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An analysis of the African concept of infusing 'Lentswe la mohu le agelwa morako' in the freedom of testation

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1 Introduction

Customary law has existed as a legal system in Africa before colonialism. However, it has faced heavy scrutiny and is treated as a subordinate legal system *vis-à-vis* the common law.[1] The Constitutional Court has, on several occasions, argued that customary law must be afforded space to exist independently from the common law.[2] In *Gumede v President of the Republic of South Africa*, the court also argued that customary law must be allowed to independently from common law.[3] Jafta J has argued in *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims*,[4] in reference to the existing hierarchy between the common law and customary law that 'Both the common law and customary law derive their legal force from the Constitution. This means that a customary law rule that is inconsistent with common law retains its validity if it is in line with the Constitution.'[5]

South Africa has a dual legal system comprising of both the common law and customary law. In *Mthembu v Letsela*,[6] the High Court, in affirmation of the existence of a dual legal system, articulated that

1 Manthwa 'The infusion of African jurisprudence on legal defences into judicial deliberations: *Bulelwa Ndamase v Development Bank of Southern Africa Limited* D 8073/2020 [2022] (ZAKZDHC) (30 May 2022)' (2023) *Obiter* 662.
2 *Alexkor v Richtersveld Community* 2004 3 All SA 244 (LCC) par 51.
3 *Gumede v President of the Republic of South Africa* (2009) (3) SA 152 (CC) par 22.
4 (2015) (3) BCLR 268 (CC) par 11.
5 *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* 2015 (3) BCLR 268 (CC) par 7.
6 1997 (2) SA 936 (T) 944 at B-C.

customary law is accepted in terms of the Constitution as a separate and independent legal system. This had not been the position for centuries during colonialism and apartheid, where any rule of customary law could be repealed in terms of section 1 of the Law of Evidence Amendment Act if inconsistent with public policy.[7] Customary law refers to a set of rules, norms, and practices that are derived from the customs, traditions, and cultural values of a particular community or society and is influenced by factors such as acculturation and urbanisation.[8] Conversely, customary law is unwritten, and knowledge and practices are orally passed from one generation to the next through informal teaching and storytelling.[9] There are, however, pieces of legislation that have been promulgated to regulate certain areas of customary law, such as marriages and succession. The Recognition of Customary Marriages Act[10] was enacted to regulate the conclusion of customary marriages and their proprietary consequences. While the Reform of Customary Law of Succession and Regulation of Related Matters Act (RCSRRMA)[11] has been criticised for not being customary law in the true sense because it is a modification of the true customary law of succession.[12] An example is section 2(1), which states that if the estate of a person or part thereof does not devolve in terms of a will then it must devolve in accordance with the law of intestate succession.

2 Intestate Succession Act and the Wills Act

South Africa's intestate law is a combined system governed by different statutes and legal norms. On one hand, it consists of the common law of succession with European roots. In *Bhe v Khayelitsha Magistrate, Shibi v Sithole*,[13] the Constitutional Court replaced the customary law practice of primogeniture with section 1 of the Intestate Succession Act.[14] This

7 45 of 1988.
8 *MM v MN* 2013 SA 415 CC.
9 Okupa 'African customary law: The new compass' in Hinz & Patermann (eds) *The shade of new leaves: Governance in traditional authority – a Southern African perspective* (2006) 375.
10 The Recognition of Customary Marriages Act 120 of 1998.
11 Reform of Customary of Succession and Regulation of Related Matters Act 11 of 2009.
12 Bekker & Koyana (2012) *De Jure* 574.
13 (2005 (1) SA 580 (CC).
14 Intestate Succession Act 81 of 1987.

was after concluding that the practice was unconstitutional. What was not considered, however, which is problematic, is whether this was in line with the wishes of the deceased for the property to be devolved the way the Constitutional Court did. There are cases where the deceased's wishes can be ignored either by his/her family or the court. This is problematic because it does not give effect to customary law the way the court has argued that it will in post-apartheid South Africa.[15]

Calls have been made for the Africanisation of the South African legal system to reflect the indigenous values of the country, such as ubuntu.[16] For example, the Courts have the power in sections 211 and 39 to interpret and develop customary law to align it with the right to human dignity and equality.[17] This includes the law of succession, which for many years has been patrilineal.[18] Individualisation has become the ethos of contemporary society, which may, in some cases, clash with the wishes of the dead.[19] Historically, customary law is informed by communal interests where an individual exists within a community and family interests.[20] This, however, does not entail that the individual does not have rights on their own, but individual rights can often intersect with communal interests. This justifies balancing interests between competing rights as the South African Constitution protects both. A person can express his or her will before passing away. Still, implementation may be problematic after death in terms of whether it is the family, or the wishes of the death as expressed in a will that must be afforded expression.[21]

15 Ntlama 'The Application of Section 8(3) of the Constitution in the development of customary law values in South Africa's New constitutional dispensation' 2012 *PELJ* 344.

16 Ndima 'Re-imagining and re-interpreting African jurisprudence under the South Africa Constitution' (LLD thesis, Unisa) 2013 185; Kamga 'Cultural values as a source of law: Emerging trends of ubuntu jurisprudence in South Africa' (2018) *AHRLJ* 637, *King N.O. and Others v De Jager and Others* (CCT 315/18) [2021] ZACC 4 para 168.

17 Ntlama 'The centrality of customary law in the judicial resolution of dispute that emanates from it: *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC' (2019) *Obiter* 209.

18 *Bhe-Shibi* para 76.

19 Bekker & Koyana 'The judicial and legislative reform of customary law of succession' (2012) *De Jure* 230.

20 L Lewis 'Judicial "translation" and contextualization of values: Rethinking the development of customary law in *Mayelane*' (2014) *PELJ* 1140.

21 Bekker & Koyana (2012) *De Jure* 230.

Customary law is legally recognised in many countries, particularly in Africa, Asia, and Indigenous communities around the world. It plays an important role in promoting social cohesion, resolving disputes, and protecting communal rights.[22] In contrast, the foundation of the common law is Roman-Dutch law, with roots from Roman law and later developed in Holland and consequently introduced in South Africa in 1652. Common law covers various areas of law, including contracts, property and succession law, among others. One area of private law where the interface between common and customary law has been bulging over since the 1996 Constitution is the law of succession or, more particularly, the law of intestate succession.[23] Disputes are often encountered relating to burial disputes and succession to traditional leadership and inheritance.

On the contrary, codifications such as the Zulu and Natal codes aim to formalise and document customary law but may not precisely reflect the dynamics and the evolving nature of customary practices. The general purpose of section 23 of the Black Administration Act (BAA), read with its regulations, was to give effect to the customary law of succession.[24] The legislation prescribed which property had to devolve in terms of the customary law of succession.

As pointed out by Langa DCJ (as he then was), the customary law of succession was designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community.[25] Within the extended family context, the customary law of succession served various purposes, such as the maintenance or discipline of family members. Each family member, thus, had its own specific role to play in the achievement of communal good and welfare.[26] Although the family head was regarded as the manager of the family property, he could not do with it as he pleased because he was under an obligation to administer it for the benefit of the family unit, with the understanding that these responsibilities would

22 NL Mahao '"O se re ho morwa 'morwa towe!" African jurisprudence exhumed' 2010 X LIII/3 *CILSA* 317.
23 Richardson 'Death, dissection and the destitute' in Cantor *After we die: The life and times of the human cadaver* (2010) 91.
24 C Himonga & T Nhlapho (eds) *African customary law in South Africa: Post-apartheid and living law perspectives* (2014) 63.
25 Langa DCJ para 87.
26 *Bhe-Shibi* para 152.

one day pass on to an heir who would have to continue fulfilling them.[27] Central to the customary law of succession was the controversial rule of male primogeniture, which was distorted to favour the eldest son of a deceased to become the one stepping into his father's shoes and excluded younger and extra-marital sons as well as females from inheritance.[28]

Considering the changed circumstances, judicial and legislative developments since 2004 saw the demise of both section 23 of the BAA (including its regulations) and the customary law rule of male primogeniture.[29] The legislative provisions and the customary law rule of male primogeniture were declared unconstitutional in *Bhe v Magistrate, Khayelitsha*.[30] To fill the void left by the order of invalidity, the court ordered that section 1 of the Intestate Succession Act be applied to all customary law estates, thus, effectively replacing the customary law of intestate succession with the rules of the common law of intestate succession, a system of devolution alien to customary law families.[31]

The judgment was supplemented on 20 September 2010 by the RCSRRMA, which confirms that the Intestate Succession Act, with certain modifications, must be applied to all intestate estates of persons living under a system of customary law.[32] In general, one could say that the Reform of Customary Law of Succession Act and the order in *Bhe v Magistrate, Khayelitsha,* essentially eradicated the customary law of succession by replacing it with the common law of succession. The outcome is, however, not so straightforward as it sounds.[33] The remaining question is whether this assimilation of customary law into the common law erased the duality of the succession laws and with it the choice of law rules. Another important development effected by the Reform of Customary Law of Succession Act is the freedom to make a will, which has now been indirectly afforded to everybody subject to customary law.

27 *Bhe-Shibi* para 153.
28 IP Maithufi 'The Law of property' in Bekker, Labuschagne & Vorster (eds) *Introduction to legal pluralism in South Africa*' (2002) 64-65; and IP Maithufi 'The constitutionality of the rule of primogeniture in customary law of intestate succession' (1998) *THRHR* 147.
29 Ngcobo J in *Bhe-Shibi* para 180.
30 *Bhe-Shibi* 2005 (1) SA 580 (CC) see para 241.
31 Ndima *LLD thesis* 53.
32 SEK Mqhayi *Ityala lamawele* (1914) 20.
33 Ntlama (2020) *PELJ* 17.

This freedom has its roots in the common-law maxim *voluntas testatoris servanda est* (the will of the testator must be complied with), and it has generally been limited by means of statute in the case of the customary law of succession until fairly recently.[34] Wills were introduced to South Africa with the imposition of Roman Dutch Law to South Africa during colonialism. A person could draft an affidavit or a letter attesting to where and how they wished to be buried or how they wished their estate to be dissolved upon their death. Parties could also make provision in relation to how they wished to be buried.[35] It was, however, required that the wishes of the testator to be consistent with rules of natural justice and public order.[36] However, it is traditionally unheard of in terms of customary law for a person to draft a will stating that they wish to be cremated or articulating how they wish their assets to be bequeathed.[37] Although it has become a common practice for people over the centuries since contact with colonialism for people to conclude wills, it used to be regarded as an augury in terms of customary law for one to conclude a will.[38] The practice around not concluding a will was related to fear of the wrath of ancestors who could unleash their wrath on a person for wishing death on themselves. However, conclusion of a will is today common owing to exposition to new cultures and religious practices among other factors and the changing nature of customary law.

However, the testator's freedom of testation is not absolute; it may be limited by common law,[39] statute law,[40] and, more recently, by the Constitution of South Africa.[41] This means that the courts may not enforce a provision in a will if it is contra *boni mores*, impossible or too

34 Jamneck, Rautenbach et al *The Law of Succession in South Africa* 4th ed (2023) 137; Ntlama (2020) *PELJ* 18. 2nd ed (2012).
35 Jansen 'Multiple marriages, burial rights and the role of *lobolo* at the dissolution of marriage' (2003) *JJS* 120.
36 Slabbert 'Burial or cremation – who decides' (2016) *De Jure* 232.
37 Bonthuys & Sibanda (2003) *SALJ* 784.
38 Mokotong 'In lieu of burial instructions: A legal exposition' (2001) *THRHR* 297.
39 *Aronson v Estate Hart* 1950 (1) SA 539 (A), *Ex parte President of the Conference of the Methodist Church of South Africa: In re William Marsh Will Trust* 1953 (2) SA 697 (C), *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C), *Curators, Emma Smith Education Fund v University of Kwazulu-Natal* 2010 (6) SA 518 (SCA).
40 The Maintenance of Surviving Spouse Act 27 0f 1990, The Trust Property Control Act 57 of1988.
41 Constitution of the Republic of South Africa, Act 108 of 1996.

vague, in conflict with the law, or deemed unconstitutional.[42] Public policy has been proven to be a vibrant concept that changes over time as social conditions evolve.[43] In *King v De Jager*,[44] the Constitutional Court stressed the need to establish and define the principle of freedom of testation to mean, and to be understood and applied in a manner that is within a constitutional framework based on equality and ubuntu

3 Freedom of testation and the re-evaluation of public policy (boni mores)

The South African law of succession affords a testator a very wide freedom of testation. This means that a testator has the right to dispose of his or her assets as he or she pleases.[45] However, a person's freedom of testation is limited by common law,[46] statute law, and, more recently, by the Constitution.[47] Wills were introduced in South Africa with the coming of the Roman-Dutch Law, where a person could dispose of their remains in a will where they wished to be buried.[48] According to this principle, the testator may leave his or her estate to his or her family, may disinherit them entirely in favour of his or her romantic partner or a stranger, or may leave the estate to a charity or welfare organisation of his or her choice.[49] Either way, it is an accepted principle that the wishes of the testator must be consistent with the rules of public policy. It is worth noting that culture, in terms of customary law, is the determining factor

42 Manthwa & Ntsoane (2020) *THRHR* 614.
43 IP Maithufi 'The requirements for validity and proprietary consequences of monogamous and polygynous customary marriages in South Africa: Some observations' (2015) *De Jure* 270.
44 *King N.O. and Others v De Jager and Others* (CCT 315/18) [2021] ZACC 4 para 204; See G Peters 'Public policy studies: Academic roots and practical significance' (2020) *AI-Muntaga: New Perspective on Arab Studies* 23. See also R Van Zyl 'The role of public policy in *King v De Jager* (CCT 315/18) [2021] ZACC 4 (19 February 2021)' *PER / PELJ* 2024 6.
45 Bonthuys & Sibanda 'Till death do us apart' (2003) *SALJ* 792.
46 *Aronson v Estate Hart* 1950 (1) SA 539 (A); *Barnett v Estate Schereschewske* 1957 (3) SA 679 (C); *Stevenson v Greenberg* 1960 (2) SA 276 (W); *De Wayer v SPCA Johannesburg* 1963 (1) SA 71 (T); *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust* 1993 (2) SA 697 (C).
47 Constitution of the Republic of South Africa, Act 108 of 1996.
48 Jansen 'Multiple marriages, burial rights, and the role of lobola at the dissolution of marriage' (2003) *JJS* 120.
49 Slabbert 'Burial or cremation – Who decides?' (2016) *De Jure* 232.

regarding where or how a person may be buried. A person, therefore, may not, in terms of customary law, detail in a will how they wish to be buried.[50] However, the South African society has changed post the 1996 Constitution, with it being guided by individual rights in the context of the right to equality and dignity.[51] This will, therefore, mean that a person can dispose in a will how they wish to be buried or how their estate must be devolved.[52]

The court may also recognise the right of the deceased spouse to make a decision about what she or he deems to be in the best interests of the deceased in cases where the person passed away without a will.[53] In *Thembisile v Thembisile*,[54] The court had to decide who was entitled to bury the deceased, between the surviving spouse and the son of the deceased, and settled the issue by opting for the heir.[55] The court was further confronted with this issue in *Sengadi v Tsambo* where the father of the deceased and the surviving spouse argued that they both had the right to bury the deceased.[56] The conclusion of a customary marriage between the surviving spouse and the deceased was also disputed by the deceased's family. This is a case that generated public interest because the deceased was a popular musician in South Africa. The court concluded that it was in the public interest for the deceased to be buried by his family.[57]

Of importance is that the court considered ubuntu as a significant African normative value. Muvangua also attests to the fact that the court, in its consideration of ubuntu as an African normative value, has an impact on addressing decisions related to ubuntu and the law.[58] It had been easier in *Thembisile v Thembisile* because the surviving spouse and the heir of the deceased had both agreed who should bury the deceased.

50 Mokotong 'In lieu of burial instructions: A legal exposition' (2003) *THRHR* 297.
51 *Ex parte: BOE Trust Ltd NO and Others* (211/09) [2009] ZAWCHC 88 paras 9-15.
52 Manthwa & Ntsoane 'The right to bury the deceased in terms of customary law: Whose right is it' *Sengadi v Tsambo* 2019 4 SA 50 GJ' 2020 *THRHR* 614.
53 *Fraser v Children's Court Pretoria North and Others* (CCT31/96) [1997] ZACC 1 para 20.
54 2002 2 SA 269 TPD.
55 Para 33.
56 *Sengadi v Tsambo* 2019 4 SA 50 (GJ).
57 *Thembisile v Thembisile* 2002 2 SA 269 TPD.Para 42.
58 N Muvangua & D Cornell *uBuntu and the law: African ideals and post-apartheid jurisprudence* 1st ed (2025) New York. See *King N.O. v De Jager.*

Although there was no clarity regarding the testator's wishes based on a will, the court still considered important values. It is argued that the court should still be guided by ubuntu, among other African values, even in cases where the deceased has expressed his or her wishes. However, this does not entail that the wishes of the testator must not be realised where they have been expressed; courts must, however, consider all competing interests. The legal position in Roman-Dutch law had been that the heir had the final say concerning where the deceased must be buried, and South African courts followed this position.[59]

4 Reconstruction of African customary law in terms of the constitution

Under the 1996 constitutional dispensation, the modernisation of African customary law is now on an equal footing with the common law, indicating that it is being changed to fit the mould of Western legal values. Section 2 of the South African Constitution provides that the Constitution is the supreme law of the Republic, and its obligations must be fulfilled; law or conduct inconsistent with it is invalid.

Therefore, both customary and common law have been given equal legal status. Section 211(3) of the Constitution provides that courts are required to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.[60]

Sections 30 and 31 guarantee the right to participate in the language and culture of choice, thereby recognising semi-autonomous social fields that include African culture and tradition and, by implication, its institutions.[61] Customary law is no longer subordinate to the common law, as was the case under the repugnancy clauses that date back to the colonial period of South Africa's history. Section 39 provides that when interpreting legislation and developing the common law, the court must promote the 'spirit, purport and objects' of the Bill of Rights. This section forces the court to develop the common law, for it to always be

59 *Mankahla v Matiwane* 1989 2 SA 920 (KGD) 922B–F; *Mnyama v Gxalaba* 1990 1 SA 650 (C); *Tseola v Maqutu* 1976 2 SA 418 TK.
60 Moodley *The customary law of succession* (2012) 61; Ndima *LLD thesis* 188.
61 ES Nwauche 'Affiliation to a new customary law in post-apartheid South Africa' (2015) *PELJ* 572.

in line with the Constitution, and our courts have pointed out that the common law should be adapted to reflect the changing social, moral, and economic fabric of the country. Section 39(3), however, makes it clear that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law, or legislation to the extent that they are consistent with the Bill of Rights.

The Constitutional Court in *Everfresh Market Virginia v Shoprite Checkers* underscored the need to promote the principles of good faith in contract negotiations to ensure the infusion of constitutional values to achieve desirable findings.[62] The principle of ubuntu is equally significant as it enables space for the infusion of African values and can enrich the common law when interpreting and giving effect to constitutional values. It is, therefore, significant that the deceased's wish is afforded similar protection where it has been expressed in a will. It should be easier for courts to give effect to it, provided there is a balance of competing interests, such as communal interests and the individual's right. In *Trollip v Du Plessis*,[63] the court argued that a corpse is not a commodity the importance of which can be determined based on a hierarchy of beneficiaries.

Section 39(2) provides that 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. This section is the basis for the indirect application of a constitutional right.

The third problematic area relates to the identification of the correct source of customary law.[64] After the 1996 democratic dispensation, a distinction was made between the 'official' and the 'living' customary law.[65] The official customary law was rejected by both traditionalists who sought to reinstate pre-colonial law and those who regarded the official law as tainted.[66] However, courts have on a number of occasions agreed that the version that should be afforded effect in the post-1996

62 *Everfresh Market Virginia* 2012 (1) SA 256 (CC) 9-10.
63 2002 2 SA 242 WLD.
64 TA Manthwa 'Handing over of the bride as a requirement for validity of a customary marriage' (2019) *THRHR* 662.
65 Bennett *Customary law in South Africa* 68.
66 Ndima (LLD *thesis*) 187-89.

Constitution is the living law because it reflects what communities are actually doing on a daily basis on the ground.[67]

Courts applied the living law in preference to the official law on the assumption that the former was untainted by the state and reflected the genuine interests of the people.[68] A few crucial issues arise in relation to how is the living law to be discovered and then proved, especially when it is localised and variable? Having overcome these hurdles, on passing judgment, the court is creating law and, in so doing, turning the living law into a new official law.[69]

5 Decolonisation

Decolonisation aims to create a more inclusive, equitable, and just law of succession that reflects the diversity of societies and promotes social cohesion and reconciliation.[70] Furthermore, decolonisation in respect of the law of succession involves critically examining and transforming the law to recognise and respect indigenous customs and traditions. It is needed to address historical injustices and the inequality perpetuated by colonialism to promote the hegemony of the Western crusade. The African side of the story must be told, and the jurisprudence must be afforded an opportunity to resolve disputes based on its own normative value system. More importantly, African customary law and other non-Western legal systems can equally redress gender biases and discrimination to empower marginalised communities and individuals, and to foster social justice and equality.[71] The impact of colonialism on the marginalised groups in society, such as women and children, must be addressed. Although African societies have historically been organised along gender defined roles, colonialism deepened these roles in ways that

67 Nhlapo 'Customary law in post-apartheid South Africa: Constitutional confrontation in culture, gender and living law' (2017) *SAJHR* 17, *Mthembu v Letsela* 1998(5) SA 675 (T), *Mthembu v Letsela* 2000(3) SA 867 (SCA).

68 Diala AC, 'Curriculum decolonization and refunist pedagogy of African customary law' 2019 *PELJ* 5, *Shibi v Sithole and Others* 2005 (1) SA 580 (CC); *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC); 2005 (1).

69 Nhlapo (2017) *SAJHR* 12.

70 CM Fombad 'Gender equality in African customary law: Has the male primogeniture rule any future in Botswana?' (2014) *Journal of Modern African Studies* 475.

71 H Friedland & V Napoleon, 'Gathering the threads: Indigenous legal methodology' (2015-2016)(1:1) *Lakehead Law Journal* 16.

resulted in women being treated as perpetual minors and not allowed to succeed to any role that included traditional leadership.[72] Igbelina-Igbokwe asserts this as follows:

> 'Colonization deepened the gender chasm through entrenching and reinforcing discriminatory gender division of roles for women and men, which encouraged the supremacy and importance of men's over women's roles. The economic system introduced by colonialism denied women the use of public space and confined them to the domestic sphere. The implication was the further invisibilization of women and the negation of their economic, political, and social roles.[73]

As Mngomezulu has posited, it is important to ensure that there is a move towards Africanisation, and the importance thereof is that 'Africanisation puts Africa-produced knowledge first without necessarily dismissing other sources of knowledge'.[74]

6 Inclusion of living customary law in legal education

The inclusion of living customary law in legal education is an important shift in the theoretical paradigm within which law is taught and the interdisciplinary study of law.

Living customary law is the law that governs the legal relations of people who are subject to a given system of customary law in their day-to-day lives.[75] An equally fitting definition of customary law is adopted in recognition of the Customary Marriages Act as 'the customs and usages traditionally observed among the Indigenous African peoples of South Africa which form part of the culture of those people.' The use of the term 'culture' in this definition is significant, as it seems to recognise the dynamic nature of living customary law, as culture is dynamic; so is living customary law.

72 Osman 'The administration of customary law estates, post the enactment of the Reform of Customary Law of Succession Act: Case study from rural Eastern Cape, South Africa' *LLD thesis* 2017 University of Cape Town 103.

73 Igbelina-Igbokwe *Contextualizing* 630-632.

74 BR Mngomezulu & S Hadebe 'What would the decolonisation of a political science curriculum entail? Lessons to be learnt from the East African Experience at the Federal University of East Africa' (2018) 45 *Politikon* at 66. https://doi.org/10.1080/02589346.2018.1418205.

75 Bennet 'Official v living customary law' 138; *Alexkor Ltd v Richtersveld Community* 2004 2004 (5) SA 460 (CC); Osman 'The consequences of statutory regulation of customary law: An examination of the South African customary law of succession and marriage' (2018) University of Cape Town 11.

Living customary law is the law observed and rooted in ethnic groups of African indigenous societies, regardless of whether the state recognises it.[76] As an unwritten repository of legal ideas and knowledge, living customary law is passed down from one generation to the next orally.[77] This store of knowledge is uniquely African in the sense that, though not insulated from global conditions, its evolution is shaped within changing African social, economic, and political contexts.[78] Moreover, because of its oral nature and flexibility, living customary law can readily and easily be adjusted18 to meet the varied needs of justice in a decolonised context.

That living customary law is distinct from other legal systems comprising African legal systems is clear from both academic literature and post-apartheid jurisprudence in South Africa.[79] Similarly, the Constitutional Court of South Africa implicitly describes living customary law as a distinctive and original source of law, referring to the recognition of customary law by sections 211 and 39(2) of the Constitution.

The source of living customary law (i.e. the people subject to customary law), the value of its flexibility and adaptability as an evolving oral system, and its recognition as a distinctive and original source of indigenous law are all positive elements in the decolonisation of law.[80] These attributes also qualify this system of law for inclusion as a core subject of study in a decolonised system of legal education. Moreover, these qualities of living customary law justify its development and retention in a decolonised legal system, also bearing in mind the fact that this system of law regulates the lives of most of the population in African legal systems[81]

76 J Juma 'From repugnancy to Bill of rights; African customary law and human rights in Lesotho and South Africa' (2007) 27 *Speculum Juris* 88.

77 E Okupa 'African customary law: The new compass' in MO Hinz & HK Patermann (eds) *The shade of new leaves: Governance in traditional authority – a Southern African Perspective* (New Brunswick) (2006) 375.

78 S Liebenberg & M O'Sullivan 'South Africa's new equality legislation: A tool for advancing women's socio-economic equality?' (2001) *Acta Juridica* 70-71.

79 AC Diala 'The concept of living customary law: A critique' (2017) 49 *JLPUL* 158.

80 C Nudelman 'Language in South Africa's Higher education transformation: A study of language policies at four universities' (University of Cape Town 2015) 15.

81 C Rautenbach *Introduction to legal pluralism in South Africa* 5th ed (Lexis-Nexis 2018) 56.

Put differently, living customary law must be taught in all law faculties or law schools and at appropriate levels of the law degree that enable students to comprehend the significance and complexity of the subject within the constitutional frameworks of African countries. Future lawyers and judges need to understand important aspects of this customary law, including its conceptualisation, its methodology in a broad sense and its development as a system of law within African constitutional frameworks.[82] If future lawyers and judges are not given appropriate legal training about living customary law, they will not have the right lens to view customary law – and not from the perspective of other legal systems[83] This is equally important in how the knowledge is transmitted in legal education in institutions of higher learning. Institutions of higher learning play a significant role in how customary law and the law of succession are taught, and the kind of lawyers and judges are produced. Lawyers and judges play an important role because judges play the role of law-making in their interpretation of the Constitution, such as what they deduce from sections such as 39 and 211.

7 The legal hypothetical context

The predominant legal theoretical framework within which law is taught, at least in law schools under the historical influence of English and Roman-Dutch law, is legal centralism and positivism.[84] This theory prepares future lawyers and judges to engage with Western legal systems and legal cultures and not with non-Western African legal systems, let alone oral legal traditions. For example, an important aspect of legal positivism is formalism. This strand of legal theory separates legal rules from 'non-legal normative considerations of morality or political philosophy 'and requires judges to apply the rules to the facts of the case before them deductively, with the value of legal certainty as a goal, among other things. However, the rules of living customary law cannot be abstracted from their social contexts. They are embedded in the social

82 C Rautenbach 'South African common and customary law of intestate succession: A question of harmonisation, integration or abolition' (2008) 12 *Electronic Journal of Comparative Law* at 10 http://www.ejcl.org.

83 *Alexkor v Richtersveld Community* 2004 3 ALL SA 244 (LCC) para 51.

84 FP Iya 'The legal system and legal education in Southern Africa: past influences and current challenges' (2001) *J Leg Ed* 141.

realities within which people live their lives. In addition, the values of certainty, stability, and predictability – which are core to Western legal cultures – are not necessarily the primary goals of dispute resolution in living customary law.

It is, therefore, arguable that the legal education of judges and lawyers in Africa, exclusively within the theoretical frameworks of legal positivism and centralism, does not adequately prepare them to deal with the application of non-Western legal orders, such as living customary law, in which law and its values are viewed differently.[85] The result is that lawyers and judges view living customary law as non-existent or regard living customary law as informal law that is irrelevant to state institutions.

South African judges, for example, have shown a remarkable willingness to step beyond the influence of the dominant mode of their legal education to embrace and recognize concepts of law, such as living customary law, that is in non-western legal pluralistic theoretical frameworks.[86] However, these judges sometimes retreat into their predominantly Western law and legal theoretical training and orientation when applying customary law.[87] The result is that they bring ideas of legal centralism and positivism into the domain of customary law as well.

8 Core discussion

The law provides for certain aspects of freedom of expression in terms of Section 16 of the Constitution but not cultural practices such as those implied in the African proverb 'lentswe la mohu le agelwa morako, for example, freedom of expression cannot be tested in relation to ' ... speech, religion, press, assembly, and the right to petition the government.' To deny the oral declarations of the deceased choosing his or her beneficiaries constitutes an infringement upon some of these rights, including the right to dignity. Perhaps the problem is the fact that there are no sanctions in law against those that can disregard the wishes

85 C Himonga 'The Constitutional Court of Justice Moseneke and the decolonization of law in South Africa: Revisiting the relationship between indigenous law and common law' (2017) *AJ* 101.

86 Mbembe 'Decolonising the University: New directions' (2016) *AHHE* 32; see also FP Iya, 'The legal system and legal education in Southern Africa: Past influences and current challenges' (2001) *J Leg Ed* 141.

87 Iya 2001 *J Leg Ed* 141.

of a testator upon death.[88] The wishes of the testator are, in many cases, unknown to people except his/her lawyer. They, therefore, sometimes come across as a shock to families and friends. This can result in people finding it difficult to respect their wishes because they can claim that it is not possible for a person to have made these wishes in a will. This is an area of law that requires legal intervention. So, parties can respect the wishes of the testator unless it can convincingly be argued that the wishes of the testator were against accepted norms in society. The other problem is that enforcing the wishes of the testator is not easy, as parties may have to go to court, and litigation is beyond the means of many in societies. In the case of *Ex parte Boe Trust Ltd,*[89] for example, the court emphasised the principle of freedom of testation. It held that this includes the right to freedom of expression in the form of the right to give enforceable directions regarding the disposal of property after death.

Therefore, the courts have a general obligation to deconstruct and to develop the common law by applying the Constitutional values as mandated by sections 8(3), read with 39(2), and section 173 of the Constitution.[90] South Africa's Western legal knowledge base is part of the global legal knowledge system. The deconstruction process should, therefore, critically interrogate existing knowledge and at the same time, develop jurisprudence as the grounding for the infusion of new knowledge into the common law, which addresses the values of South African society in its African context.[91] This simultaneously entails the removal of procedural technicalities that obstruct the integration of new knowledge into the common law. Authentic jurisprudence is organic as it responds to lived social experiences.

9 Recommendations

Infusion of this African proverb (an oral declaration) to the provisions in the Constitution, specifically around 'freedom of expression'; the right to human dignity and the right to property, may require amendment of

88 B Mupangavanhu 'Yet another opportunity to develop the common law of contract? An analysis of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) (Ltd)*(2011) ZACC 30, Slabbert' (2003) *De Jure* 234.
89 2009 (6) SA 470 (WCC).
90 Ntlama (2019) *PELJ* 2.
91 Manthwa (2023) *Obiter* 663.

statutes and public policy to accommodate the different matters implied in this African proverb.[92] This will allow for the law to prevail where there are family disputes and for the courts to weigh arguments towards a fair judgment.[93] The Constitutional Court, in a seminal judgment in *State v Makwanyane*, argued for a change in how the legal hierarchy had been formulated, which saw customary law at the bottom of the hierarchy. Sachs J stated as follows:

> It is a distressing fact that our law reports and textbooks contain few references to African sources as part of the general law of the country. That is no reason for this court to continue to ignore the legal institutions and values of a very large part of the population, moreover, of that section that suffered the most violations of fundamental rights under previous legal regimes and that perhaps has the most to hope for from the new Constitutional order.[94]

A concentrated effort in integrating indigenous knowledge systems and interdisciplinary perspectives into legal curricula and legal education.[95]

This chapter, therefore, recommends as follows:

(a) Case studies should be developed to show cases and guide debates in class or arguments in the assignments as part of the law of succession curriculum, as to how to ignite practical infusion of African proverbs such as 'letswe la mufu le a ge lwa...'. That is the indigenous knowledge of how freedom of testation is implied in this African proverb.

(b) Moot court sessions by law students need to be convened to test arguments and possible judgements that can arise from dealing with disputes on matters relating to adhering to the wishes.

(c) Further research needs to be conducted to produce policy briefs that will create knowledge necessary to inform the infusion of indigenous knowledge implied in African proverbs and as applied in African cultural practices.[96]

92 Himonga 'The Constitutional Court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law' 2017 *AJ* 117.

93 See also Diala 'Curriculum, decolonisation and revisionist pedagogy of African customary law' (2019) *Potchefstroom Electronic Law Journal* 6.

94 *S v Makwanyane* 1995 (3) SA 391 (CC) para 371.

95 Mendy & Madiope 'Curriculum transformation: A case in South Africa' (2020) 38 *Perspectives in Education* 2.

96 See for example *Chairperson of the Council of UNISA v AfriForum* 2022 (2) SA 1 (CC); see also *AfriForum v University of the Free State* 2018 (2) SA 185 (CC); See also *Daniels v Scribante* 2017 (4) SA 341 (CC) para 154.

10 Conclusion

For the most part, the customary law of succession has been replaced by statutes that are generally based on common-law principles. These changes, however, did not unify the common and customary law entirely. Under certain circumstances, it would still be necessary to determine if a person who died intestate was subject to customary law to apply the modifications prescribed in the Reform of Customary Law of Succession Act. To remove any doubt as to which law is applicable, it is recommended that a person clearly indicate in his or her will which legal system should apply to the deceased's estate. If reasons are sought, then in the writer's opinion, one is prominent: the common law mostly remains intellectually colonised; it still functions within the domain of Western legal values and is applied mainly within a positivist paradigm.[97] If any progress is to be made, then it is respectfully submitted that the deconstruction of the common law is also necessary. The notion of the deconstruction of the common law is not particularly novel.[98] History teaches that the resurgence of the Roman-Dutch Law from 1910 and onwards was essentially a deconstruction of English law and values that predominated at the time.[99] English law was not discarded but rather retained in so far as the Roman-Dutch Law was given the capacity to develop and expand.[100] Essentially, the issues go to the validity of existing knowledge as well as the introduction of new knowledge into the legal system.[101]

97 Mbembe 'Decolonising the University: New directions' (2016) *AHHE* 32.
98 L Nkosi 'The ideology of reconciliation: Its effect on South African culture' in L Stielebel & M Chapman (eds) *Writing home: Nkosi on South African writing* (2016) 149.
99 MB Ramose 'In memoriam: Sovereignty and the "new" South Africa' (2007) 16 *Griffith Law Review* 324.
100 AN Allott 'What is to be done with African customary law? The experience of problems and reforms in Anglophone Africa from 1950' (1984) 28/ 1&2 *JAL* 59.
101 Pieterse 'It's a black thing: Upholding culture and customary law in a society founded on non-racialism' (2001) 17 *SAJHR* 392.