Generosity as a Constitutive Element in African Customary Law: Some Thoughts on *Muvhali v Lukhele* (21/34140) [2022] ZAGPJHC 402 (18 July 2022)

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Abstract

Over the last decade, courts have been called upon to adjudicate the validity of marriages under the auspices of the *Recognition of Customary Marriages Act* 120 of 1998. In *Muvhali v Lukhele* (21/34140) [2022] ZAGPJHC 402 (18 July 2022) the high court had to decide on the validity of a marriage, considering contested claims to the succession of a deceased estate. In this case note I discuss the court's findings with the background of its reasoning that the inception of African customary law is born as the spirit of generosity. In implied terms, the court asserted that generosity is a constitutive element of customary law, insisting that this must be reflected in how both facts and the law are interpreted where customary disputes are concerned. I briefly investigate the essence of "generosity", its historicity and the potential implications for customary law disputes, particularly those that have to do with customary marriages. The thesis of my argument is that the acceptance of an undefined generosity as a constitutive element of customary law brings about a level of legal uncertainty, but that this is not a weakness. Instead, it is an opportunity for a radical (and even decolonial) re-imagination of a legal system that embraces the jurisprudence of generosity. If understood and applied correctly, African customary law can be exemplary for other disciplines of law in terms of achieving some of the transformative aspirations of the post-apartheid constitutional order.

Keywords

African customary marriages; generosity; human dignity; succession; decolonisation; transformative constitutionalism.

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1 Introduction

Each legislation is a product of the ~~p~~politics of the day.[1] This is true as regards African customs and the principles that they embody, including those that have to do with the conclusion of a valid customary marriage under the auspices of section 3(b) of the *Recognition of Customary Marriages Act* 120 of 1998 (hereinafter the Act). In recent years courts have been called upon to determine the validity of customary marriages. In each instance they have had to grapple with the complex granularities that define the essence of marriages through the lens of African people.[2] This was the case in the *Muvhali* case,[3] where the court had to determine whether a customary marriage existed between Munyadziwa Muvhali (hereinafter the applicant) and Khethuhuthula Louie Khipho Lubisi (hereinafter the deceased).

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1 I am indebted to Karin van Marle for the differentiation between Politics with a capital "P" and politics with a small "p". Sometimes the differentiation is simplistic and reductionist, but it is apt for the argument to be made in this case note. See Van Marle 2019 *LDD* 209: "Important here is to insist on the distinction between politics and the political, the former reflecting the notion of partisan politics, the latter, as articulated by Jean Luc Nancy and Philippe Lacoue Labarthe, calling for a retreat from partisan politics in order to reflect on the meaning of politics. This distinction is crucial for an understanding of the relation between law and politics, also when teaching law to students. At the heart of a critical jurisprudence lies the awareness of the need to retreat from partisan politics and to embrace a continuous rethinking of the political."

2 See for example, *ND v MM* (18404/ 2018) (2020) ZAGPJHC 113 (12 May 2020), the court had to deal with a dispute about the validity of customary marriage. This court judgment is studied in detail in Manthwa 2022 *Speculum Juris*, where he broadly observes that the court took the correct decision when it insisted that any court-sanctioned development of customary law must always stem from the living customs and traditions of the actual people who live in accordance with that specific African custom. The most salient part of Manthwa's intervention can be gleaned from his conclusion that customary law is inherently pluriversal, especially in the context of determining the validity of a customary marriage. For example, see at 227: "There cannot be a standard approach to determining the validity of a customary marriage because customary law is not a single law system where norms are the same. … Parties need simpler measures to prove the validity of a customary marriage in court. One way to reduce the burden is to use traditional courts that are meant to address customary law disputes exclusively. The regulation of customary marriages by Western-style courts is problematic because the presiding officers are often not well equipped in customary law." This observation is at the heart of the argument that I make in this case note, that is, to insist that the jurisprudence of generosity is logically applicable to a system of customary law that is built on plurality, multiplicity, and openness.

3 *Muvhali v Lukhele* (21/34140) [2022] ZAGPJHC 402 (18 July 2022) (*Muvhali* case).

By "politics of the day", I am not referring to partisan politics and the public performative spectacle that usually accompanies it. I am instead talking about the values, goals, ethos and aspirations of the people that emerge through lawmakers and are evidenced in the text of the legislation.[4] Sometimes these politics appear only in legislation without much discussion. Still, in certain instances courts assert themselves quite decisively in discussing and unpacking the politics of specific legislation or sections therein. Indeed, this was the case in the *Muvhali* case where, among other things, the court held that the politics that define the system of African customary law are generosity and human dignity:

> I am duty bound to decry the often unwarranted attempts by parties to tabularise and dissect constituent components of an otherwise rich and generous system of law to meet legal exigencies. The unfortunate consequence is to denude customary law of its inherent feature and strength – namely the spirit of generosity and human dignity.[5]

The assertion that generosity is a constitutive element in African customary law is not new, and it seems to be an opinion that courts have favoured in recent days, as in:

> I pause to mention that when the decision in *MM v MN* is read together with the SCA's decision in *Mbungela v Mkabi*, both cases point to the open, generous, flexible communal spirit of customary law, which, when correctly embodied, places a high premium to the right to dignity and the community beyond narrow individualistic interests.[6]

Some scholars, particularly those from the positivist and formalist legal traditions,[7] may argue that these assertions lead to legal uncertainty and thus create gaps/ambiguities in determining the validity of a customary marriage.[8] I will argue that the court in the *Muvhali* case ought to be

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4 See for example, Botha 2010 *SAPL* 40, where he makes use of the phrase "politics of the law", that draws somewhat of a distinction between Politics and politics. He opines that: "This [differentiation between Politics and politics] opens up the possibility of an alternative conception of the politics of law, which would avoid the dichotomised worldview and the quest for normative closure inherent in attempts to insulate legal interpretation from the corrosive effects of politics."

5 *Muvhali* case para 52.

6 *LNM v MMM* (2020/11024) [2021] ZAGPJHC 563 (11 June 2021) (*LNM v MMM* case) para 29.

7 For a deeper discussion on the meaning of legal positivism and its impact on legal culture/reasoning, see generally Zitzke 2018 *SAJHR* 498.

8 See for example, Bapela and Monyamane 2021 *Obiter* 186-193, who study the court's findings in *Mbungela v Mkabi* 2020 1 SA 41 (SCA) (*Mbungela* case) and argue that the Supreme Court of Appeal not only incorrectly interpreted and applied the law, but the judgment also unjustifiably departed from precedent relating to the transfer and/or integration of the bride. I must state it clearly that Bapela and Monyamane do not consider themselves as positivists/formalists generally, and such a label does not relate to their scholarship generally, however in the context of the cited text, it is apt to appreciate their positivist/formalist grasp of customary law. For example, the nub of their argument is that the court's holding that a valid customary marriage took place even where, on the face of the facts, the legislative requirements

commended for excavating the politics of the *Act* and arriving at the correct conclusion that generosity and human dignity are a constitutive element of African customary law.

In this case note I discuss the court's findings with the background of its reasoning that the inception of African customary law is born from the spirit of generosity. By implication, the court asserted that generosity is a constitutive element of customary law and insisted that this must be reflected in how both the facts and the law are interpreted where customary disputes are concerned. I briefly investigate the essence of "generosity", its historicity and its potential implications for customary law disputes, particularly those that have to do with customary marriages.

My argument is organised into four segments. Following this introduction, the second segment lays out the facts of the case whilst illuminating the parts of the court's finding that are central to the discussion of the case note. The third segment has the task of excavating a situational analysis that seeks to substantively grapple with the meaning of generosity, its historicity, and its implications for the adjudication of customary law disputes. This segment appreciates that the court's assertions as regards generosity have the potential to enhance some of the transformative aspirations of the post-apartheid constitutional arrangement. The segment further accepts that the present scholarly obsession with ascertaining legal certainty in customary law disputes is a missed opportunity to develop a jurisprudence of generosity which would give meaning to the omnipresent need to develop customary law and thus attain a nuanced living customary law. The fourth and final segment concludes this case note.

2 Facts

This case dealt with a dispute about the marital status of the applicant and the deceased. The applicant approached the court seeking an order declaring that the customary marriage entered into between her and the deceased on 22 December 2018 was a valid customary marriage as envisaged in the provisions of section 3 of the Act.[9] On the same score, the applicant requested the court to grant leave to posthumously register her customary marriage with the Department of Home Affairs.[10]

were not met, is erroneous. In true positivist/formalist fashion, Bapela and Monyamane bemoan the court's over-reliance on contexts and situations and its alleged neglect of the law, for the sake of the law and certainty. To this end, they are at odds with what seems to be a "revolving door" in how courts read/interpret the requirements for the validity of a customary marriage.

9 *Muvhali* case para 10.

10 *Muvhali* case para 10.

The family of the deceased (hereinafter the primary respondents)[11] opposed the application. The seventh and eighth respondents were the administrators of the deceased pension and other death benefits. The ninth respondent was the deceased's employer at the time of his death (hereinafter the secondary respondent). The eleventh respondent (hereinafter the tertiary respondent) was the cabinet minister responsible, among other things, for the registration of customary marriages in terms of the Act.[12]

The applicant and the deceased started their romantic relationship in 2009 at the University of Johannesburg, where they were both students. In 2009 the deceased was in his third year and the applicant was in her first year.[13] They started to stay together in 2014. The applicant claimed that in September 2016 the deceased proposed that they should get married by customary law. She accepted his proposal. They got engaged to be married. The engagement was made known to their respective families.[14] In 2018 the deceased proposed to pay *lobolo,* and she consented to get married to him.[15] Arrangements were made for their families to meet. The families met at her parental home on 22 December 2018, in Maungani village in Limpopo, and commenced *lobolo* negotiations.[16] It was agreed that the deceased would pay a total sum of R90 000 as *lobolo*, R23 000 of which was in cash. The deceased family undertook to return for the payment of the outstanding *lobolo* when ready. At the time of the passing of the deceased this had not yet happened.[17] Part of the dispute centred on the fact that the applicant claimed that after the successful negotiations and part payment of *lobolo*, the two families started celebrating their customary marriage on that same day.[18] Thereafter the deceased's family referred to the applicant as their *makoti* (bride).[19]

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11 They are cited in their individual capacities as the first to sixth respondents. These are Rich Lukhele, Lindiwe Lukhele, Victor Lubisi, Victoria Lubisi, Siphamandla Lubisi and Mbali Lubisi.

12 *Muvhali* case para 8.

13 *Muvhali* case para 11.

14 *Muvhali* case para 14.

15 Consent is one of the key requirements of the conclusion of the validity of a customary marriage, as demanded by s 3(1) of the *Recognition of Customary Marriages Act* 120 of 1998 (the Act). This requirement is studied in detail in Sibisi 2021 *PELJ*, where he considers the court's handling of the requirement for consent in its decision in the *LNM v MMM* case. The central question that Sibisi seeks to probe is "what form should this specific consent take?"

16 *Muvhali* case para 15.

17 *Muvhali* case para 18.

18 *Muvhali* case para 19.

19 This part of the dispute speaks to the heart of the legal questions that the court needed to respond to. The court ultimately had to measure the fact against two things: the first was the definition of a customary marriage, and the second was the requirements of a valid customary marriage as set out in the Act. S 1 of the Act

The deceased died on 11 March 2021. The applicant told the court that the deceased's funeral arrangements were fraught with family conflict. As a result the applicant could not bury the deceased. He was instead buried[20] by the primary respondents in Nelspruit in Mpumalanga.[21]

When the applicant approached the office of the Master of the High Court in Johannesburg to obtain the letter of executorship, the officials declined to grant it to her because the customary marriage was not registered with the Department of Home Affairs.[22]

The primary respondents disputed the existence of the valid customary marriage between the applicant and the deceased on various grounds. Firstly, they argued that of the R23,000.00 paid in respect of *lobolo*, R10,000.00 was for the purposes of the right to speak (also known as *iVulamlomo*) and was not part of the *lobolo* itself. Therefore, the actual amount paid was R13,000.00.[23] Secondly, they argued that the fact that the deceased and the applicant stayed together does not mean that they were married under customary law, and their house did not qualify as a marital home.[24] Thirdly, the primary respondents argued that for the marriage to have been valid, it ought to have been concluded in Swati traditions and customs, and that this was not done.[25] These three arguments formed the basis of the respondent's dispute over the applicant's claims.

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defines a customary marriage as "a marriage that is concluded in accordance with customary law". As for the requirements for the validity of a marriage, they are set out in s 3(1), which provides that for a customary marriage to be valid, the prospective couples must be consenting adults, and the marriage must be negotiated and entered into or celebrated in accordance to customary law.

20 Although it was not at issue in the case discussed, the right to bury is something that has been at issue in many African customary law disputes. Conversely, it appears that most contestations as regards the validity of a customary marriage always feature disputes as regards the right to bury. Indeed, this was at issue in *Tsambo v Sengadi* 2019 4 SA 50 (GJ) (*Tsambo* case), and it is carefully studied in Manthwa and Ntsoane 2020 *THRHR*, where they demonstrate that there are three approaches to the question of who has the right in African customary law to bury. The first approach is that one's parents have the right to bury, the second approach is that one's spouse has the right to bury, and the third option is one's eldest son. Ntsoane and Manthwa lean towards the first approach only because they observe that African customs are based on the belief in ancestors (*abaphansi/abezimu*), so being buried by one's parents ensures that a person is buried in the land of their ancestors. For a deeper reading and analysis of the *Tsambo* matter, see generally, Radebe 2022 *De Jure*.

21 *Muvhali* case para 25.

22 *Muvhali* case para 28.

23 *Muvhali* case para 30; this argument was made with the intention of persuading the court that the *lobolo* was incomplete. This was an exercise in futility considering that previous court judgments have made it clear that the complete payment of *lobolo* was not a requirement for the completion of a valid customary marriage. See for example Rautenbach *Introduction to Legal Pluralism* 100-101.

24 *Muvhali* case para 31.

25 *Muvhali* case para 33.

At a more material level, the primary respondents were of the opinion that there was no valid marriage because the "celebration" requirement of section 3 of the Act was not met. According to the respondents, the occasion of 22 December 2022 was merely for the purposes of concluding the *lobolo* negotiations and not celebrations.[26] This was directly contrary to the applicant's claims. The respondents insisted that the fact that lunch had been served on the day did not constitute a "celebration" because, in terms of Swati culture:

> [a] cow would be slaughtered by the family of the husband as a sign of acceptance of their new 'makoti'. This custom is known as 'imvume'- an acceptance custom. The family of the groom would then pour cow bile on the head of their 'makoti', known as the 'ukubikwa' custom which represents that the new wife is introduced to the ancestors of the groom's family. The family of the bride must equally slaughter a cow and pour bile liquid on the head of the groom as a sign of recognising him as their lawfully wedded 'mkhwenyana' or groom. Both families must exchange half of the cow slaughtered to complete the acceptance and integration of marriage bonds between the families. The family of the 'makoti' must bring gifts to the family of the groom to lawfully recognise them as her in-laws also known as the 'umabo' tradition. In order to conclude a customary marriage, a second meeting of the families was required during which meeting the elders would be present and the handing over of the bride would occur at the deceased's home. The applicant's family would be requested to slaughter cows, give the bride clothes and neighbours and relatives would sing and dance. Once the balance of [t]he lobola is paid, the applicant and her family would be invited to the deceased's family home where the customary marriage would then be entered into and celebrated. This did not occur.[27]

The applicant neither challenged nor contradicted the factual nature of the essence of the "celebration" requirement as enunciated from Swati customs and traditions. She did, however, assert that the luncheon that was held after the negotiations amounted to a celebration in terms of the Act.[28] The primary respondents partook in the luncheon in the spirit of *ubuntu*,[29] arguing that it would have been culturally offensive for them not to accept the offered meals.[30] The court accepted the primary respondent's claim that the luncheon did not constitute a celebration in terms of the Act.

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26 *Muvhali* case para 34.

27 *Muvhali* case paras 35, 36, 37.

28 *Muvhali* case para 43; the applicant argued that the *lobolo* negotiations and the luncheon were separate events even though they took place on the same day. At the conclusion of the *lobolo* negotiations, the primary respondents returned at 18:00 for the purposes of the luncheon. In the view of the applicant, the act of their returning for the second event was a tacit acceptance of the celebration of a marriage.

29 The respondent's invocation of *ubuntu* is interesting to note because this is a concept that is discussed at some length both in the sphere of Transformative Constitutionalism and as well as in Critical Decolonial Legal Scholarship.

30 *Muvhali* case para 38.

Furthermore, the court observed that according to African customs, the applicant was not *uMakoti*.[31]

To respond to the question of whether a customary law marriage existed between the applicant and the deceased, the court had to contend with the primary respondent's claim that not all the elements in section 3(1)(b) of the Act were met.[32] Whilst there were differences in the events associated with the *lobolo*, there was agreement between the parties that it took place. Thus, this satisfied the first part of section 3(1)(b) of the Act, which requires that the marriage be negotiated. The dispute pertained to the latter part of section 3(1)(b) of the Act, which requires the marriage to be "entered into" and or for it to be "celebrated".[33]

In respect of the primary respondent's claim that not all elements of the Act had been met, the court condemned the seeming tendency of people often to insist on a strict reading of the Act.[34] The court insisted that such an approach to African customary law was inimical to the intended purpose of the Act. The court opined that the entire system of African customary law is based on generosity and human dignity and that strict readings of the Act serve only to denude this system of law of its constitutive character.[35] On the same score, the court leaned towards the applicant's averment that "it should always be borne in mind that [African customary law] is a dynamic system of law."[36] Although the court did not define or clarify what it meant by generosity and dynamism, it did describe the operative function of

31 A careful reading of the case shows that there is a dispute in the connotation that is attached to the word "uMakoti". See for example *Muvhali* case para 31, where the applicant claims that being referred to as "Makoti" by the primary respondents implied that the primary respondents accepted her as their daughter-in-law. The primary respondents did not dispute this connotation of the word "uMakoti" but tacitly called for a relaxed reading of the term, preferring instead to argue that they used it in relation to her in "a manner of speaking" considering that the applicant and the deceased were cohabiting, rather than with the purpose of recognising her as their actual daughter-in-law in terms of customary law.

32 *Muvhali* case para 50. There are three requirements for the subsistence of a valid customary marriage under the Act. These are encapsulated in s 3(1), and they are as follows: (1) the prospective spouses must be 18 years or older, (2) both spouses must consent to being married under customary law, and (3) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

33 *Muvhali* case para 50.

34 *Muvhali* case para 54, where the court specifically took issue with the primary respondent's strict reliance on Swati customs to aid their argument that there had been no customary marriage between the applicant and the deceased. The court likened this to the situation in the *Tsambo* case para 15, where the parties proffered a different interpretation to the celebrations that had occurred after the negotiations, and in a distinctly similar set of facts to the *Muvhali* case, the parties in the *Tsambo* case opposed the marriage and relied on customs and traditions.

35 *Muvhali* case para 52.

36 *Muvhali* case para 53.

generosity when it firmly asserted that the customary law rituals relied on by the respondents were not cast in stone.[37]

Even if positivists/formalists were to argue for a strict reading of the principles and customs of African customary law,[38] such an argument would be unworkable because the court correctly demonstrated that the Act is not specific as regards the requirements for the celebration of a customary marriage.[39]

Instead of engaging in a strict reading of the Act or even acceding to the primary respondent's strict insistence on adherence to Swati customs, the court opted for a contextual and situational analysis. For example, the court believed that the evidence in the making of a valuation certificate from Arthur Kaplan Jewellers dated 12 September 2016 submitted by the applicant, was more compelling than the claims made by the primary respondents. The court felt that this piece of evidence was significant because it confirmed that the deceased bought the engagement ring for the applicant approximately two years before the *lobolo* negotiations.[40] This evidence not only spoke to the lived intention of the deceased but also showed that the primary respondent's claim that the applicant and the

37 *Muvhali* case para 55; the fact that customary law rituals are not cast in stone appears to be a widely accepted notion in African customary law adjudication. For example, see para 56, where the court invokes the *Mbungela* case, where it was held that the ritual of the handing over of the bride was important but not a key determinant of a valid customary marriage. Indeed, the court's assertion is confirmed by scholarly interlocutors such as Manthwa 2021 *THRHR*, where he asserts that the handing over of the bride is not a requirement as per s 3(1) of the Act, but that it is commonly accepted as an essential requirement mostly because of ancestral acquiescence.

38 See for example Koyana 2022 *Speculum Juris* 2, where he bemoans how courts almost always seek to overzealously develop customary law by "departing from its practices of the past." Koyana proposes that South African courts must give full unqualified recognition to customary law as a legal system, not subject to conformity with the Bill of Rights. Of course, this a purist and somewhat positivist approach to customary law. However, I must point out that the argument that African customary law must not be subservient to the Bill of Rights and the Constitution follows from existing criticisms of the Constitution's general handling of customary law; see for example, Zitzke 2018 *SAJHR*, where he demonstrates that the Constitution enjoins us to take African customary law more seriously but fails to give African law the prominence that it deserves. Indeed, this is an argument that is advanced in Monyamane 2023 *SAPL*, where he asserts that the Constitution renders the indigenous people of South Africa naked and defenceless in the sense that customary law has been adopted into a scheme that engages in the vernacularisation of foreign concepts.

39 *Muvhali* case para 57; to this end the court cited *Ngwenyama v Mayelane* 2012 4 SA 527 (SCA) para 23, where it was held that the legislature purposefully deferred the meaning of celebration to the living customary law. By implication, this means that the requirement of a "celebration" is fulfilled when the customary law celebrations are generally in accordance with the customs applicable in those circumstances.

40 *Muvhali* case para 59.

deceased were not engaged to be married during the period September 2016 until 2018, when the *lobolo* negotiations took place, was patently incorrect.

Whereas it was common cause that none of the Swati customs were followed, the court took heed of the evidence that the family of the deceased communicated in a cordial tone with the applicant by way of WhatsApp and had invited her to some family events. The court felt that this spoke to the fact that they (the deceased's family) had not only recognised her as a daughter-in-law, but that they had accepted that as a fact, too.[41]

In the spirit of generosity, where reading situations and contexts is preferred over strict readings, the court proceeded to study the conduct of the deceased. It noted two incidents that it felt were crucial to consider: (1) when the applicant and the deceased had moved into their new home, there had been a WhatsApp group consisting of fellow homeowners of their neighbourhood. To this group the deceased introduced the applicant as "his wife", and (2) the deceased took out a FNB Law on Call Personal Plan where he registered the applicant as "a spouse".[42] In the opinion of the court, these two incidents were more telling and certainly more definitive of the fact that a marriage had existed between the applicant and the deceased. It thus concluded:

> When all the above facts are considered in the context of the living, inherently flexible and pragmatic custom, a valid customary marriage existed between the applicant and the deceased from 22 December 2018 onwards.[43]

In summation, the court accordingly ordered that there had been a valid customary marriage between the applicant and the deceased as envisaged in the provisions of section 3 of the Act and that the applicant had been the customary wife of the deceased. Furthermore, the court granted leave to the applicant to register the customary marriage with the tertiary respondent posthumously.

The court's assertion as regards the dynamic and flexible nature of African customary law and its inherent generous nature leads to three indubitable conclusions: (1) unlike other systems of law, African customary law does not begin and end with the letter of the law as enunciated in legislation but prefers a deeply contextual reading of situations and realities, (2) when approaching African customary law disputes, courts must primarily concern themselves with arriving at a just outcome, and not merely strictly abide by

41 *Muvhali* case para 60.
42 *Muvhali* case para 62.
43 *Muvhali* case para 64.

the legislation, and (3) the Act is a product of the Politics[44] of the day, which are generosity, human dignity and other constitutional imperatives.

3 Generosity in African customary law

3.1 Foregrounding the jurisprudence of generosity

The law is not a hard science; instead, it is a discipline in the humanities. This means that legal rules are inherently subject to interpretation and enunciation. As a result, the frequently observed obsession with legal certainty is misplaced. My argument is that the very strength of the law (especially African customary law) lies in its uncertainty. This is true of the transformative demands of the Constitution in the post-1994 era. Usually couched in the language of transformative constitutionalism, the post-apartheid constitutional arrangement is based on the notion of shifting from a culture of authority to a culture of justification. Klare's now famous definition of transformative constitutionalism is worth re-stating in his own words:

> By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word.[45]

Klare's definition of transformative constitutionalism, read together with Mureinik's exhortation about shifting from the culture of authority to a culture of justification,[46] offers three indubitable implications for African customary law adjudication. These are the following: (1) the adjudication of African customary law disputes ought to mirror constitutional Politics, and thus be geared towards its aspirations of creating an egalitarian society; (2) courts

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44 Van Marle 2019 *LDD* 209.

45 Klare 1998 *SAJHR* 150.

46 Mureinik 1994 *SAJHR* 32: "What the bridge is from is a culture of authority. Legally, the apartheid order rested on the doctrine of Parliamentary sovereignty. Universally, that doctrine teaches that what Parliament says is law, without the need to offer justification to the courts. In South Africa, since Parliament was elected only by a minority, the doctrine taught also that what Parliament said was law, without a need to justify even to those governed by the law. The effect of these teachings, at the apogee of apartheid, was to foster an ethic of obedience … If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification - a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion."

must be consciously attentive to their role to interpret legislation in the mode of finding a balance between reform and revolution – that is to try using the law to bring about meaningful societal change; and (3) courts ought to disabuse themselves from their pre-1994 legal culture, precisely in their strict observance of parliamentary sovereignty, where the letter of the law was embraced in the same way as devout Christians embrace the word of God.

Against the background of Klare and Mureinik's insights into the essence of post-apartheid adjudication, Van Marle introduces[47] the idea of the jurisprudence of generosity. She expansively ponders on how the dialogue about transformation, socio-economic reparation and other social problems like poverty, violence and disease are addressed mostly through law and human rights. Yet these hardly have sufficient thrust to effect real change.[48] At the instance of the law's seeming inability to decisively respond to societal challenges, Van Marle seeks to respond to the question: how can we find different ways to approach these issues in the face of the pervasiveness of law and human rights? She then paradoxically proffers a disclaimer which insists that her intervention does not intend to provide answers, solutions or even conclusions. It is in this disclaimer that she foregrounds the definition of the jurisprudence of generosity:

> A 'jurisprudence of generosity' as [or is] one response to the gap between theoretical legal understanding and social transformation. I find this suggestive for post-apartheid jurisprudence. What lies at the heart of the notion of generosity for me is the idea of unexpectedness that breaks with the formality and predictability of law.[49]

Van Marle's choice of words is worth a brief comment; of two words specifically. The first is "unexpectedness" and the second is "predictability". As I alluded to earlier, the law is not a hard science but rather a subject in the humanities. The words unexpectedness and predictability, as employed by Van Marle, speak precisely to this point. The expectation that the law must always be certain and that there must always be strict compliance with the provisions of the legislation is certainly the easier approach to embrace. Still, it is not in the spirit, tenor and ambit of the Politics of the day. The image of predictability and unexpectedness mirrors the constitutional transformative aspiration of freedom from colonial laws. Predictability and unexpectedness are expressions that call for a continued probe, exploration

47 In this sense Van Marle introduces it only to the South African academy, but the idea of a jurisprudence of generosity is not new, because it has been the subject of scholarly attention in other disciplines and certainly in different parts of the world; see for example Malon 2011 *AFLJ*.

48 Van Marle 2007 *Stell LR* 194.

49 Van Marle 2007 *Stell LR* 194.

and opening.[50] Conclusively, the jurisprudence of generosity refers to a jurisprudence that reflects something beyond the confines of traditional law.[51]

In a different text and in the context of a *festschrift* for Justice Albie Sachs,[52] Van Marle presents an even deeper discussion about the jurisprudence of generosity. She finds that this jurisprudence is a break from restricted jurisprudence and leans more towards general jurisprudence.[53] The former is a type of jurisprudence that is obscenely preoccupied with legal certainty and often dabbles in simplistic quests that seek to ascertain purist notions of the essence of law. The latter, on the other hand, not only concerns itself with the letter of the law, but takes heed to contexts, situations, realities and a wider concept of legality.[54] Van Marle figures that a general jurisprudence is relevant to the context of South Africa, considering the prevailing legacy of colonialism, because the present context demands that judges not only know the law but are conscious of the conscience of the law.[55]

Woolman proffers a substantive response to Van Marle, where he specifically takes issue with Van Marle's habit of not engaging more meaningfully with the full breadth of the Constitutional Court's

50 In Van Marle 2007 *Stell LR* 198, she alludes to the concept of "refusal" as one of the ways for women to specifically situate their forms of resistance, and thus contribute to the quest to radically transform society, and by implication the law too. She posits that this conception of refusal is a constitutive element of the jurisprudence of generosity because it entails a firm rejection of systems that aim to prevent forms of questioning, opposition or resistance. Refusal appears to be a dominant feature in various discourses. For example, see generally Tate *From Post-Intersectionality to Black Decolonial Feminism*, specifically at 43, where she defines refusal as: "the active, consciously enacted, turning away necessary to bring Black people and People of Colour into view as humans, and refuse white dominant intersectional racialization discourses, representations and imaginaries that we have all inherited, even when we do not want them. Turning away through refusal can be intellectual, psychological, political, but it can also be viscerally felt and can lead to community building through affection."

51 Van Marle 2007 *Stell LR* 205.

52 Albie Sachs is often used as an example by many scholars who seek to make the point about transformative adjudication. See for example Botha 2010 *SAPL*, where he argues that Sach's works both as a jurist and a scholar demonstrate a jurisprudence that subverts and inverts traditional understandings of the politics of law.

53 Van Marle "Abandoning Certitudes" 51.

54 Van Marle "Abandoning Certitudes" 51.

55 There are numerous examples of the sort of approach to legal adjudication that Van Marle draws from Albie Sachs' judgments and other writings. For example, she demonstrates that Sachs was overtly frank about the fact that he was not influenced just by rules, legal reasoning/logic and the letter of the law, but insisted on approaching the cases before him by way of evaluating/weighing the circumstances that surrounded each matter. I find this to be remarkable, and somewhat like the approach taken by the judge in the *Muvhali* case, although not as expansively.

jurisprudence.[56] For example, Woolman feels that Van Marle's assertion that the law and human rights are unable to bring about tangible societal change (or transformation) is overly simplistic and suffers from several disabilities.[57] Woolman figures that the human rights discourse is an ally and not a foe in the quest to transform South Africa. He firmly believes that the rights discourse possesses the potential to liberate South Africans from unemployment, poverty and other social ills.[58]

From Woolman's rejoinder it becomes apparent that the difference between him and Van Marle is that he strongly believes in the power of the courts and the law to effect the substantive transformation of our society. In contrast she is somewhat suspicious of an overly optimistic acceptance of the law's transformative abilities.[59] In fact she has argued elsewhere that the notion of transformative constitutionalism ought to be understood, among other things, as a critique – instead of merely a theory of transformative adjudication.[60]

Although framed as a retort, I find parts of Woolman's insights to be rather disingenuous; for example, his claim that Van Marle's statements as regards the limits of the law and human rights amounts to a sweeping rejection of the court's transformative potential is misplaced because this is not Van Marle's argument. To argue that the law and human rights are limited does not automatically lend itself to constitutional abolitionism. The latter is certainly not Van Marle's position. Instead, the jurisprudence of generosity, or even the "ethics of refusal", as understood by Woolman, speaks more to the need for courts to employ critical interpretative tools when adjudicating matters before them instead of strictly relying on positivist/formalist approaches. The term " "critical interpretative tools" implies the use of a generous, contextual and situational reading of the law and facts. This is the same sort of reading of the law and facts that I argue was carefully and quite correctly deployed by the court in its findings in the *Muvhali* case.

In some instances, when the limits of the law and human rights are exposed, they are done so with the intention of advancing an argument that says that in the efforts to transform society there is a need to shift away from the law. In this instance I do not think Van Marle's musings about the jurisprudence of generosity are an invitation for a shift away from the law. Instead, they are about finding ways to make the law and adjudication have a sharper transformative thrust. In this sense Van Marle and Woolman are not too far

56 Woolman 2007 *Stell LR* 509.
57 Woolman 2007 *Stell LR* 510.
58 Woolman 2007 *Stell LR* 511.
59 Van Marle 2019 *LDD* 204.
60 Van Marle 2009 *Stell LR* 288.

from each other because they both inherently believe in the capability of the law and the court's ability to actuate some form of societal change (transformation).[61] Thus Woolman's response is ideologically inaccurate. Moreover, there is an unhealthy contradiction in Woolman's conclusions because he commits the very mistake that he accuses Van Marle of making in the sense that he staunchly insists on a false dichotomy between rules-based jurisprudence and restorative, outcomes-based decision-making.[62] That being said, there is a part of Woolman's rejoinder that I think is not only important to underscore but is essential to the argument that I advance in this case note:

> A jurisprudence of generosity is, as Van Marle makes clear here, a natural and necessary corrective to systems of law that make people invisible. However, as cases such as *Barkhuizen*, *Masiya* and *NM* make clear, generosity is no substitute for justice, and an ethics of refusal is no substitute for the equally powerful demand for reasons and justification. The correct path leads neither to arid abstractions nor to stubborn solipsism.[63]

What is patently clear is that the jurisprudence of generosity, as unpacked by Van Marle and applied in the *Muvhali* case does not replace rules. Nor does it proffer an alternative concept of justice. Therefore Woolman and Van Marle agree with each other as regards the need to fundamentally uphold the rule of law, albeit from different methodological viewpoints.

As alluded to earlier, there is an element of decolonial critical legal studies that is worth discussing in this case note. Whereas transformative constitutionalism and decolonisation have distinct meanings and starkly divergent tools of analysis,[64] I argue that in this specific instance of the *Muvhali* case, the court's insistence on a generous reading of the Act, comports quite expansively with some articulations of decolonial legal critical scholarship.[65] For example, Motshabi draws from the scholarly

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61 Woolman 2007 *Stell LR* 519. This is so, especially because Woolman seems to agree with Van Marle on the issues that matter. For example, Woolman argues that "[his] initial take on three decisions - *Barkhuizen v Napier*, *Masiya v Director of Public Prosecutions* and *NM v Smith* - was that all three majority decisions reach spurious legal conclusions through rather tendentious reasoning. Van Marle and other commentators on South African legal culture have not altered my opinion of the outcomes or the route each majority took to reach those outcomes. However, Van Marle's writing does suggest that if one *shifts* (my emphasis) the prism through which one analyses this troika of cases, then one may arrive at a greater appreciation for the motivations that lay behind each decision."

62 Woolman 2007 *Stell LR* 521.

63 Woolman 2007 *Stell LR* 522.

64 Sindane 2021 *Pretoria Student Law Review* 245.

65 I am aware of a branch of decolonial and critical legal scholarship that is completely at odds with the entire constitutional project/arrangement. This branch is usually referred to as "constitutional abolitionists". In the main, this group of scholars argues that the Constitution must be abolished because it is a Eurocentric document that arrogantly claims itself superior, whilst disavowing the horrors and cementing the grand theft of land and other colonial crimes. Criticisms of the constitutional project

interventions of decolonial thinkers in the humanities[66] to delineate an articulation of decolonisation that is applicable to the law, where he observes that decolonial theory is sometimes scoffed at among lawyers and law academics because it is often accused of being too general and thus inapplicable to the law, and specifically to adjudication.[67] However, he demonstrates that decolonisation, among other things, means working toward a vision of human life that is not structured by the forced imposition of one ideal of society over another.[68] Understood correctly, decolonisation strives for a pluriversal, pluralistic and multifaceted concept of the law. This means an adjudication that does not zealously stick to the formalist letter of the law.

Decolonial critical legal scholarship calls precisely for nuance and flexibility in how courts interpret the law. It further insists that, among other things, the law must be understood within the parameters of contexts and situations. The most incisive thrust of decolonial critical legal scholarship is its ability to study society holistically and draw insights from the societal context that impacts how law is understood and has predictive options that seek to recreate legal adjudication.[69] Whereas the jurisprudence of generosity is fashioned in the language of transformative constitutionalism, a similar approach is employed in the language of decoloniality in introducing "The Jurisprudence of Steve Biko".[70] The essence of the jurisprudence of Steve Biko, among other things, is an imagination of an alternative system of law, one that specifically considers the context of brazen racism, landlessness and the anti-black socio-economic architecture that continues to define South Africa's lived social setting.

The court and the parties in the *Muvhali* case referred to the principle and philosophy of *ubuntu* in passing but did not discuss/define it in detail. *Ubuntu* has been written about and debated quite extensively in the South African

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are almost as old as the new South Africa, but they gained legitimate momentum in the aftermath of the #FeesMustFall and #RhodesMustFall revolutions, which demanded that South Africa be decolonised in its entirety. The #MustFall revolution presented the legal academy with a *Decolonial Turn*. This *Turn* challenged legal scholars to think quite deeply about the transition from apartheid to democracy, and from parliamentary sovereignty to constitutional supremacy. Constitutional abolitionists, in their studied analysis, conclude that the Constitution may be transformative, but it is not liberational, and is thus a misfit for a South Africa that urgently needs to be decolonised. Some prominent constitutional abolitionists include Modiri 2018 *SAJHR* 300-325, Dladla 2018 *SAJHR* 415-440, and Ramose 2018 *SAJHR* 326-341.

66 For example, Grosfoguel 2007 *Cultural Studies* 211-223, Maldonado-Torres 2011 *Transmodernity* 1-15.

67 Motshabi 2020 *Strategic Review for Southern Africa* 107.

68 Motshabi 2020 *Strategic Review for Southern Africa* 109.

69 Sindane 2022 *SAPL* 2.

70 Modiri *Jurisprudence of Steve Biko*.

legal academy.[71] In this case note I argue that *ubuntu*, when understood in its correct historicity, is a decolonial imperative. On the other hand generosity, as unpacked in the scholarship of the jurisprudence of generosity, is a transformative constitutional imperative. Both these concepts converge at the nexus of the Politics of the day, the politics that define South Africa's law (adjudication) and society.

One might ask how and why I argue that *ubuntu* is a decolonial imperative. My response would be to canvass a definitional paradigm of *ubuntu* as studied by Ramose in his seminal work titled, "African Philosophy Through *Ubuntu*".[72] Ramose brings about a definition of *ubuntu* that is often neglected in prevailing academic discourse on the subject. Whereas most discussions on *ubuntu* focus on its inclination towards either beinghood (*ubu*) or relational theory (I am because you are – you are because I am),[73] Ramose reveals two further dimensions to *ubuntu*. The first is its firm insistence on the onto-triadic nature of Africa and Africans,[74] and the second (which is relevant to this case note) is his concept of *ubuntu* as a demand for justice:

> Religion, politics and law must be anchored upon the understanding of the cosmos as the continual strife for harmony. It is such anchorage which gives them authenticity and legitimacy. And this is the basis for consensus as the distinctive feature of ubuntu philopraxis. Peace through the concrete realisation of justice is the fundamental law of ubuntu philosophy. Justice without peace is the negation of the strife towards cosmic harmony. But peace without justice is the dislocation of umuntu from the cosmic order.[75]

Ubuntu, when understood in the discipline of African philosophy, finds its decolonial imprimatur in its sacrosanct demand for justice – or, quite simply, its insistence on a society that is based on what is just. Decolonisation, as

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71 See for example, Ncube "Calibrating Copyright". Also see Radebe and Phooko 2017 *South African Journal of Philosophy*, and Mokgoro and Woolman 2010 *SAPL*. Also, see Cornell and Van Marle 2005 *AHRLJ*, Cornell 2004 *SAPL*, and Bennet 2011 *PELJ*.

72 See generally, Ramose *African Philosophy Through Ubuntu*.

73 There has been an undue focus on *ubuntu* as regards its relational aspects, which are usually gleaned from the aphorism *"umuntu ngumuntu ngabantu"*. Some scholars have shown that there is more to *ubuntu* than this aphorism; see for example, Mboti 2015 *Journal of Media Ethics* 125.

74 Ramose *African Philosophy Through Ubuntu* 45: "[a] specific element of the experience and concept of whole-ness in *ubuntu* philosophy is the understanding of be-ing in terms of three interrelated dimensions. We find the dimension of the living - *umuntu* - which makes the speech and knowledge of being possible. The second dimension is that of those beings who have passed away from the world of the living. These beings departed from the world of the living through death. It is thus understood that death has discontinued their existence only about the concrete, bodily and everyday life as we know it. But it is believed that death does not totally discontinue the life of these departed beings. Instead, they are believed to enter into and continue living in a world unknown to those left behind. On the ground of this belief the departed are called the living-dead (*abaphansi*)."

75 Ramose *African Philosophy Through Ubuntu* 46.

mentioned earlier, is a justice-seeking project. It aims to complete the incomplete business of liberation for all colonised people of the world, particularly black people, who continue to labour under the vestigial force of colonialism, which keeps them in the zone of non-being.[76]

Simply put, colonialism was a system that dis-membered colonised people from the family of human beings, thus dehumanising them. Decolonisation thus seeks to undo dis-memberment by re-membering the dis-membered.[77] Similarly, *ubuntu* as a demand for justice is attentive to the fact that to achieve a society that is just, there ought to be actions taken to repair and restore what may have been broken. This includes returning stolen land and mineral resources to the indigenous people of Africa.[78] This reading of Ramose correctly suggests that the relational aspect of *ubuntu* encapsulated in the adage "I am because you are – you are because I am" rings hollow if it is not accompanied by natural justice.[79] Inversely, I cannot "be" because "you are" if you have stolen my land and mineral wealth and you refuse to return them to me. For me to "be" because of "you", *ubuntu* requires that you must return to me what belongs to me – and this is a decolonial imperative.

Of course, the return of land and other colonially stolen wealth was not an issue in the *Muvhali* case. However, there was indeed a question of justice. In determining whether a valid customary law marriage existed between the applicant and the deceased, the court opted not just to read the letter of the law, but it chose to respond to the question of whether finding against the applicant would be in line with *ubuntu's* demand-for-justice. An important factor to underscore is that the court's reliance on the jurisprudence of generosity stretches the ordinary meaning of the word "generosity" because the court's generous interpretation of the Act does not arise from sympathy or pity or some kind of reconciliatory notion. It is instead an expression of the pursuit of justice.

Whilst it may be easy to logically appreciate how generosity fits into *Ubuntu* like a puzzle piece because of the latter's relational characteristic, it is not as easy to link generosity with *ubuntu's* characteristic of being a philosophy that demands justice. I argue that generosity not only comports with the relational characteristic of *ubuntu* but also with its characteristic of demanding justice. This argument is uniquely relevant to the facts of the

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76 Fanon *Black Skin, White Masks* 2.

77 Ndlovu-Gatsheni 2015 *Australasian Review of African Studies* 23. The word "dismemberment" and the phrase "remembering the dismembered" speak to trite decolonial theorisation that calls for the need to rehumanise all colonised/Black people who continue to be dehumanised by the unending colonial episode that persists long after the official/formal cessation of imperial/colonial conquests.

78 Ramose *African Philosophy Through Ubuntu* 34.

79 Ramose *African Philosophy Through Ubuntu* 80.

case in the *Muvhali* case and ultimately the findings of the court therein. By claiming that African customary law is based on generosity the court drew not just from the relational characteristic of *ubuntu* but also mostly from its demand-for-justice characteristic. Finding that a valid customary marriage existed between the applicant and the deceased is generous in the sense that it exemplifies *ubuntu*'s demand-for-justice characteristic, because it appreciates that a contrary finding would be contrary to *ubuntu's* aspiration for a society that is just. In the segment below I briefly demonstrate how a contrary finding by the court would have had unjust practical implications.

3.2 The practical implications of formalist/positivist readings

As discussed above, it would be easy to argue that accepting the jurisprudence of generosity would open African customary law to some level of uncertainty.

The purported legal uncertainty is a strength in the sense that it creates legitimate space for courts to deviate from a strict reading of legislation where the demand of justice dictates that they do so. The instance of *Muvhali v Lukhele* is a good example of how a strict reading of legislation would have led to an unjust court outcome.

At a practical level, there would have been two implications had the court embraced a strict reading of the Act; the first would have been a finding that the applicant and the deceased were not in a valid customary marriage. This would have had the implication of the applicant's losing access to all if not most of the assets that she and the deceased had accumulated together. Most importantly, it is apparent that the family of the deceased thought that they had a legal claim to the house that the deceased and the applicant had lived in. Ultimately, that claim would have been vindicated had the court agreed that there had been no customary marriage between the applicant and the deceased.

The second practical implication would have related to the consideration that the applicant and the deceased had had a child together.[80] A declaration of invalidity of the customary marriage between the applicant and the deceased would have had far-reaching consequences for the status of the child. This is important to amplify, because in African customs and family units, being born out of wedlock affects the status of the child and the child's eventual role in the family.[81]

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80 *Muvhali* case para 21.

81 Even though this may be the real (de facto) treatment, de jure the distinction is non-existent.

In my analysis, the two practical implications set out above far outweigh the religious fetishisation of legal certainty and vindicate the court's approach to choosing a generous reading of the facts and the law.

4 In the final analysis

In this case note I have argued that generosity is indeed a constituent of African customary law. I have demonstrated that this is in line with the Politics of the day, which are constitutional imperatives, and decolonisation. To strengthen my argument I studied the court's findings in the *Muvhali* case, where the court was comfortable with the finding that the legislatively stipulated requirements of a valid customary marriage had not been met, but chose to deviate from the letter of the law and preferred instead a generous, contextual and situated reading of the Act and the facts of the case.

The court must be commended for the approach it took, and specifically its insistence on the jurisprudence of generosity. This bit of customary law adjudication is uniquely poised to be exemplary to other systems and disciplines of law, especially commercial, private and mercantile law adjudication, which often commits the sin of constitutional heedlessness[82] and strict formalist reading of the law, which stems from colonial legal culture and traditions.

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82 I borrow the phrase "constitutional heedlessness" from Zitzke 2015 *CCR* 259-290.

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List of Abbreviations

AFLJ	Australian Feminist Law Journal
AHRLJ	African Human Rights Law Journal
CCR	Constitutional Court Review
LDD	Law, Democracy and Development
SAJHR	South African Journal on Human Rights
PELJ	Potchefstroom Electronic Law Journal
SAPL	Southern African Public Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg