section 211(3) provides that ‘the courts *must* [my emphasis] apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law’.

<sup>38</sup>2004 5 SA 460 (CC) para 51.

<sup>39</sup>2009 2 SA 66 (CC) para 43.

<sup>40</sup>For the *Bhe* decision referred to by Van der Westhuizen J see *Bhe v Magistrate, Khayalitsha; Shibi v Sithole; SA Human Rights v President of the RSA* 2005 1 BCLR 1; 2005 1 SA 580 (CC).



The courts, as was observed in *Gumede v President of the Republic of South Africa*,<sup>41</sup> are not only required to apply customary law but also to develop it. The court went on to identify reasons behind the development of the customary law and said:

The adaptation of customary law serves a number of important constitutional purposes. Firstly, this process would ensure that customary law, like statutory law or the common law, is brought into harmony with our supreme law and its values, and brought in line with international human rights standards. Secondly, the adaptation would salvage and free customary law from its stunted and deprived past. And lastly, it would fulfil and reaffirm the historically plural character of our legal system, which now sits under the umbrella of one controlling law – the Constitution. In this regard we must remain mindful that an important objective of our constitutional enterprise is to be “united in our diversity.” In its desire to find social cohesion, our Constitution protects and celebrates difference. It goes far in guaranteeing cultural, religious and language practices in generous terms provided that they are not inconsistent with any right in the Bill of Rights. Therefore, it bears repetition that it is a legitimate object to have a flourishing and constitutionally compliant customary law that lives side by side with the common law and legislation.

It is, therefore, imperative that customary laws are developed with the view to taking full advantage of the enjoyment of rights. It is equally important to develop customary laws to ensure their preservation and protection. In this regard, development and protection require the protection and preservation of positive past practices on the one hand and, on the other hand, they require the change or ‘development’ of any custom and culture that is harmful, so as to ensure the well-being of society. Mwanbene and Sloth-Nielsen<sup>42</sup> argue that ‘development implies some departure from past practice – a change/evolution or forward movement on a continuum’.<sup>43</sup> It is the change which accepts development and evolution of society. Every society and community changes its values from time to time. The changing values are influenced by a variety of issues. In traditional authorities, customs are to comply with the constitutional mandates. It is therefore clear that the change will be influenced by the Constitution. The Bill of Rights will be at the forefront of such change. Change sometimes needs to be encouraged for the good of the people it affects.

This change, or forward movement in a continuum, seems to evade the Constitutional Court from time to time when it is called upon to develop a

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<sup>41</sup>2009 3 BCLR 243 (CC).

<sup>42</sup>Mwanbene and Sloth-Nielsen ‘Talking the talk and walking the walk: How can the development of African customary law be understood?’ (2010) 28 *Law in context* 27.

<sup>43</sup>*Id* 32.

customary-law rule. *Bhe*<sup>44</sup> was the first decision in which the court simply declared the principle of male primogeniture to be unconstitutional. Instead of developing the primogeniture principle so as to recognise the right of the eldest female to inherit the estate of the deceased male ancestor, the court simply applied the Intestate Succession Act, 81 of 1987. Rautenbach<sup>45</sup> observed that:

... the court's decision to strike down customary law instead of developing it in accordance with constitutional rights and values could be queried". She asked "whether the abolishment of a customary rule, such as the rule of male primogeniture, can be regarded as development as required by section 39(2) of the Constitution or merely a rejection of customary law".<sup>46</sup>

Mailula in his aptly titled article 'Abdication of judicial responsibility, cultural determination and the development of customary law: Lessons from *Shilubana*',<sup>47</sup> demonstrates how the court once more failed to develop the principle of male primogeniture in relation to the ascension to the throne/*Bogosi* amongst the Balebedu.

It is my submission that sections 211 and 39(2) of the Constitution found relevance in the Constitution to discourage courts from paying mere lip service to the development of customary law. That development, furthermore, does not mean simply acknowledging the customary laws and then disregarding their worth as the living laws of most of the South African people. It is necessary that development should lead to a 'flourishing and constitutionally compliant customary law that lives side by side with the common law and legislation'.<sup>48</sup> It

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<sup>44</sup>Note 40 – in this case the Court was called upon to pronounce on the principle of primogeniture in succession cases. The Court having found that the principle would offend the equality clause, declared the principle unconstitutional.

<sup>45</sup>Rautenbach 'South African common and customary law of intestate succession: A question of harmonisation, integration or abolition' 2008 (12)1 *Electronic J of Comp L* 1 available at: <http://www.ejcl.org> (accessed 2013/09/09).

<sup>46</sup>*Id* 10.

<sup>47</sup>(2008) 23 SAPR/PL 215. The case revolved around the chieftaincy of the Balubedu. The Court in that case found that, since the tribe had changed its customs that a woman could not ascend to the throne, such a tribal change at the heart of the principle was to be encouraged and be seen as a development of customary law.

<sup>48</sup>*Gumede v President of the Republic of South Africa* (n 41) para 22. A closer analysis of the Constitutional Court judgments on various cases that dealt with customary law issues poses a number of questions on whether the court comprehends its mandate in terms of s 39(2) of the Constitution properly. The case of *Bhe* was the first where the court simply declared the principle of male primogeniture to be unconstitutional. Instead of developing the primogeniture principle so as to recognise the right of the eldest female to inherit the estate of the deceased male ancestor, the court simply applied the Intestate Succession Act. After much criticism of the approach it took in *Bhe*, the Constitutional Court, in *Shilubana*, opted to act as a 'by-stander' when the same rule arose on the question of chieftaincy. The incentive of the court was that the Balubedu people have

should be the kind of customary law that must provide its practitioners with a sense of integrity and dignity rather than a sense of inadequacy and despair.

## 7 *Pilane v Pilane*

The Kgotha Kgothe custom was at issue in this case. The Court, in its minority judgment, delivered jointly by Chief Justice Mogoeng Mogoeng and Justice Nkabinde interpreted the matter narrowly in that the issue of the effect of a *Kgotha Kgothe* was not sufficiently canvassed to unravel its hidden implications of, firstly, denying a traditional community its right to assemble and, secondly, to express the community's right to freedom of expression without restraint.

The majority judgment of Justice Skweyiya went a long way to find a balance between the freedom of association and freedom of expression within a community. In the next pages of this article an effort will be made to examine the dilemma faced by communities, *vis-à-vis* freedom of speech, assembly, and association.

### 7.1 *Facts of the case*

The Bakgatla ba Kgafela is the main tribal group in Moruleng, also known as Saulspoort. They are located in about 32 villages around Moruleng. Moruleng is in the province of North West, in the Bojanala Platinum district Municipality. Moruleng is regarded as the headquarters of the *Bakgatla ba Kgafela* in South Africa.<sup>49</sup> They are under the leadership of *Kgosi* Nyalala Pilane who was duly appointed and recognised as *Kgosi* in terms of the relevant laws of South Africa.<sup>50</sup> The applicants in this case are inhabitants of one of the villages of *Moruleng* called *Motlhabe*. From 2009, the villagers under the leadership of the two applicants raised several governance issues with the main *Kgosi* (respondents). These issues related in the main to their dissatisfaction about developments in their area. At some stage, they held a meeting where they decided that they would no longer recognise *Kgosi* Nyalala as their *Kgosi* and wanted to form their own authority. They accordingly addressed a letter to that effect to the first

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the right to change their customs and that, since they had done so in *Shilubana*, the Court would be incorrect to find otherwise. Once again the approach was criticised in academic circles. In a move that appears to compensate for its abdication of its duty under s 39(2) of the Constitution, the Court, in the case of *Mayelane v Ngwenyama* 2013 4 SA 415 (CC), invoked s 39(2) in a manner that fixed the custom of the Xitsonga people to mandating the consent of the first wife as a requirement for the validity of the marriage of a second wife. This is, however, a matter for another investigation/research.

<sup>49</sup>Part of the *Bakgatla Ba Kgafela* are found in Botswana with Mochudi as their headquarters.

<sup>50</sup>Traditional Leadership and Governance Framework Act 41 of 2003 (Traditional Leadership Act, 2003) and the North West Traditional Leadership and Governance Act 2 of 2005 (North West Leadership Act, 2005).

Respondents. The letter was not well received by the first respondent and accordingly advised that they would be flouting the laws of the village. The respondents did not follow up on the matter but apparently decided to seek further advice on the issue from the Premier's office. In January 2010, the applicants, following the advice<sup>51</sup> from the officials from the Premier's office, decided to call a *Kgotha Kgothe* of the people of *Motlhabe*. The agenda was that various governance issues and advice from the Premier's office were to be discussed.

Following this, a number of incidents took place, including a threat from the police to arrest the respondents if they went ahead with the meeting. The respondents however, ultimately approached the High Court in Mafikeng and obtained an interdict.

### **7.2 *Reasons for the judgment in brief***

The main reason to grant the interdict was that, whilst the applicants were entitled to meet to discuss their desired independence and matters of mutual interest, they were not entitled to convene meetings under names that implied that they were clothed with statutory authority as an independent traditional community when in fact they were not.<sup>52</sup>

The respondents, thereupon, sought leave to appeal to the Supreme Court of Appeal which was denied. The applicants then approached the Constitutional Court. Their main contention was that the final interdicts were 'granted incorrectly by the High Court and impermissibly limited their rights to freedom of expression, assembly and association'.<sup>53</sup> Their argument centred on the issue of *Kgotha Kgothe*, namely, who could convene a *Kgotha Kgothe*?

## **8 Customary law or common law – the application dilemma**

To my mind, this case was not properly couched in that it is difficult to understand whether it falls within the realm of customary law or common law. Clearly the matter came before the Court as a matter that sought to deal with an interdict. An interdict is a common-law remedy and, in this regard, was thus a remedy sought by the tribal authority under the common law.

An interdict is predicated upon proof of: (i) a clear right; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of an alternative

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<sup>51</sup>The advice was that in order to secede, an application had to be made to, and granted by, the Premier in terms of the Traditional Leadership Act, 2003 and the North West Leadership Act, 2005.

<sup>52</sup>*Pilane v Pilane* (n 1) para 13.

<sup>53</sup>These rights are interrelated and give effect to one another.

remedy. To this end, the majority judgment found that the respondents did not establish a clear right and to that extent the interdict should not have been granted.<sup>54</sup>

Despite this, the Court went further to consider other factors, amongst others, to address the main respondents' contention that the applicant wanted to appropriate to themselves the identity, authority, or powers of the respondents. The court however pointed out:

Both the contents and context of the invitation could only have portrayed the applicants, being would-be secessionists, in a way that emphasised the distinction between them and the respondents. Furthermore, no evidence of any confusion was relied on by the respondents in support of their claim. It is thus difficult to see how in these circumstances one might consider the applicants to be attempting to appropriate the identity, authority or powers of the respondents, when the terms and tenor of their attempted meeting, as contained in this invitation, speak to the very disassociation from the respondents that they seek.<sup>55</sup>

Clearly, the respondents, despite being the traditional authority and custodian of tribal laws and customs, abandoned the very laws and customs that they are meant to uphold. They abandoned the very traditions and practices that distinguish them from other forms of governance.

My objection in this regard is that chieftaincy is a traditional institution that upholds traditional law. This is done through traditional leadership. Chief Justice Mogoeng Mogoeng cautioned correctly that:

Traditional leadership is a unique and fragile institution. If it is to be preserved, it should be approached with the necessary understanding and sensitivity. Courts, Parliament and the Executive would do well to treat African customary law, traditions and institutions not as an inconvenience to be tolerated but as a heritage to be nurtured and preserved for posterity,<sup>56</sup> particularly in view of the many years of distortion and abuse under the apartheid regime.<sup>57</sup>

To this end, the Chief Justice provided guidance on how *Bogosi* (traditional leadership) should be treated, but he also added that '[t]he institution of traditional leadership must respond and adapt to change, in harmony with the Constitution and the Bill of Rights'.<sup>58</sup>

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<sup>54</sup> *Pilane v Pilane* ( n 1) at para 42-47.

<sup>55</sup> *Id* para 56.

<sup>56</sup> *Id* para 78.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Id* para 79.

It is my submission that the Court should have endeavoured actively to establish whether the matter should have been dealt with in terms of the common law or customary law. This is even more apposite in that the applicants in the matter maintained that the respondents 'failed to use customary systems of dispute resolution before launching these proceedings'.<sup>59</sup> This contention was never followed up or enquired into by the Court. It is the duty of the Court to develop customary law, and, in this regard, it would have been interesting to know what the customary law says about an interdict. It is my view that, in a case where such a pronouncement is impossible, the Court should have said so.

In this case, however, one is left with the impression that, as observed by the majority, the series of interdicts by the *Kgosi* were attempts to curtail the democratic rights of the disaffected members of the traditional community.

To my mind, there are two competing traditional practices and/or customs involved in this matter. The first is '*lefoko la kgosi le agelwa mosako*',<sup>60</sup> and the other is '*the Kgotha Kgothe* custom'; these two customary laws impact directly on freedom of expression within traditional communities.

### 8.1 *When should customary law be applied?*

This is the door behind which the Courts have hidden, but it is the very question that needs to be addressed. From a conflict of law perspective, there is no legislative or judicial certainty as to how to resolve a conflict between the application of customary law and common law in a particular situation. Bennett<sup>61</sup> sets out the following rules or guidelines as to how to deal with this conflict:

- where there is an agreement between the parties, the courts must enforce such agreement;
- where there is a dispute on the choice of law, the court must be guided by the nature of a prior transaction;
- where the transaction is known to both systems of law, the court must look at the circumstances of the particular case to determine general cultural orientation by looking at the subject matter and environment in which the transaction was concluded;
- where the transaction is known to both legal systems, the parties use of a form peculiar to one system may be indicative of an intention to abide by that system; and

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<sup>59</sup>*Id* para 94.

<sup>60</sup>Note 9.

<sup>61</sup>Bennett 'Conflict of laws – The application of customary law and the common law in Zimbabwe' (1981) 30 *The International and Comparative Law Quarterly* 59.

- the ways of living of the parties, and their overall cultural orientation, also have a strong influence on the choice of law, and the exemption from customary law of the parties.<sup>62</sup>

According to Mailula, the Constitution does not limit the application of customary law to specific indigenous communities or limit its application to their culture. It recognises indigenous law only as a system of law to be applied parallel to the common law. It must, furthermore, be subject to the purport, spirit, and object of the Bill of the Rights.<sup>63</sup>

Mailula makes the pertinent submission that whether indigenous law applies should, therefore, be determined by reference to the transaction itself. In other words, the question should be whether indigenous law applies in a particular transaction rather than whether it applies to a particular person.<sup>64</sup> Whilst this observation is appreciated, the true issue is whether the Courts have the discretionary power to apply customary law. This is particularly pertinent when, as in the present case, the Court observed that the questions before it were not properly pleaded. In this regard, the Court held that the parties should stand or fall by their own founding affidavits.<sup>65</sup> As earlier indicated section 211 of the Constitution is peremptory and therefore whether to apply customary law or not is not a discretionary matter but a question of law.

#### 8.1.1 Lefoko la kgosi le agelwa mosako *in brief*

Expressed in simple terms, the nature of nature, the custom requires respect for the decision of the *Kgosi*. It requires that once *Kgosi* has pronounced on an issue all his (or her) subjects must obey such a decision without question. To this end, it is understood that the tribal matter or grievance – be it of a general or a personal nature – has been resolved. The traditional way of resolving issues is not dictatorial in nature. Every matter is raised in a *kgotla* and all members of the community are invited to discuss the issue freely. This practice is embedded in the custom or saying '*lentswe la motla pitsong le a tlhompwiwa*'.<sup>66</sup> The aim of the *kgotla* meeting is to bring about consensus on any issue. The final decision of *Kgosi* is normally to bring about that consensus after such a meeting. As it was pointed out by Comaroff and Roberts<sup>67</sup> that chiefly decisions announced at the

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<sup>62</sup>Bennett (n 61) 53-57.

<sup>63</sup>Mailula 'Customary (communal) land tenure in South Africa: Did *Tongoane* overlook or avoid the core issue?' in (2011) 4 *Constitutional court review* at 104-105.

<sup>64</sup>*Id* 106.

<sup>65</sup>(Note 1) para 49.

<sup>66</sup>Literally: 'The voice of each attendant of the *Kgotla* should be respected'.

<sup>67</sup>See (n 9) 26.

end [of a dispute] are expected to reflect the weight of manifest opinion ... such decisions are binding as the chief's word is law.

In this case, it does not appear that such a meeting took place except that the respondents received a letter telling them that they should not hold a *Kgotha Kgothe*. It would have been interesting to know how the matter would have been resolved by the Court had it been couched along the lines that the matter had been adjudicated upon by the tribal authority and the decision of *Kgosi* was such and such. In view of such a decision and in line with the traditions of the Bakgatla ba Kgafela, the matter is then considered closed, and there is no further correspondence on the matter.

It is submitted that, in this regard, this custom of the tribe as a law of general application of the community would have limited the right to the freedom of expression of the said community. It would be interesting to know whether the law should not have been developed to take into account the new constitutional mandate. The matter would, furthermore, then have cleared the way as to whether it should have been handled by way of an interdict or not.

#### 8.1.2 *The Kgotha Kgothe custom*

*Kgotha Kgothe* can be defined as a 'mass gathering' of the community. It can be said to be a gathering of *morafe*. 'Morafe' implies a community with a certain identity. It is in the *kgotha kgothe* that all issues pertaining to the governance of *morafe* and their interests are raised. It is during such times that reflections on the successes of the traditional leadership are evaluated and earnestly dealt with by the *morafe*. According to customary law, only the *Kgosi*, or his duly recognised appointee, like a *Kgosana* (traditional headmen), may convene a meeting of the Traditional Community or any part of it for the purpose of discussing governance-related matters, and it refers to a meeting of that kind as a *Kgotha Kgothe*. The respondents described *Kgotha kgothe* as follows:

"Kgothakgothe" is a general traditional meeting or gathering which, in Setswana, stems from an adage that "Morafe o kgobokanngwa ke mong wa ona." Freely translated, this means that "a tribe or traditional community may only be convened or assembled in a 'Kgothakgothe' by the owner(s) of that tribe." Morafe in this instance denotes all villages of the Bakgatla–Ba–Kgafela Traditional Community and not individual villages.<sup>68</sup>

It was further noted by the court that the respondents consider a *kgotha kgothe* as a meeting that is more than a ward or village meeting.

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<sup>68</sup>(Note 1) para 84.



The Chief Justice went on to say:

It is important to note that the people's assembly is convened by a particular leader who has the authority to do so and within his or her area of jurisdiction. The authorities identified are a Sub-headman, a Headman, a Senior Traditional Leader (Kgosi) and a King. These assemblies, unlike any other meeting, cannot be convened by any member of the Royal family or a particular clan who wishes to do so. If anybody other than the authorities who are duly empowered to convene a people's assembly were to purport to do so, it would be open to the authority vested with the power to convene that assembly at that level or above to have the imposter restrained from doing so.<sup>69</sup>

Indeed the question of who can and/or should convene a people's assembly should have been properly dealt with by the Court. The Court should have allowed oral (expert) evidence in this regard. This would have provided the Court with the opportunity of determining the extent to which this right to call a meeting by *Kgosi* could be put in line with the constitutional mandates of our democracy. In its present form, the custom clearly curtails freedom of speech and assembly as well as freedom of association. It requires that only *Kgosi* should decide about the holding of a *Kgotha Kgothe*. If he (or she) is not in favour of holding one, as in the case when the fear is not so much of the violence that may erupt but about the economic benefits that come with having the area of *Motlhabe* under the *Bakgatla ba kgafela*, then that is the end of the matter. Alternatively, it would be reinforcing the custom of *Lefoko la kgosi le agelwa mosako*. As pointed out earlier, that custom, I submit, curtails unreasonably the right to freedom of association, expression, and assembly.

In this regard, the court decided the matter on the understanding of who should call a *Kgotha Kgothe*. In my view this was too limiting in that, once it is established and found by the Court that *Kgosi* was the 'lawful' (rightful) person to call a *Kgotha Kgothe*, any other person who would do that would be found to have acted against *Kgosi* and strictly speaking to have been regarded as acting in revolt against *Kgosi* and not acting in the interest of the tribal community. Instead, the notion of a *Kgotha Kgothe* and its implications should have formed the main basis of such an inquiry.

What rights are being limited in this regard and whether individual community members should at all times seek the permission of *Kgosi* to hold a *Kgotha Kgothe* are other questions which should have been addressed. What are the implications in instances where *Kgosi* and his (or her) decisions and/or actions are not in the interests of the tribal community and as such are the source of discontent or even a revolt? These are some of the questions the court should

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<sup>69</sup>*Id* para 104.

have addressed as they present a serious limitation to the enjoyment of the rights of traditional communities.

As has been pointed out earlier, although the Chief Justice cautioned about the fragility and sensitivity of the traditional authority and customs, it is submitted that the view expressed was quite paternalistic. The view expressed resulted in the Court being too protective in its approach and, as a result, blurring the content of the rights affected by its approach.

It is submitted that the point of departure of the minority spoke to the preservation of the institution at the expense of human rights in traditional communities and this is unfortunate. This is evident from what was said in the minority judgment about creating an environment of disorderliness. The court said:

In the circumstances, the respondents, as the lawful authorities, were entitled to approach the High Court to resist the usurpation of their rights by the applicants, who had no authority under customary law and the relevant statutes to convene a meeting of that nature and form. Although the applicants have promised not to repeat what they have done, this was not a once-off event. They previously undermined the authority of the existing legitimate structures when they stated that they “were no longer part of [the respondents’] Tribal Administration, and . . . shall no longer take part in any activities and even observe any protocol to [the respondents’] Administration.” They declared their own independence and that their community would be known as “Bakgatla–Ba–Kautlwale Pilane”. Their subsequent conduct reinforces the position that they seek to continue to operate as if the “unilateral declaration of independence has already been given effect to”.<sup>70</sup>

The Court held further:

Disorderliness is on the rise in this country and traditional communities are no exception. If it were to be permissible, the applicants’ form of secession would have to be led by a legally-recognised leader of the community. Meetings that are meant to pave the way for secession should not be clothed with authority the applicants do not enjoy.<sup>71</sup>

The lawlessness and possible chaos the respondents feared may be implied from what the applicants stated in their letter of 20 July 2009. In addition, the convening of a general meeting of almost all the villagers in Motlhaba as well as people from neighbouring villages without any legal authority had the potential of creating factions and disorder which could make the Moruleng community ungovernable.

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<sup>70</sup>*Id* para 116.

<sup>71</sup>*Id* para 117.

In the circumstances, it cannot be said that the apprehension of harm was not reasonable.<sup>72</sup>

In this regard I submit that the minority, without substantive and concrete evidence, found itself in uncharted waters. Indeed, the court eloquently and persistently reminded us about the history behind the actual motives and reasons of the applicants' case. More importantly, it argued that they (the applicants) wanted to usurp the powers and authority of the recognised governance structure, that of the *Bakgatla Ba Kgafela* under the leadership of *Kgosi Nnyalala Pilane*.

It is clear that the import of the approach of the minority judgment was, to a large extent, the very approach of the High Court itself on the matter. This was the very point to which the applicants sought an appeal by resorting to the Constitutional Court in the first place.<sup>73</sup>

The question remains: Should enjoyment of the right to freedom of expression and association in traditional communities be subject to the veto of *Kgosi*?

## 9 Conclusion

Encouraging rather than discouraging robust engagement enhances democratic development in our country. In this case, it will enhance customary law development in that, in a democratic country such as ours, it is the voices of the people in traditional communities that need to be heard independently of the *Kgosi*. Traditions and customs change over time, and such change is 'triggered' by a variety of circumstances. In this instance, the Constitution and its Bill of Rights makes it imperative that customs should be developed in line with the Constitution. Where custom is in conflict with the Constitution and its Bill of Rights, it is prudent to develop such a custom in such a way that it is in line with the Constitution as prescribed by section 39(2) of the Constitution.

Whilst it is understood that traditional communities will give full respect to their traditional leaders, it is also to be expected that dissenting voices will always be there. It is these dissenting voices that should be listened to as well in order to avoid disobedience to the law in general.

Judge Skweyiya concluded his judgment by referring to the decision in *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly*<sup>74</sup> where the Constitutional Court stated:

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<sup>72</sup>*Id* para 118.

<sup>73</sup>*Id* para 100.

<sup>74</sup>2012 6 SA 588; 2013 1 BCLR 14 (CC) para 49.

The need to recognise the inherent value of ... dissenting opinions was largely inspired by this nation's evil past and our unwavering commitment to make a decisive break from that dark history. South Africa's shameful history is one marked by authoritarianism, not only of the legal and physical kind, but also of an intellectual, ideological and philosophical nature. The apartheid regime sought to dominate all facets of human life. It was determined to suppress dissenting views, with the aim of imposing hegemonic control over thoughts and conduct, for the preservation of institutionalised injustice. It is this unjust system that South Africans, through their Constitution, so decisively seek to reverse by ensuring that this country fully belongs to all those who live in it.

The only conclusion that one may hope for is the desperate plea for peace and understanding. In the words of Skweyiya, J:<sup>75</sup>

The restraint on the applicants' rights is disquieting, considering the underlying dissonance within the Traditional Community and the applicants' numerous unsuccessful attempts to have this resolved. The respondents' litigious record also portrays a lack of restraint on the part of the Traditional Community's official leadership in employing legal devices to deal with challenges that should more appropriately be dealt with through engagement.

This could be seen as an attempt to silence criticism and secessionist agitation and, if this is indeed the case, it would not be a situation that the law can and will tolerate. In the end, whilst the freedom to receive and exchange ideas could be seen as a weapon through which anarchy can be avoided in traditional authorities, it could be its unreasonable curtailment that could bring about untold consequences.

Traditional leaders should be encouraged to observe and respect the Constitution and its Bill of Rights in the light of the positions of power they occupy in traditional communities. They also have the duty to respect the Constitution and to promote its values whenever they apply the law, in particular the customary law. They will also then be promoting the spirit, purport, and objects of the Bill of Rights.

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<sup>75</sup>(Note 1) para 71.