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## THE APPLICATION OF SECTION 8(3) OF THE CONSTITUTION IN THE DEVELOPMENT OF CUSTOMARY LAW VALUES IN SOUTH AFRICA'S NEW CONSTITUTIONAL DISPENSATION

N Ntlama\*

### 1 Introduction

The advent of the new democracy in 1994 resulted in a new lease of life<sup>1</sup> for customary law owing to its constitutional recognition as a legitimate system of law alongside common law. Prior to this period, South African legal history had been characterised by the apartheid system, which institutionalised the discrimination that permeated every sphere of society. As Meierhenrich correctly points out, the law was characterised by a system that:

- demonstrated its ability by serving as an effective method of control;
- promised to better the apartheid government's standing in the internal community by providing a modicum of legitimacy; and
- embodied a sincere belief in its appropriateness.<sup>2</sup>

The development of customary law was not immune to this either, as it had fallen prey to a legal system that recognised it only in so far as it could be used to perpetuate the discrimination against the majority of South African citizens.<sup>3</sup> Dlamini similarly indicates that the recognition of customary law was not born of any exceptional insight or sympathy that the apartheid government may have had for African customary law, but of other more prosaic reasons which were based solely on the need to facilitate more effective control over the African population.<sup>4</sup>

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<sup>1</sup> Bekker and Van der Merwe 2009 *De Jure* 239-248.

<sup>2</sup> Meierhenrich *Legacies of Law* 605-608.

<sup>3</sup> See Grant 2006 *Journal of African Law* 3. He indicates that South Africa is a culturally diverse society in which the culture of the majority, including the legal culture, has, over a long period of time, been disparaged and subjected to a minority "Western" culture, first under colonialism and subsequently under apartheid.

<sup>4</sup> Dlamini 1992 *Legal Studies Forum* 133. See also Mamdani *Citizen and Subject* 27-29. He demonstrates that the apartheid system established a second-tier legal and administrative order which focused on asserting power and control over the great majority of the South African

Moreover, Myers describes this period, which he refers to as "British indirect rule in South Africa", as one that systematically institutionalised "divide and conquer" by using customs, traditions, ethnic identity and legitimisation to impose government authority through indirect rule.<sup>5</sup>

Pursuant to the adoption of the 1996 *Constitution*,<sup>6</sup> customary law is given formal recognition and placed on an equal footing with common law. This means that it is recognised as a legitimate system in South Africa's new legal order. The period following 1994 affirms the legitimacy of the various sources of the law which are reinforced by the supremacy of the *Constitution*<sup>7</sup> and the independence of the judiciary.<sup>8</sup> Basically, the post-1994 period is characterised by a firm recognition of the mixed legal systems which Rautenbach refers to as a "potjiekos". According to her, the system consists of common, civil and customary law layers which lay the foundation for the evolution of the values of the new constitutional dispensation.<sup>9</sup> The importance of the doctrine of "potjiekos" lies in the fact that it affirms that the legitimacy of the law receives its effectiveness from the consent of the people, which was not the case in the past.<sup>10</sup>

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people. In fulfilling its objectives, it needed to establish institutional and political control over traditional authorities by: "developing a system of indirect rule that created a dependent but autonomous state system that combined accountability to superiors with a flexible response to the subject population, a capacity to implement central directives with one to absorb local shocks," quoted in Sibanda "When is the Past not the Past?" 31-32.

<sup>5</sup> See Review of Myers *Indirect Rule in South Africa* by Skelcher 2009 *H-Net Reviews*. See also Bennett *Customary Law* 157. Bennett notes that while customary law was recognised by the courts, it was not on the same footing, but subservient to common law, and treated as an inferior system of law which became an "invented tradition" of interpretation and application by the courts, quoted in Moyo *Relevance of Culture and Religion*.

<sup>6</sup> The *Constitution of the Republic of South Africa*, 1996, hereinafter referred to as the *Constitution*.

<sup>7</sup> See section 2 which provides that: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

<sup>8</sup> See section 165 which provides that:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence.
- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

<sup>9</sup> Rautenbach 2008 *EJCL* 13.

<sup>10</sup> Even though the new constitutional dispensation is highly commended for the changes and transformation it has brought to the development and building of a united South Africa, the after-effects of the past are still evident even today. For example, it is evident from the jurisprudence of the Constitutional Court in the resolution of customary law disputes, where the court imports common law values in addressing customary law issues. This will not be addressed in this paper

In this regard, the purpose of the paper is to provide a critical overview and a comparative analysis of the constitutional protection of customary law in relation to its equal status with common law. The objective is to determine the substantive nature of its constitutional status and its contribution to the general framework of the law in South Africa. This purpose raises a number of questions but those will be limited to determining if the *Constitution* recognises customary law out of a genuine respect for indigenous cultures?

This argument is limited to section 8(3) of the 1996 *Constitution* and the jurisprudence that emanates from the Constitutional Court without a focus on the shortcomings of the latter, as that has already been argued elsewhere.<sup>11</sup> The primary focus on section 8(3) and the Constitutional Court is justified by the fact that:

- first, the *Constitution* provides a framework upon which the values of the new dispensation may be developed;
- second, the Constitutional Court is the final determinant in the interpretation and application of the values of the new democratic order.

It is therefore argued in this paper that the constitutional protection of the customary law system conveys nothing more than the institutionalised dominant status of common law principles over those of customary law. It reduces the significance of customary law rules to a system in which it is a stepchild to common law that has to be "merely tolerated".<sup>12</sup> This is evident from the remedies provided by the Constitutional Court in the adjudication of disputes arising from customary law as drawn from *Bhe* and *Shilubana* as noted.

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but it is worth stating that the Court in *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) (*Bhe*) imported common law values as endorsed in the *Law of Intestate Succession Act* 81 of 1987 to resolve the question of succession in customary law.

<sup>11</sup> See the further analysis in Ntlama 2009 *Stell LR* 333-356 of the judgment of the Constitutional Court in *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC). It is submitted that although the Court appears to have developed the customary law rule of succession of women to traditional leadership in reinforcing the right to gender equality, it has done nothing more than institutionalise the inferior status of customary law's pre-1994 past. The Court, as it did in *Bhe*, imported the common law principles of equality in addressing the customary law dispute of the succession of women to chieftaincy without considering the implications it would have on the identity of the particular traditional communities and their institutions. See also Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 6-30.

<sup>12</sup> Extracted from Langa DCJ, as he then was, in *Bhe* para 41.

Moreover, the intention is not to argue for a "national legal system" but for the values of customary law, like any other source of law, to be recognised and developed in their context within the framework of the new constitutional dispensation. In sum, the argument also acknowledges the debates which are beyond the scope of this paper on the legitimacy of the *living v official* customary law.

## **2 The demise of the institutionalised historical subjugation of customary law**

The constitutional recognition of customary law, which RaoRane refers to as "aiming straight",<sup>13</sup> alongside common law is highly commendable. As Makeri correctly points out "... because in the past it was disliked, ridiculed and discouraged by [apartheid rulers] ... it did not form part of their culture as it was alien to them and was systematically eroded and replaced with imported laws".<sup>14</sup>

This recognition is an acknowledgement of South Africa's rich diversity, which is deeply entrenched in the preamble to the *Constitution*, as it seeks to build a united and just society based on democratic values, social justice and fundamental human rights.<sup>15</sup> The recognition of customary law as a stimulus<sup>16</sup> for the development of the law in general is clearly evident in section 30 of the *Constitution*, which recognises the right to culture, as it provides that:

everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

This provision is reinforced by section 31, which also protects the right to culture by providing that:

- (1) persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community:
  - (a) to enjoy their culture, practice their religion and use their language; and

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<sup>13</sup> RaoRane 2006 *Pacific Rim Law and Policy Journal* 827.

<sup>14</sup> Makeri "Jurisdictional Issues" 6.

<sup>15</sup> Preamble of the *Constitution*.

<sup>16</sup> Extracted from Care 2000 *Journal of South Pacific* 1-15.

- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) the rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

The importance of customary law is further reinforced by section 39(3), which states that:

the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law or customary law or legislation, to the extent that they are consistent with the Bill.

The importance of the constitutional protection of customary law values and principles in the new dispensation was substantiated by Langa DCJ, as he then was, in *Bhe*, where he correctly pointed out that '...quite clearly the *Constitution* itself envisages a place for customary law in our legal system. Certain provisions of the *Constitution* put it beyond doubt that our basic law specifically requires that customary law should be accommodated, *not merely tolerated*, as part of South African law, provided the particular rules or provisions *are not in conflict with the Constitution*,'<sup>17</sup> (author's emphasis).

Similarly, the place of customary law in the new democratic order was put into a substantive context by Sachs J in *Christian Education South Africa v Minister of Education*.<sup>18</sup> Although this case did not deal directly with the protection of customary law rules, but rather with the challenge on the constitutionality of section 10 of the *South African Schools Act*<sup>19</sup> and its impact on religious beliefs,<sup>20</sup> it provided a synthesis of the constitutional recognition of customary law rules, as the judge argued that:

... the presence of section 31 in the Bill of Rights may be understood as a product of the two-stage negotiation process resulting in the adoption of the final Constitution, in which one of the concerns was how community rights could be protected in a non-racial parliamentary democracy based on universal suffrage, majority rule and individual rights. Constitutional Principle (CP) XI declared that the *diversity of language and culture* should be acknowledged and protected and

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<sup>17</sup> See *Bhe* para 41.

<sup>18</sup> *Christian Education South Africa v Minister of Education* 2000 10 BCLR 1051 (CC), hereinafter referred to as "*Christian Education*".

<sup>19</sup> *South African Schools Act* 84 of 1996.

<sup>20</sup> *Christian Education* para 32.

conditions for their promotion encouraged. CP XII stated that collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations should be recognised and protected... [and] they go on to emphasise the protection to be given to members of communities *united by a shared language, culture or religion*.<sup>21</sup>

Sachs J also points out that the protection of customary law rules is essential both for individuals and for the communities they constitute. If the community as a community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights. Moreover, if society is to be open and democratic in the fullest sense, it needs to be tolerant and accepting of cultural pluralism.<sup>22</sup>

In essence, the recognition of customary law rules envisages what has long been hoped for. Ellmann describes it as the vision of legitimation of the new South Africa. This author points out that "many black people felt that [the apartheid system] was a systematic block[age] of their aspirations and more bluntly as greed and blindness. They were all aware, in addition, that naked force, as well as the veiled force of law, was constantly being deployed to keep them in line".<sup>23</sup>

This vision was reinforced by the former President, Mr Nelson Mandela, in his inaugural speech on 10 May 1994, as the first black President of the Republic of South Africa. He stated that "our daily deeds as ordinary South Africans *must produce an actual South African reality that will reinforce humanity's belief in justice*, strengthen its confidence in the nobility of the human soul and sustain all our hopes for a glorious life for all" (author's emphasis).

It is in the context of producing a South African reality that Sibanda indicates that the constitutional recognition of customary law was motivated by the following factors:

- there was a need to incorporate on equal basis a legal system rooted in African cultural traditions;

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<sup>21</sup> *Christian Education* paras 22 and 23. Emphasis added.

<sup>22</sup> *Christian Education* para 23.

<sup>23</sup> Ellmann 1992 *Legal Studies Forum* 195.

- the majority of South Africans identified and conducted their lives in accordance with customary law; and
- there was already a functioning customary legal system that could become part of the state's administration of justice.<sup>24</sup>

These factors are similarly endorsed by Sarre, as he notes that they entail:

- the move towards reconciliation;
- the identification of the lack of recognition as a possible factor in the alienation from society of the [great majority of South Africans];
- bring[ing] about safer and less violent communities; and
- help[ing] bring [South Africa] into line with its international commitments under several UN-human rights conventions and covenants [such as CERD which prohibits all forms of racial discrimination].<sup>25</sup>

It is deduced from these factors that the recognition of customary law confirms its significance and relevance as the courts seek to integrate it within the general framework of the law in South Africa.<sup>26</sup> They also guarantee the right of everyone to live according to the legal system applicable to the particular cultural group to which they belong, as the specific recognition of customary law rules and principles gives effect to South Africa's diverse population. According to Fishbayn, this also indicates an expression of the desire to recognise the importance of a culturally based community for the wellbeing of individuals and society, and to make a space in which "difference" can flourish.<sup>27</sup> This contention is endorsed by Grant, as he observes that the recognition of customary law values alongside common law cannot be underestimated because the *Constitution* makes space for cultural diversity.<sup>28</sup>

Hence, Sachs J in *Christian Education* concretised his argument by affirming that the protection of customary law rules:

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<sup>24</sup> Sibanda "When is the Past not the Past?" 31-32.

<sup>25</sup> Sarre 1997 *Critical Criminology* 97.

<sup>26</sup> Care 2000 *Journal of South Pacific* 1-15.

<sup>27</sup> Fishbayn 1999 *IJLPF* 148.

<sup>28</sup> Grant 2006 *Journal of African Law* 22.



... underline[s] the constitutional value of acknowledging diversity and pluralism in our society and give[s] a particular texture to the broadly phrased right to freedom of association contained in section 18 [of the Constitution]. Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different". In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.<sup>29</sup>

It is also drawn from Sachs' argument that, as Radar correctly highlights, there may be a diversity of cultures based on ethnic or religious differences, and of institutional cultures within the constitutional framework.<sup>30</sup> These factors were contextualised by Andrews as she points out that "... the new constitutional framework embraced a vision of a pluralistic society that strives to incorporate historically marginalized legal systems and institutions, including those of indigenous and religious [groups], within the broader South African legal framework".<sup>31</sup> She further maintains that this incorporation, at least at the theoretical level, represents the rejection of the legacy of colonialism and apartheid and an ethnocentric bias that had regulated indigenous laws and institutions as inferior partners in law and governance.<sup>32</sup>

However, notwithstanding these positive developments, the limitation of the application of the Bill of Rights as entrenched in section 8(3) on the development of the values of the new constitutional dispensation to common law to the exclusion of customary law reduces the latter to nothing more than being the poor cousin<sup>33</sup> of the former.

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<sup>29</sup> *Christian Education* para 24.

<sup>30</sup> Raday 2003 *ICON* 667.

<sup>31</sup> Andrews 2009 *Utah L Rev* 307.

<sup>32</sup> Andrews 2009 *Utah L Rev* 307.

<sup>33</sup> Extracted from Nhlapho "Judicial Function of Traditional Leaders". He points out that the old, unequal relationship between common law as the big brother and customary law as the poor cousin has gone.

### 3 Section 8(3) and its potential to limit the development of customary law values

As noted above, the recognition of the historical subjugation of customary law to common law remains uncertain, as it raises more questions than answers. This uncertainty is traced back to the lack of consistency in the protection of customary law rules by the *Constitution* itself. The *Constitution* advances the development of common law principles over those of customary law. This is evident in section 8(3) of the *Constitution* which limits the development of customary law rules and principles by making specific reference to common law to the exclusion of customary law. For example, the application of the Bill of Rights applies to all law (which may include customary law) and binds the legislature, the executive and the judiciary and all organs of state.<sup>34</sup> This means that, as argued by Ackermann J and Goldstone J in *Carmichele v Minister of Safety and Security*:<sup>35</sup> "... there is a duty imposed on the state and all of its organs not to perform any action that will undermine the foundational and constitutional values of the new democratic order and to ensure that appropriate protection [is afforded] to [the different legal systems] through laws and structures designed to afford such protection".<sup>36</sup>

Despite the envisaged effect of the application of the Bill of Rights, of grave concern is its application to all law to the exclusion of customary law, as entrenched in section 8(3), which states that:

... when applying the provisions of the Bill of Rights to a natural or juristic person in terms of subsection 3, a court:

- (a) in order to give effect to a right in the Bill, must apply or if *necessary develop the common law* to the extent that the legislation does not give effect to that rights; and
- (b) may *develop the rules of common law* to limit the right, provided that the limitation is in accordance with section 36(1).<sup>37</sup>

It may be deduced that this provision institutionalises the dominant status of common law over customary law by failing to make a specific reference to the latter, as is the case with the former system of law. The exclusion of customary law in section 8(3)

<sup>34</sup> Section 8(1) of the *Constitution*.

<sup>35</sup> *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC).

<sup>36</sup> *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC) para 44.

<sup>37</sup> Emphasis added.

from the development of the law in general raises uncertainty as to its protection in the *Constitution*. This means that the application and evolution of customary norms and standards for the development of the law in general may be inferred from the concept of "all law". Generally, the concept of "law", without specific reference to either common or customary law, is essential for the regulation of relationships between citizens. However, the creation of the concept of "inference" in section 8(3), which is fused within the concept of "all law", waters down an argument by Kennedy. She argues that "law" is essential for the regulation of human relations and affirms its importance by noting that:

... law [whether customary or common] matters ... [and] is a cornerstone [and] supreme regulator [that] is a glue that holds together the constituent parts of society [because it] is what makes the centre hold, the mortar that fills the gaps between people and communities, creating a social bond without which the quality of our lives would be greatly undermined ... [and] just law is the invisible substance which sustains social well-being, moral consensus, mutuality of interests and trust.<sup>38</sup>

Notwithstanding the significance of the "law" in the regulation of human relations, as Kennedy indicates, the inference of the absence of customary law from the concept of "all law" reverts to the historical subjugation of its application through the lens of common law, which was rejected by the Constitutional Court in *Alexkor v Richtersveld Community*.<sup>39</sup> The inference defeats the importance of including customary norms in the *Constitution*, the purpose of which was explained by Moseneke DCJ in *Gumede*. He states that the objective of customary law's inclusion was to:

- ensure that customary law, like statutory law or the common law, is brought into harmony with our supreme law and its values;
- bring [it] in line with international human rights standards;
- salvage and free customary law from its stunted and deprived past; and
- lastly, fulfil and reaffirm the historically plural character of our legal system, which now sits under the umbrella of one controlling law – the Constitution.<sup>40</sup>

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<sup>38</sup> Kennedy *Just Law* 9.

<sup>39</sup> *Alexkor v Richtersveld Community* 2003 12 BCLR 1301 (CC). The Court correctly pointed out that the application of customary law must now be determined by reference to the Constitution and not common law. "Therefore, like any other recognised legal system in South Africa, it is possible to say of customary law that "its force and validity depends on the Constitution" (para 51).

<sup>40</sup> *Gumede (born Shange) v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC) para 22.

Moseneke DCJ substantiated his contention by arguing that "it bears repetition that 'it is a legitimate objective to have a *flourishing and constitutionally compliant customary law that lives side by side with the common law and legislation*'"<sup>41</sup> (author's emphasis). In giving effect to Moseneke DCJ's contention, Mokgoatheng J of the Southern Gauteng High Court in *Maneli v Maneli*<sup>42</sup> reinforced the interrelationship that exists between the legal systems and the importance of not promoting one over the values of the other system. The Judge held that:

the recognition of ... customary law and the civil law is reconcilable with the common law and a Bill of Rights. The logical extension and development of the [customary law values] to accommodate [common law] is not inconsistent with the prescripts of The Constitution. [In turn] the development ... will be seen by the public not only as a progressive positive contribution to the advancement of the "undocumented customary law... practices" but also as a development of the common law and its jurisprudence.<sup>43</sup>

These arguments reinforce the centrality of customary law alongside common law, which not only guarantees its recognition but also its development in terms of the enjoyment of the benefits associated with the legal system in question. In addition, it is an affirmation of a legal system that may produce an egalitarian, non-sexist society that is available to all.<sup>44</sup>

It is also submitted that the concern over the specific reference to common law to the exclusion of customary law in subsection 3 does not mean that we should create another national legal system. Rather, there is a need to ensure the establishment of shared principles and values, whether through the customary or the common law value systems, in the establishment of a just society as envisaged in the preamble of the Constitution. This contention was earlier endorsed by Sachs J in *S v Makwanyane*<sup>45</sup> as he argued:

... we do not automatically invoke each and every aspect of traditional law as a source of values, *just as we do not rely on all features of the common law*. Thus, we *reject the once powerful common law traditions associated with patriarchy and the*

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<sup>41</sup> *Ibid* para 22.

<sup>42</sup> *Maneli v Maneli* Case Number 14/3/2-234/05, Magistrate Serial No: 19/07 LB626/05, Special Review No. 19/07, 19 February 2010.

<sup>43</sup> *Maneli v Maneli* paras 31 and 40.

<sup>44</sup> *Bhe* para 50.

<sup>45</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC).

*subordination of servants to masters*, which are inconsistent with [the values of the rule of law] and we uphold and develop those many aspects of the common law which feed into and enrich the [foundational values] enshrined in the Constitution. I am sure that there are many aspects and values of traditional African law which will also have to be discarded or developed in order to ensure compatibility with the principles of the new constitutional order.<sup>46</sup>

The quest for the interdependence of constitutional values advances the importance of a balance in their interpretation. This balance, as argued by Sachs J, gives effect to South Africa's subscription to the brain crust of the mixed legal systems in relation to the manner in which these values should be applied in a culturally diverse society and their implications for cultural diversity and difference.<sup>47</sup> The failure to balance constitutional values, as evidenced by the exclusion of customary law from section 8(3), compromises an opportunity for the development of the values of the new democracy on an equal footing.<sup>48</sup> It also undermines Langa DCJ's argument that if the development of customary law were to be undertaken through the lens of common law, it would lead to the fossilisation and codification which resulted in its marginalisation in the past. This means that customary law will consequently be denied the opportunity to grow in its own right and adapt itself to changing circumstances.<sup>49</sup>

It is also reasonable to deduce that the application of the Bill of Rights as envisaged in section 8(3) for the development of common law to the exclusion of customary law is not consistent with the *Constitution* itself. This contention is drawn from section 39(2) of the *Constitution* which is in direct contrast to section 8(3), as the former states that:

when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum *must promote the spirit, purport and objects of the Bill of Rights*, (authors' emphasis).

In the context of developing customary law within the framework of this provision, Van der Westhuizen J in *Shilubana v Nwamitwa*,<sup>50</sup> (as indicated above, this author will not focus on the shortcomings in this judgment here) determines the factors that

<sup>46</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 383. Emphasis added.

<sup>47</sup> Andrews 2009 *Utah L Rev* 355.

<sup>48</sup> See Moseneke DCJ in *Gumede* para 33.

<sup>49</sup> *Bhe* para 43.

<sup>50</sup> *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC).

are essential for the development of customary law. He drew attention to what has been compromised by its exclusion in section 8(3), by holding that:

... it is essential for the process of determining the content of a particular customary law [rule] to:

- consider the traditions of the community concerned [because] customary law is a body of rules and norms that has developed over the centuries [and] an enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community where such a consideration [should] focus [on] the enquiry on customary law in its own setting rather than in terms of the common law paradigm;<sup>51</sup>
- respect the right of communities that observe systems of customary law to develop their law [as envisaged in section 211(2) [which] includes the right of traditional authorities to amend and repeal their own customs [because] customary law is by its nature a constantly evolving system [even though] under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated;<sup>52</sup> and
- be cognisant of the fact that customary law, like any other law, regulates the lives of people. The need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights.<sup>53</sup>

These factors are essential for the development of customary law but there is a potential for them to be compromised by the exclusion of the specific reference to the application of all the values of the new constitutional dispensation. Lehnert, too, points out that these factors hold a number of advantages that the common law value system cannot offer. He states that they:

- give due recognition to customary law [as prescribed in various provisions that deal with it] by ensuring its continued application, albeit in a developed form... and similarly acknowledges its particular nature, namely, its flexibility, which is one of its key features and in fact, one of its major merits;
- are also required to correct the dubious authority of much of the official customary law [which]... can be substituted with rules that reflect the current culture of South Africans... [and in turn] the development of the law and the application of living law can promote the realisation of human rights; and
- have also the advantage that affected communities will accept a developed customary law rule more readily than a completely new rule [and] a rule that is rooted in the value system with which the people are familiar and which therefore reflects their cultural expectations has a much greater chance of

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<sup>51</sup> *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC) para 44.

<sup>52</sup> *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC) para 45.

<sup>53</sup> *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC) para 47.

acceptance than the imposition of rules based on values from outside the community.<sup>54</sup>

These factors were given credence by Langa DCJ, as he then was, in *Bhe*, where he argued that

... it should however not be inferred ... that customary law can never change and that it cannot be amended or adjusted by legislation [because] in the first place:

- customary law is subject to the Constitution. Adjustments and development to bring its provisions in line with the Constitution or to accord with the "spirit, purport and objects of the Bill of Rights" are mandated;
- second, the legislative authority of the Republic vests in Parliament; and
- third, the Constitution envisages a role for national legislation in the operation, implementation and/or changes effected to customary law.<sup>55</sup>

It is therefore quite striking that section 8(3) enhances the development or application of common law rules over those of customary law. The significance of the parity of the legal systems is undermined by section 8(3) because the basic principle that underlies the equal recognition of these systems, as pointed out by Langa DCJ in *Bhe*, is that:

... an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of the common law or legislation, such as the Intestate Succession Act, would be incorrect. At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are *consistent with the Constitution*.<sup>56</sup>

It may be deduced from this contention that the limitation of customary norms and principles should not be frustrated by the continued historical stagnation of these values in the new constitutional dispensation. This frustration is evident in section 8(3), as Andrews draws attention to the fact that '... [the formal] recognition of customary law also suggests that [even though the Constitution] is a celebration of cultural diversity, it also reflects a continued reticence about the [parity of legal systems in South Africa]'.<sup>57</sup> On the whole, it advances an argument that had long been advanced by Koyana as he points out that 'regrettably, the new South African

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<sup>54</sup> Lehnert 2005 *SAJHR* 254-255.

<sup>55</sup> *Bhe* para 44.

<sup>56</sup> *Bhe* para 42. Emphasis added.

<sup>57</sup> Andrews 2009 *Utah L Rev* 379.

Constitution has done no better than the pre-1994 legislatures in the sphere of the recognition of customary law'.<sup>58</sup>

It should therefore be noted that there are positive developments that have taken place since the advent of the new democracy and those should not be overlooked, as Koyana contends but it may be thought that the question of whether or not the *Constitution* recognises customary law out of genuine respect for indigenous cultures still remains unanswered.

#### 4 Conclusion

As argued in this paper, the simultaneous recognition of customary law and common law in the *Constitution*<sup>59</sup> is commendable. This paper argues that the implication of section 8(3) on the development of the values of the various legal systems in South Africa negates a shared understanding in relation to the evolution of the principles of customary law *vis-à-vis* those of common law. This paper has not engaged with the shortcomings of the jurisprudence of the Constitutional Court itself. Instead, the primary focus was on section 8(3), which is a source of the inequality of the mixed legal systems in South Africa. This means that the inequality is traced back to the Constitution itself, as evidenced by the argument in this paper.

Although the drafters of the *Constitution* are commended for the inclusion of customary law as a legitimate system alongside common law,<sup>60</sup> this recognition is a reflection of the survival of the values of the old apartheid system in the new constitutional dispensation, as the constitution indirectly entrenches a subordinate status for customary law.

In relation to the argument made in this paper, it is essential for the Constitutional Review Committee, after sixteen years of democracy, to urgently consider reviewing

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<sup>58</sup> Koyana 1997 *Consultus* 126.

<sup>59</sup> See Qhubu "Development of Restorative Justice". She acknowledges at 14 that it has been a long and a rocky road.

<sup>60</sup> See Grant 2006 *Journal of African Law* 22, who indicates that the retention of cultural diversity was part of the constitutional settlement.



the formal recognition of customary law in order to ensure its alignment on an equal status with common law.

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**List of abbreviations**

EJCL	Electronic Journal of Comparative Law
IJLPF	International Journal of Law, Policy and the Family
SAJHR	South African Journal on Human Rights
Stell LR	Stellenbosch Law Review
Utah L Rev	Utah Law Review