TOPIC:

CUSTOMARY LAW OF PROCEDURE AND EVIDENCE: A JURIDICAL AND ETHNOGRAPHIC STUDY IN THE LIMPOPO PROVINCE, SOUTH AFRICA

PHILLIP LESETJA MONYAMANE

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SUPERVISOR: PROFESSOR SL RAPULANA
CO-SUPERVISOR: PROFESSOR OS SIBANDA

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DEDICATION

This work is a dedication to my young self, a testatment that if you are KIND ON YOURSELF you can always find your way through the maze.

DECLARATION

I declare that the study entitled **CUSTOMARY LAW OF PROCEDURE AND EVIDENCE: A JURIDICAL AND ETHNOGRAPHIC STUDY IN THE LIMPOPO PROVINCE, SOUTH AFRICA** hereby submitted to the University of Limpopo for the degree of **DOCTOR OF LAWS** has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained therein has been duly acknowledged.

From this work, an article titled 'Creating and Sustaining a 'Tunnel Vision' Argument for the Application of Customary Law — A Language Conundrum' (2023) *SAPL* 1 – 18 has been published.

....

Signature Date

DECLARATION BY SUPERVISOR

I declare that the study entitled **CUSTOMARY LAW OF PROCEDURE AND EVIDENCE: A JURIDICAL AND ETHNOGRAPHIC STUDY IN THE LIMPOPO PROVINCE, SOUTH AFRICA** is the work of PL Monyamane submitted for the study of LLD at the University of Limpopo. The study, completed under my supervision, is the candidate's own work in design and execution and that all material contained therein has been duly acknowledged.

....

Signature Date

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STUDY SUMMARY

Customary law has undeniably experienced a tumultuous journey within the South African legal landscape. Its historical trajectory includes a dark chapter marked by legislative injustice, exemplified by the enactment of the Black Administration Act 38 of 1927. However, there has also been a glimmer of hope on this path, symbolised by the insignificant acknowledgment and acceptance of customary law in the Law of Evidence Amendment Act 45 of 1988. Every endeavour was made to belittle customary law, pervert it and erode it of its true fabric as an amalgamation of customs, religion and the lived realities of the indigenous people. The conscious failure by the morally reprehensible colonialists and the segregationalist Apartheid state to appreciate the correct paradigm of customary law has resulted in an intentioned non-law that has been rather prolific in both literature and jurisprudence.

It is the view of this study that it has long been overdue to cleanse customary law off the stains of bad faith draftsmanship and rid it off the perversion caused to it by its colonial past. To achieve this, the study is intentional about de-linking customary law from the other system in order to properly understand, define, establish, advance and promote traditional justice. In doing this, the study proceeded from the premise that customary law, as a system, is an inseparable matrix of customs, religion and the lived realities of the people living according to that system. This lived reality as innate in the system itself necessitated the type of methodology adopted for study and encouraged extra care in dealing with the pervasion achieved through official documents on this system.

Ethnography was intentionally opted for as the correct methodology because its definition and scope is based on magnifying the reality of the subject studied. This view corresponds directly with the need to ground indigenous reality in traditional dispute resolution. As a methodology that embraces pluralism, it allows for adaptation to the methods as the study develops. This study invites researchers to undertake customary law inquiry within the correct location that enhances Natives' cultural capital. At the end, this study aims to contribute meaningfully to transformative action by properly aligning the customary law paradigm to the realities of the people as envisioned in the definition of customary law.

The theoretical and conceptual framework of study accepts that the knowledge paradigm in general and legal training in particular was not constructed for the benefit of Natives. As a result of the foreign ideology of knowledge, customary law was penetrated and perverted through the lenses of a law foreign to it. This meant that a foreign reality was endorsed in the shared South African worldview and education is the vehicle through which reality of Natives

was perverted or oppressed. Notwithstanding this, it is contended in this study that the Constitution in the Republic of South Africa validates this colonial conquest by failing to expressly locate the cultural capital of Natives in its text. This need for promotion of indigenous reality through constitutional text is based on colonial and apartheid bad faith in the erosion of Native worldview. Foreign language(s), as a cultural artefact, in particular English, was given a privileged position in South Africa through legislation. This privileging, it is argued, was not nor does it fully embrace the epistemological edges of customary law. To properly locate these edges, the study invites us to engage in new pursuits of traditional epistemology. For current purporses, this pursuit entails the adoption of community cultural wealth as the lenses through which traditional justice must be considered. Within this lense, the study denotes that Natives have legal capital that has always and continue to enable them to resolve legal issues in their communities. Properly understood, however, it is argued in this study that traditional courts are a socially embedded *fora* that is both fluid, flexible and comprehensive.

KEYWORDS

Access to justice; *Bohlatse*; Chiefs; Civilise; Indigenous cosmology; Community; Community Cultural Wealth; Constitution, Constitutionalism; Custom; Customary Law; Customary marriage; Epistemology; Evidence; Equality; Ethnography; Execution; Fair trial; Family; Gerentocracy; Indigenisation; Headmen; Headwomen; Hearsay; Language; *Kgoro*; Kinship; Legal capital; Living customary law; *Moshate*; Natives; *Ntona*; Official customary law; Procedure; Reality; Reconciliation; Re-indigenisation; Social clubs; Traditional courts; Traditional justice.

LIST OF ACRONYMS

1.	A	Appellate Division
2.	AJCR	African Journal on Conflict Resolution
3.	AJLJS	African Journal of Law and Justice System
4.	All SA	All South African Law Reports
5.	BAA	Black Administration Act
6.	C	Cape Provincial Division
7.	CA	Constitutional Assembly
8.	CC	Constitutional Court
9.	CILSA	Comparative and International law Journal of Southern Africa
10.	CIP	Critical Indigenous Pedagogy
11.	CJ	Chief Justice
12.	ED	Editor
13.	ED.	Edition
14.	EDS	Editors
15.	*et al*	And others
16.	GJ	South Gauteng High Court, Johannesburg
17.	*IBID*	The same as immediately above
18.	IKS	Indigenous Knowledge System
19.	*In re*	In the case of
20.	ISS	Institute for Security Studies
21.	J	Judge/Justice
22.	JOL	Judgments Online
23.	MBL	Master of Business Leadership
24.	NASASA	National Stockvel Association of South Africa
25.	OTE	Old Testament Essays
26.	PER/PELJ	Potchefstroom Electronic Law Journal
27.	PTO	Permission to Occupy
28.	RCMA	Recognition of Customary Marriages Act
29.	SA	South African Law Reports
30.	SAJHE	South African Journal of Higher Education

31. SAJHR South African Journal of Human Rights
32. SALJ South African Law Journal
33. SALRC South African Law Reform Commission
34. SAPL Southern African Public Law
35. SAPS South African Police Services
36. SARS South African Revenue Services
37. SASSA South African Social Security Agency
38. SCA Supreme Court of Appeal
39. T Transvaal Provincial Division
40. TA Thematic Analysis
41. TC Transformative Constitutionalism
42. TCB Traditional Courts Bill
43. THRHR Tydskrif vir Hedendaagse Romeins-Hollandse Reg
44. Tk Transkei High Court
45. TSAR Tydskryf van Suid Afrikaanse Reg
46. UNISA University of South Africa
47. V Versus
48. ZACC South Africa: Constitutional Court
49. ZAECMHC South Africa: Eastern Cape High Court, Mthatha
50. ZAGPJHC South Africa: South Gauteng High Court, Johannesburg
51. ZAKZPHC South Africa: Kwazulu Natal High Court, Pietermaritzburg
52. ZASCA South Africa: Supreme Court of Appeal
53. ZAWCHC South Africa: Western Cape High Court, Cape Town

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CHAPTER 1

FORMULATING SPACE FOR THE INTRODUCTION OF A LIVING CUSTOMARY LAW IN SOUTH AFRICA

1. Background and introduction

> … [A]n important lesson in democracy [is that] the constitution protects our right not to be oppressed or ill-treated, *not necessarily our preference not to be embarrassed or inconvenienced by the behaviour of others*.[1] [Emphasis added]

The emphasis added to the above statement marks the point of departure for this study, which delves into the complex and multifaceted world of traditional justice. From the beginning, it must be borne in mind that this investigation into traditional phenomenon[2] of justice is an attempt to understand, define, establish, advance and promote traditional justice. As a direct result of this stated goal, it follows naturally that there was no intention to align traditional justice with western precepts of litigation and or justice as recognised by the state law. The stated goal and the intentional action that attach to it were done in an empirical manner whilst appreciating the injunction to be constitutionally compliant. The desire to be constitutionally guided, though not jovially embraced, is fostered by the supremacy of the Constitution of the Republic of South Africa.[3] This study is a call to action for scholars, policymakers, and practitioners to recognise the importance of traditional justice in promoting social cohesion and human rights, and to work towards creating a more just and equitable society.

To navigate towards the promotion of a properly understood, defined, established and advanced traditional justice, it was critical for this study to engage with the phenomena of traditional justice outside of what is perceived as strict legal research and its traditional methodologies. This is so because the study aims to contribute to practical social solutions in

[1] Thandabantu Nhlapo, 'Indigenous Law and and Gender in South Africa: Taking Human Rights and Cultural Diversity' (1994) 13(3) *Third World Legal Studies* 49, 71.

[2] "Phenomenology aims at gaining a deeper understanding of the nature or meaning of our everyday experiences… [it] does not offer us the possibility of effective theory with which we can […] explain and or control the world, but rather it offers us the possibility of plausible insight that brings us more direct contact with the world". Mark Valge, *Crafting Phenomenological Research* (Left Coast Press Inc 2014) 11.

[3] Section 2 provides that [t]his 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.

dealing with aspects of traditional justice in South Africa. The need for practicality and engaging in uncommon methodology in legal discipline is a direct response to an invitation by Himonga and Diallo to be open to the influence of other disciplines.[4] According to these authors, being open to the influence of other disciplines will enable legal science to "transform social reality".[5]

These authors propose that legal science has to open itself to such disciplines as sociology, anthropology and history in an endeavour to provide practical and effective solutions.[6] Whilst this is so, these authors should not be understood as providing a closed list of interdisciplinary influences. What stands out though is the invitation for legal science to open itself to the influence and information of other disciplines as it strives to provide lasting solutions to practical problems. This need for interdisciplinary studies or varied methodologies is crucial in the area of the scope, content, understanding and application of customary law in the South African legal context. It is worthwhile to note that this idea is not meant to justify the nature of the current study. Instead, it is aligned to the understanding that customary law does not enjoy a life of its own separate from the cultural context in which it is applied.[7] As such, the social system, undergirded by culture and religion, defined the acceptability and propriety of human conduct.[8] Atop of that social system is intentional dependence on each other premised on *Ubuntu.*[9]

A juridical reading of customary law on its own does not reveal its matrix and rich tapestry. It is open to debate as to why this fundamental essence of customary law has not always been emphasised or properly advanced. The answer lies somewhere between the historical deceit that manifested itself through the subjugation of customary law to foreign standards and the current stifling of research into customary law through the debate on official versus living law components. Not much could have been expected of the colonialists and the Apartheid governments in the advancement of a proper customary law, if history is anything to go by. This is so because their interest in customary law went only as far as it was necessary to

[4] Chimu Himonga & Fatimata Diallo, 'Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law' (2017) 20 *PER/PELJ* 1, 14.
[5] *Ibid*.
[6] *Ibid*.
[7] Dial Ndima, 'The Anatomy of African jurisprudence: a Basis for Understanding the African Socio-legal and Political Cosmology' (2017) 50(1) *CILSA* 84, 85.
[8] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 2.
[9] *Ibid*.

control the Native population or to advance separatist policies.[10] In this respect, the damaging effect of the Black Administration Act 38 of 1927 (hereunder referred to as the BAA) can still be felt in the echoes of the difference between the so called "official" and living customary law.[11]

Despite the reverberations of the BAA, it is crucial to note the significant progress made through the enactment of the Repeal of the Black Administration Act and Amendment of Certain Laws Act.[12] This legislative milestone has effectively nullified the majority of the BAA's provisions, thereby marking a substantial step towards dismantling the discriminatory framework it once represented. Notwithstanding this, it must be made clear for purposes of this study that if one is to insist on this distinction (between official and living law), then reference to customary law refers to living customary law, unless otherwise specifically mentioned. This position is premised on the submission and understanding that official law is neither proper law nor is it necessarily customary for the Natives of South Africa.[13] It is instead, a combination of the conceit and insufferable arrogance of colonialist and the Apartheid state's legislatures and judicial pronouncements.[14] Living customary law, on the other hand, is a custom based system that encompasses the true and evolving customary law.[15] Its significance lies in the fact that it may lay claim to direct links with the Natives.[16]

It is a well known fact that customary law has had a chequered history in South Africa. Despite this, a discussion of this history is made only when necessary to elucidate the context in chapter 3 in particular. This selective approach ensures that we delve into this historical background only when it is pivotal for providing a comprehensive understanding of the contextual framework at hand. This includes, but not limited to, a discussion of the Law of

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[10] Thandabantu Nhlapo, 'Indigenous Law and and Gender in South Africa: Taking Human Rights and Cultural Diversity' (1994) 13(3) *Third World Legal Studies* 49, 49.

[11] The repealed section 11(1) created the infamous repugnancy clause which read as follows: Notwithstanding the provisions of any other law, it shall be in the discretion of the courts of native commissioners in all suits or proceedings between Natives involving questions of customs followed by Natives, to decide such questions according to the native law applying to such customs except in so far as it shall have been repealed or modified: Provided that such native law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

[12] 28 of 2005.

[13] Dial Ndima, 'The African Law of the 21st Century in South Africa' (2003) 36(3) *CILSA* 325, 335.

[14] *Ibid*.

[15] Thandabantu Nhlapo, 'Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity' (1994) 13(3) *Third World Legal Studies* 49, 53.

[16] *Ibid.*

Evidence Amendment Act[17] which has a direct impact on the application of customary law through the state courts. Section 1(1) of this Act permits courts to take judicial notice of customary law on the condition that it is ascertainable with ease and not in contrast with the ideals of public policy and natural justice. It is noteworthy that the subsection further preserves the customary practice of *lobolo* by insulating it from repugnancy. In subsection (3), the Act regulates the application of choice of law in instances where parties to a suit do not belong to the same tribe. Importantly, the provision of subsection (3) premises application of the choice of law on agreement between parties or the domicile of the defendant and or respondent.

Whilst this Act and section 1 in particular officially recognises customary law, it is submitted that its provisions are not without conceptual problems. It is submitted that the tepid reception of customary law in South African jurisprudence is due to the following: Firstly, and as aptly noted by Ndima, the letter and spirit of subsection 1 creates a reasonable, and in the author's view, explicit impression that customary law is of equal status and value as foreign law.[18] This is disconcerting as customary law is, for all intents and purposes, part of the South African social and legal fabric. The acknowledgement of its existence and subsequent recognition was nevertheless the subject of disdain and pervasion by colonialists and the Apartheid state. In effect, equating it or giving it the same value as foreign law in Act 45 of 1988 robs it of its rightful status as an equal with the South African state law.

Secondly, the qualified judicial recognition offends on the epistemological make-up of customary law. This is so because the reincarnation of the repugnancy clause[19] is an attempt to deal with customary law through the prism of a foreign paradigm. It is the attitude in this study that any attempt to deal with customary law without appreciating its epistemological nuances is no different to its non-recognition and or disdainful treatment.

Thirdly, and closely connected with the preceding point of contention, is the promotion of the dominant legal paradigm through the repugnancy clause. It is argued hereunder that the

[17] 45 of 1988.
[18] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 114.
[19] Marius Pieterse, 'Its a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism' (2001) 17(3) *SAJHR* 364, 372.

subtle retention of the repugnancy clause evidences the potential for the colonising tendencies of language in craftsmanship.[20]

Fourthly, the Act retains significant discretion on the part of presiding officers to decide on whether or not to consider customary law.[21] Pieterse's proposition is that customary law is not only underdeveloped but as well that judges and legal practitioners alike generally have limited knowledge of it.[22] Owing to this underdevelopment and limited knowledge of customary law's nuanced principles in mainstream judicial processes, it follows naturally that the presiding officers would be less likely to use it to resolve a dispute. This, of course, is unless the matter before the court occasions the resolution of the dispute through customary law. In fact, Ntlama rues missed opportunities in several cases that could have advanced the constitutional fabric of customary law.[23]

The current author posits that the above judicial notice in terms of Act 45 of 1988 and the recognition of customary law by the Constitution is reminiscent of a classic tale of curate's egg.[24] The contention flows from the qualified application of customary law in the South African jurisprudence and the lack of express appreciation of its true make-up as a complex system that is inseparable from both custom and the lived experiences of its adherents.

Whilst the contention remains that customary law is a complex system of law and that this fact is not properly acknowledged in South African law, it would be remiss to ignore provisions

[20] Beth Swadener, & Kagendo Mutua, 'Decolonizing Performances: Deconstructing the Global Postcolonial' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 31.
[21] Marius Pieterse, 'Killing it Softy: Customary Law in the Constitutional Order' (2000) 33 *De Jure* 35, 37.
[22] *Ibid* 36.
[23] Nomthandazo Ntlama, 'The Centrality of Customary Law in the Judicial Resolution of Disputes that Emanate from it – *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC' (2019) 40(3) *Obiter* 202*,* 202 – 213.
[24] The tale of curate is famously captured in a punch cartoon. The legend describes a timid curate who, after being served a stale egg at the bishop's breakfast table, politely replied that "it was good in parts" upon inquiry from his hostess. Caroline Ball, 'The White Paper, Adoption: A New Approach. *A 'curate's egg*?' (2001) 25(1) *Adoption and Fostering* 5, 6. The analogy between customary law and the anecdote of the curate is best captured in the contemporary understanding of the curate's egg as meaning a thing that is partly good and partly bad. In the constitutionalist framework that this study is undertaken, the recognition of customary law is undoubtedly something good. However, the qualified application thereof and the lack of appreciation of the proper context puts a stain on that good.

of the Constitution dealing with this system. Sections 30;[25] 31;[26] 39;[27] and 211(3)[28] are the predominant provisions that form the crux of customary law recognition, application and discussion through the lenses of the Constitution. Constitutional recognition represents the current position in law and gives further support to the idea of customary law being allegedly equal in status with the state law.[29] In spite of that, it is both necessary and desirable, where the context demands, to indicate the legal mileage that customary law had to travel to arrive at this moment of constitutional recognition. Notwithstanding historical context, the significance of this travel mileage is not of and in itself the primary concern in this study.

This study is instead an endeavour to investigate, define, focus and contextualise the phenomena of traditional justice in South Africa. After all, the injunction to be sensitive to the cultural affiliations of a people is a vital component of legal pluralism.[30] This injunction must be appreciated against firstly, the backdrop of legal and cultural perversion formulated in terms of the BAA; secondly, interpreted with caution in the light of meek recognition in terms of Act 45 of 1988; and thirdly, advanced beyond the inaction by the legislature as witnessed by the Traditional Courts Bill.[31] There have been two hotly contested Bills in this regard. The most recent of these Bills is the 2017 version and shall be discussed in the main unless the context necessitates otherwise. In those alternate circumstances, reference will be made to the 2012 Bill.[32]

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[25] 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.

[26] (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, practise their religion and use their language; and (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.

[27] 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.

[28] The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

[29] See Ntebo Morodu, & Charles Maimela, 'The Indigenisation of Customary Law: Creating an Indigenous Legal Pluralism Within the South African Dispensation: Possible or Not? (2021) 54(1) *De Jure* 54 – 69 who claim that the recognition is more superficial than real.

[30] Tom Bennett, 'Legal Pluralism and the Family in South African Law: Lessons from Customary Law Reform' (2011) 25 *Emory International Law Review* 1029, 1052.

[31] Ntebo Morodu, & Charles Maimela, 'The Indigenisation of Customary Law: Creating an Indigenous Legal Pluralism Within the South African Dispensation: Possible or Not? (2021) 54(1) *De Jure* 54, 55. The authors advance the argument of an inattentive legislature in so far as remedying customary law affairs.

[32] B1 – 2012.

This study will critically engage the available data and, through an ethnographic approach and methodology, compile the necessary recommendations that provide insight into traditional justice. It cannot be emphasised enough that this study is not intended as an addition to the cultural elitism of the academy but is in fact geared towards facilitating real and practical change in attitude in relation to customary law and traditional justice in particular.[33]

2. Research problem

In *Christian Education South Africa v Minister of Education* it was emphatically held that "if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism".[34] The issue of tolerance and acceptability of diversity is compelling in a diverse country like South Africa with its troubled history of segregation-inclined policies. The cultural assimilation of a western paradigm both in society and in research is something that this study shall grapple with in the articulation of traditional justice phenomena. Admittedly, urbanisation and the colonising effect of language has robbed customary law and indigenous customs of much of their traditional fabric. However, customary law and customs of the Natives cannot be thought away without the Natives disappearing as a consequence. Naturally, the submission in this regard is that customary law and traditional customs are the *sine qua non* of Natives' existence in South Africa. As a consequence, the law of the Natives and its nuanced meaning must be advanced to be properly understood in the correct context. Whilst this intention may be noble, one must be alive to the reality that no advancement of the proper customary law will be leave it free from external influences of other legal traditions and customs. In fact, it may not even be desirable to resist well intentioned external influences on this system of law. The wisdom of this idea of being amenable to such external influences has already been lent on us by Ndima who opines that this system of law cannot escape the influence of other laws.[35] If anything, the opinion continues, an attempt should be made to rid the system of bad influences that aims to pervert and or degrade its authenticity.[36]

Care must be taken to remember that the contention in this study is that the so called official customary law must always be treated with caution. It is submitted further that an obsession

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[33] Mags Crean, & Kathleen Lynch, 'Resistance, Struggle and Survival: The University as a Site for Transformative Education' in Andrew O'shea, and Maeve O'Brien, (eds), *Pedagogy, Oppression and Transformation in a 'Post-Critical' Climate* (Continuum International Publishing Group 2011) 51.
[34] (CCT13/98) [1998] ZACC 16 para 23.
[35] Dial Ndima, 'The African Law of the 21st Century in South Africa' (2003) 36(3) *CILSA* 325, 341.
[36] *Ibid*.

with the distinction of character between "official" and living customary law has deprived the true customary law of making gains in the South African legal context and ensured the survival of the dominant legal culture.[37] Consequently, the domination of the western legal culture dressed as official customary law, has acted as an obstacle for the establishment and recognition of the true indigenous knowledge in academic works and pedagogy.[38]

That being so, the submission is that it is suspect to conduct a study of customary law without fully appreciating its vexed epistemological nuances. Wherefore, it is contended, the concern of a study into customary law should, as of necessity, always undertake to properly locate its epistemological nuances and or its proper location as a cross section of customs, religion and the lived experiences of the Natives. A full acknowledgement of this cross section can only be attained through a methodology most suitable to recording lived realities. The observation of secondary data through a desktop methodology is less likely to have a successful inquiry. If anything, that method will redirect a reader to circular thoughts on the contest of the true character of customary law.

In addition, as indicated above, the closing off in epistemological monism by legal scholars will hardly yield practical solutions that nartures effective and long lasting solutions.[39] In effect, the first problem identified for investigation relates to the epistemological challenges in the application of customary law. To locate the true law observed in the comic order of the Natives, an investigation of the past pervasion is undertaken with a view to understanding the present and providing a fertile ground for future realisation of a cleansed customary law. In that way, the investigation will mirror the ideal hallmarks of ethnographic phenomenology.[40] At the risk of repetition, as far as living customary law is concerned, the past is one of subjugation of a people and their true law; the present is one inundated with a fixation on the distinction between "official" and living customary law; and a future, which this study aims to contribute to, is one premised on practical solutions that are aimed at ascertaining the cultural location

[37] Marius Pieterse, 'Its a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism' (2001) 17 *SAJHR* 364, 378.
[38] Joe Kincheloe, & Shirley Steinberg, 'Indigenous knowledges in Education: Complexities, Dangers, and Profound Benefits' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 135.
[39] Chimu Himonga, & Fatimata Diallo, 'Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law' (2017) 20 *PER/PELJ* 1, 14.
[40] Keith Berry, 'The Ethnographic Choice: Why Ethnographers Do Ethnography' in Kahryn Hughes, et al (eds), *Contemporary approaches to ethnographic research* (Vol I Sage Publications 2018) 27.

of Natives. To achieve this aim, the phenomena of traditional justice is investigated through an ethnographic inquiry.

It is well worth noting that traditional justice and by extension living customary law is an existing component of the justice factor in South Africa. In the light of this admission, this study should not be understood as professing to save traditional justice. Instead, it is an endeavour to bring to bear its true form within a proper epistemological setting and through a methodology that responds appropriately to lived realities. Much like any informed purpose of indigenous education, this venture is undertaken with a view to constructing conditions that will allow for the self-sufficiency of the system and the procedural mechanisms it employs.[41] Notwithstanding these aspirations, one ought to accost to the operational issues from which traditional justice is currently beset. Furthermore, in the pursuit of new truths to epistemological differences between indigenous and western methodologies, care must be taken to consider the effect of what could potentially be a fractious and evolving relationship.[42] In the context of traditional justice, the setting is historically noted as one premised on the need for reconciliation and the maintenance of harmonious relationships within communities.[43] The essence, therefore, is that traditional justice is a "community based [and] human centred" phenomena.[44] Its resolution is depended on the participation of all stakeholders in the search for solutions. These stakeholders are the victims of the breach of the harmonious relations, offenders of these breaches and the general community members as interested parties.[45]

It is tempting to provide a blanket provision of an all-encompassing aspect of reconciliation. After all, that very swiftly meets the celebrated African philosophy of *Ubuntu*. In spite of that, traditional justice, concerned as it is with substantive justice,[46] is not blinded to reconciliation

[41] Joe Kincheloe, & Shirley Steinberg, 'Indigenous Knowledges in Education: Complexities, Dangers, and Profound Benefits' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 135.
[42] *Ibid* 143.
[43] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 20; Tom Bennett, 'Re-introducing African Customary Law to the South African Legal System' (2009) 57(1) *American Journal of Comparative Law* 1, 3; Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 26.
[44] Dial Ndima, *Re-imagining and Re-interpreting African jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 26 – 27.
[45] *Ibid*.
[46] Tom Bennett, 'Re-introducing African Customary Law to the South African Legal System' (2009) 57(1) *American Journal of Comparative Law* 1, 2 – 3.

at all cost.[47] It is difficult to imagine that reconciliation at all cost is a feasible objective when traditional idioms like *go nyatsa Kgoši ke go tloga*[48] are instructional. The case of King *Buyelekhaya Dalindyebo v S*,[49] discussed in chapter 3, seems to be premised on this instructional idiom. Furthermore, Mnisi Weeks avers that the express exclusion of banishment from criminal sanctions but omission from civil sanctions potentially mean it is still available in the latter processes.[50] Beyond its deliberate intention to foster reconciliation, at its core, the community based system of law is best known for its flexibility or flaunting the rule book of procedure.[51] It is in this flaunting of the rule book that those with western inclination of justice raise questions of lines of accountability by traditional courts councils, the need for uniformity with the Constitution and the lack of awareness regarding human rights.[52]

Regrettably, following the deception of being relegated to an inferior status and the concurrent erosion of a genuine legal system by the BAA, traditional justice has remained conspicuously absent of direct statute. Chapter 8 of the Constitution, which deals with Courts and Administration of Justice, spares no thought to mentioning traditional courts as falling within the ambit of recognised courts in terms of section 166.[53] A claim could be made that section 166(e) does in fact implicitly cover traditional courts and all other tribunals.[54] This is so because not all provisions of the BAA have been repealed.

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[47] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 20.

[48] Loosely translated, this means that any person that fails to honour the Chief or King is susceptible to being expelled from the community. This adage speaks to the fractious relationship between traditional leadership and the human rights jurisprudence. While it would be unwise to argue that customary law is inimical to human rights culture, there is not always a clear cut determination of how disputes should be settled without shaping customary law through the more dominant state law paradigm.

[49] [2015] ZASCA 144 (1 October 2015).

[50] Sindiso Mnisi Weeks, 'Regulating Vernacular Dispute Resolution Forums: Controversy concerning the Process, Substance and Implications of South Africa's Tradition Courts Bill' (2012) 12(1) *Oxford University Commonwealth Law Journal* 133, 150.

[51] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 20.

[52] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 20.

[53] The courts are;

(a) the Constitutional Court;
(b) the Supreme Court of Appeal;
(c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;
(d) the Magistrates' Courts; and
(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.

[54] This claim is unsupported by Navilla Somaru & Christa Rautenbach, 'The Indian Approach to Criminal Justice: The Role of Traditional Courts as Alternative Dispute Resolution Mechanisms' (2020) 53(2) *CILSA* 1, who expressly opine that traditional courts are not recognised 2.

One of the troublesome offshoots of the 2017 Bill that appears in the Preamble relates to the 'voluntary affiliation' between customary law and the people living according to it. The voluntary affiliation has veiled undertones that unlike the omnipotent justice system of the state, traditional justice is not to be taken seriously. Should the Bill come to pass, it will potentially create a situation where a litigant can choose to disassociate himself or herself with the customary law applied in the indigenous cosmology for a myriad of reasons including inconvenience. To put this in the most explicit of terms, the Traditional Courts Bill, in its current form, will make traditional *fora* phantom courts. The regulation as forecasted by the Bill is a slippery slope most likely to drive traditional courts to the abyss. It appears as though its regulation will be no more than a form of paying lip service to traditional leadership whilst in no way giving it practical meaning to the people most affected by it. This means that traditional justice will remain in the doldrums of legal education and the justice system as a whole. To avoid this third problem related to traditional justice, a thorough inquiry is undertaken in an effort to move it from its jurisprudential otherness. Once removed from this position of otherness, the alleged equality that customary law enjoys in the South African legal order will be realised.

In sum, the following are a list of the problems of law identified herein;

1. The epistemological make-up of customary law is not correctly aligned in both jurisprudence and legal education;
2. There is no express post constitutional recognition of traditional courts in terms of statute or the Constitution itself; and
3. There exists a real possibility, if the 2017 Bill is passed in its current version, to systematically relegate customary law to legal "othering" if the idea of voluntary affiliation is allowed to pass.

3. Principles, premises, and conceptual parameters of the research

3.1. Introduction

In *Alexkor Ltd v Richtersveld Community and Others* the Constitutional Court significantly and emphatically endorsed what is in principle the equality of customary law with the common law

by subjecting both systems to the Constitution.[55] From paragraph 51 to 56, the court expressed its views in a manner that appreciates the material differences between customary law and the common law. The pronouncements therein are cogent and provides the fundamental premise for a study like the present that labours to investigate the phenomenon of traditional justice within its correct epistemological prism. Indeed customary law is distinctive in that it is an amalgamation of law, politics, culture, religion and the lived experiences of the people living by that system. In the investigation of this distinct system of law one must be careful, as sounded by the Constitutional Court, not to be misled by old textbooks and authorities on customary law.[56] The *caveat* sounded off by the court is critical to remember as these authorities had the tendency of "enthroning the head of the household as the only true person in law and the holder of civic status".[57] Once adult males assumed the status of the only recognisable person in law, the entire indigenous cosmology is incurably misrepresented. A natural result of this is that the realisation of a proper legal framework can never be achieved, regardless of the good intentions of scholars or any interested stakeholders.

It is fitting, in an attempt to navigate a way to a proper representation of indigenous cosmology, to provide conceptual clarity on some of the most common terminology used in this study. This conceptualisation is necessary to understanding chapter 2 in context.

3.2 Conceptual definitions

3.2.1 Customary Law

In terms of the Recognition of Customary Marriages Act 120 of 1998, customary law is defined in section 1 as "customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples". This definition is not materially different to the opinion of Nhlapo who defined customary law as a "custom based system that owes its legitimacy to having direct links with the past and the tradition".[58] As highlighted above, this study operates from the point of departure that according to

[55] [2003] ZACC 18 para 51.
[56] *Alexkor* para 54.
[57] Thandabantu Nhlapo, 'Indigenous Law and and Gender in South Africa: Taking Human Rights and Cultural Diversity' (1994) 13(3) *Third World Legal Studies* 49, 58.
[58] *Ibid* 53.

indigenous cosmology, law is a cross section of customs, religion and the lived realities of the people. In this way, the law forms part of the central virtues that nourishes society's values.

3.2.2 Restorative justice

This is defined in clause 1 of the Traditional Courts Bill B1 – 2017.[59] The definition supports Ndima's view that the concept of restorative justice contemplates the participation of victims, offenders and the community in the description of the harm caused and the search for the conflict resolution.[60] This idea is best captured by the idiom that proffers that *sephiko ga sena ngwana wa monna.*[61] The broad nature and what is essentially the main fabric of traditional justice must be understood in context. As observed above, restoration or reparation of relations is not the be all and end all of traditional justice.[62]

3.2.3 Traditional Court

In terms of clause 1 of the Traditional Courts Bill, 2017 Traditional Court is defined as a "customary institution or structure, which is constituted and functions in terms of customary law and customs, for the purposes of resolving disputes in accordance with constitutional imperatives and this [Bill]". The salient features of these *fora* are that it is a consent based system; cases are decided based on pre-existing laws; the system is inherently flexible, which mean that judgments are not necessarily patterned; and it is an oral system.[63] Closely

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[59] (a) means an approach to the resolution of disputes that aims to involve all parties to a dispute, the families concerned and community members to collectively identify and address harms, needs and obligations by accepting responsibility, making restitution and taking measures to prevent a recurrence of the incident.
(b) does not extend to measures which, in good faith, purport to give effect to the objectives contemplated in paragraph (a) but which, in fact, do not meaningfully restore the dignity of, or redress any wrong-doing against any person involved in the dispute; and
(c) results in redressing the wrong-doing in question and ensuring the restitution of the dignity of the person in question in a just and fair manner.

[60] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 26.

[61] This may also be expressed in this form; *mpya pedi a di šiti ke sebatana.* The essence of this idiom is the underscoring of shared responsibility in the resolution of a dispute. By the coming together of heads or minds, a solution can be derived easily as opposed to an attempt to resolve the matter as individuals.

[62] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 20.

[63] Nomthandazo Ntlama, & Dial Ndima, 'The Significance of South Africa's Traditional Courts Bill to the Challenge of Promoting African Traditional Justice System' (2009) 4(1) *International Journal of African Renaissance Studies* 6, 8.

inspected, this paints a picture of a court that is less overwhelming and less formalistic in both make up, procedure and evidentiary burdens.

3.2.4 Law of Evidence

According to Bellengere et al this refers to the "requirements and steps to follow in order for information to be admissible in court as evidentiary material".[64] What must be apparent, though, is that this definition is a representation of procedural formalities, and as such it is in direct conflict with the flexibility of traditional courts. The flexibility of traditional *fora* is best underscored by the fact that testimony is provided in the interest of the truth and not necessarily for a specific party.[65] Furthermore, the strict rules of evidence do not apply. The language dynamics also becomes quite important to negotiate. This study will determine whether *bohlatse* has the same effect and meaning with evidence as defined here.

3.3 Customary law and custom protection in the Constitution

It is argued below that the relationship between the Constitution and customary law is one fraught with some degree of uneasiness. Perhaps it is more accurate to capture this relationship as one that is unburdened by an intention to both break with historical perversion and provide room for fresh recognition of customary law epistemology. Fittingly, Morodu and Maimela decry the post-constitutional pervasion of customary law by the Constitution itself, the legislature and the courts.[66] It is suspect, firstly, that the Constitution devotes its shortest chapter to traditional leadership while also in no way providing sufficiently clear guidelines for the framework of operation for traditional leaders.[67] While one may take gripe with what is seemingly a lack of interest in the customary law systems and traditional leadership, some portion of the blame must be cast on the Constitutional Court as a complacent party to the othering of customary law in South Africa. To arrive at this characterisation of the Constitutional Court as a complacent party guilty of othering customary law, regard must be

[64] Adrian Bellengere, et al, *The Law of Evidence in South Africa: Basic Principles* (2nd ed., Oxford University Press 2018).
[65] Dial Ndima, 'The African Law of the 21st Century in South Africa' (2003) 36(3) *CILSA* 325, 330.
[66] Ntebo Morodu, & Charles Maimela, 'The Indigenisation of Customary Law: Creating an Indigenous Legal Pluralism Within the South African Dispensation: Possible or Not? (2021) 54(1) *De Jure* 54, 58 – 64.
[67] See chapter 13. Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 10.

had to *In re Certification of the Constitution of the Republic of South Africa* where it pronounced that;

> [t]he [Constitutional Assembly] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.[68]

It is submitted that striped off its supposed technical meanings and interpretation, the above pronouncement essentially makes customary law guilty of an oral tradition and flexibility.[69] From this verdict of fault, the constitutional protection and enjoyment of standing has been left vulnerable to misinterpretation and the continued subjection to either the common law or its pervesion through the "official" customary law.[70] It is tempting to argue that the Constitutional Assembly (hereunder referred to as the CA) was careful to avoid the common mistake of grouping all indigenous cultures together and providing a blanket solution at the stroke of a pen.[71] Tempting as that notion may appear, it does not quite provide a fitting response to years of sufferance and concerted efforts to fabricate and leave for the ruins the authentic system of customary law. Having been left vulnerable in the *Certification* judgment, it is unsurprising that some later judgments on customary law, discussed below, have fallen on the constitutional blind spots in failing to herald a proper post constitutional customary law.

Secondly, the veracity and the very existence of customary law is put into question by the qualified recognition of customary law wherever it appears in the Constitution.[72] With the benefit of hindsight, it is not farfetched to aver that the knock on effects of the *Certification* judgment was always going to result in a suspect jurisprudence for customary law. It is highlighted in 1 above that sections 30, 31, 39(2) and 211(3) of the Constitution have a direct bearing on customary law. Beyond that recognition, a closer examination of the provisions

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[68] [1996] ZACC 26 para 197.

[69] This proposition is not new to jurisprudence. Ndima notes the same sentiments in pre-constitutional attitude of the courts when dealing with customary law. Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 120.

[70] Chuma Himonga, 'The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession' (2005) *Acta Juridica* 82, 83.

[71] Joe Kincheloe, & Shirley Steinberg, 'Indigenous knowledges in education: Complexities, Dangers, and Profound Benefits' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 137.

[72] In Nomthandazo Ntlama, 'The Centrality of Customary Law in the Judicial Resolution of Disputes that Emanate from it – *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC' (2019) 40(3) *Obiter* 202, 208 the author rightly laments the view that perpetuated by some academics that customary law, as a system of law, is confusing.

highlights that a golden thread running through these sections is the conditional application of customary law. The constitutional point of departure seems to be that either customary law is inherently unconstitutional unless otherwise proven or that the existence of customary rules is put into unending question until a contrary view comes to light. The consequences of this blind spot, whether unintended or not, has set in motion a blueprint for conditional application of customary law that has left the system vulnerable and makes a mockery of the imagined equality with the common law. Proceeding from this position, and the failure as yet to legislate on traditional justice mean that traditional justice is in a free fall to nowhere. Essentially, this phenomena is driven to legal oblivion through inaction by the legislature and conditional application pioneered by the Constitution.

3.4 Research questions

The critical inquiries relating to the epistemology of customary law must be kept separate from the questions that strike at the heart of the phenomenon of traditional justice. That is because there are material differences between these inquiries. For that reason, the research questions are divided into primary research questions, which address aspects of epistemology, and secondary research questions, which address the phenomenon of traditional justice. The rationale is that issues of epistemology should take precedence over the promotion or advancement of traditional justice. It is submitted that in order to properly advocate for the understanding, advancement, promotion, and application of a true traditional justice system, one must be able to locate it within a correct epistemological currency.

3.4.1 Primary research question

a) What is the appropriate theory or paradigm necessary to understand, define, establish, advance and promote proper customary law?

3.4.2 Secondary research questions

The following questions inquire into the operation of traditional justice as a phenomena.

a) What is the scope and purport of traditional justice as practised by the specific community or traditional authority? This question seeks to determine the role of traditional justice in infusing and injecting a sense of substantive justice.

b) How is traditional justice understood by the specific community or traditional authority? Inevitably, this inquiry will be tested against the constitutional injunctions of equality and whether in its outlook it is inherently inimical to the cries of constitutionalism and the rights of women in particular.

c) Does traditional *fora* apply procedural and evidentiary rules compatible with rules of natural justice in exclusion of or supplementary to formal rules of procedure and evidence? The working of this *fora* must be held to some standard or norm. The study establishes this from the data collected.

d) Is there a consistent pattern or processes for the handling of matters that come before the traditional *kgoro*? Some level of responsive accountability is necessary to ensure consistency of process and fairness of results. Notwithstanding the fact that reconciliation is a primary aim of traditional justice, it is imperative to ascertain if this aim is aligned to a specific or generic pattern of handling cases.

These questions underlie some of the crucial aspects of traditional justice. These are: what is it, how does it work and can it be brought up in line with the 21st century society that is no longer as truly indigenous as when the settlers arrived here. These inquiries must be investigated in light of the broad aims and objective of the study.

4. Purpose of the study

4.1 *Aim*

The epistemological nuances of customary law is a topic that has not quite been properly contested in current jurisprudence. This study contends that this lack of adequate engagement owes much to the proliferation of "official" customary law in the place of an evolving living customary law. The contestation in the place of a proper living law is the direct result of the assimilation of the dominant western culture and methodology in research. In light of this, it is crucial that a study similar to this should have as its aim the proper alignment of customary law. The need for this alignment, it is contended, is the inevitable result of an acknowledgment that customary law is different in material respects to the common law.[73] In its proper setting in terms of indigenous cosmology, customary law does not have an independent existence

[73] Freddy Mnyongani, 'Duties of a Lawyer in a Multi-Cultural Society' 2012 23(2) *Stellenbosch Law Review* 352, 353.

separate from the social matrix from which it is applied.[74] As an amalgamation of custom, religion and the lived experiences of its adherents, customary law as a system is much more complex than just a body of rules regulating human behaviour.

In the consideration of this system of law, the correct paradigm must always be borne in mind. For all intends and purposes, the broad study aim is to ensure that customary law is divorced from the common law for epistemological reasons and not for difference of theory. A more focused aim, is one intended to juxtapose the notion of traditional justice as one premised on substantive justice. This substantive justice should nourish, nurture and enhance the justice apparatus by inculcating humanness at the centre of the legal inquiry. The aspect of humanness emanates from the fact that customary conflict resolution embraces a broader participation.[75]

4.2 Objectives

The objectives of this study inherently invite a discourse on transformative education and knowledge. Chartering into transformation is always going to ellicit varied responses considering the South African history of human rights violations and segregationist policies. As well, transformative knowledge creation will disturb and or contest the comfort of the established methodologies. Within this disturbance or contestation, it may potentially even invite inquiry into the identity of the narrator or researcher.[76] It is common cause that the narrators or researchers in the space of customary law have not always been Natives themselves. It follows consequently that good faith cannot always be established in the space of customary law. In fact, it is arguable that the pervasive invasion of the living customary law by the "official" customary law was the product of bad faith commencing from the BAA.

The question that must be asked then is whether Natives have not been (mis)represented enough by the academic and impractical thoughts of others and the intellectual buffers? While this question may raise the ire of many, it remains a valid inquiry in the place of customary law. The background established in this chapter has averred that customary law is an amalgamation of customs, religion and the lived experiences of Native South Africans. Against

[74] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 2.
[75] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 26.
[76] Paul Carr, & Gina Thesee, 'Discursive Epistemologies by, for and about the De-colonizing Project' in Ali Abdi (Ed), *Decolonising Philosophies in Education* (Sense Publishes 2012) 19.

that background and in order to promote a correct paradigm in the application of customary law, it is perhaps befitting to ask whether the time is ripe for Natives to narrate their lived realities without the corrective guidance of others? In answering this question, one must be mindful of the constitutional injunction as imposed by constitutional supremacy and as well no attempt should be made to insulate offensive practices.[77] Nonetheless, the question of race and its role in research is critical in responding to the inquiry into whether the existing methodologies answers the question of "ontological blackness or the blackness that whiteness created".[78]

It is tried that race and racism has played a starring role in the history of South Africa. It is the view of this study that customary law research cannot be insulated from the imperfections and uneasiness of that conversation. Be that as it may, this study will not descent into that arena but instead is geared towards embarking on the deep seated aspirations of substantive traditional justice. The attitude is intentional in seeking to advance only ontological blackness. This is done through an ethnographic methodology as detailed in chapter 4.

5. Significance of the research

The following are established legal facts in South Africa:

- The BAA introduced a repugnancy clause into statute. It is argued here that this is the single most critical point in the creation and sustenance of a system of (non) law known as 'official' customary law.
- The Law of Evidence Amendment Act, 1988 marks the first official statutory recognition of customary law as a system of law that the courts should take judicial notice of. However, such notice depends on the specific rule being ascertainable and applicable. In simple terms, the recognition is more conditional than express.
- True customary law does not have a separate life away from the cosmic social order in which it is applied. Properly grounded in its epistemology, customary law differs from common law in material respects. To use the latter to shape it effectively deprives customary law of its essence.

[77] Tom Bennett, 'Legal Pluralism and the Family in South African Law: Lessons from Customary Law Reform' (2011) 25 *Emory International Law Review* 1029, 1034.
[78] Garrett Duncan, 'Critical Race Ethnography in Education: Narrative, Inequality, and the Problem of Epistemology' in Adrienne Dixson, and Celia Rousseau (eds), *Critical Race Theory in Education* (Routledge 2006) 193.

- Apart from the offending statute, the BAA, traditional justice is not currently regulated by any statute in South Africa. The pronouncement in the *Certification* judgment that section 166 of the Constitution does not preclude any legislation from being promulgated for the purpose of giving effect to these courts seems to have the converse effect, requiring these courts to continue operating as per the prescripts of the BAA.
- Traditional justice is primarily concerned with restoring relations between litigants.
- The court procedure is highly flexible.

Considering the above, it is essential to investigate the nuanced epistemology of customary law as a system, particularly in the context of traditional justice. The chosen research methodology is ethnographic, and it is not limited to legalistic monism. The intention was to critically engage with the lived realities of the communities sampled in this study in an effort to cleanse customary law and traditional justice of any distortions, thus contributing to scholarship on transformative legal education. It is important to distinguish between transformative knowledge and transformative action. While the former is primarily the concern of the academy and often of limited practical value, the ethnographic aspect of the research design aims to manifest transformative action.

The broader relevance of this study is achieved through the organisation of the following chapters.

6. Chapter outline

The outline of this work consist of seven chapters made up as follows;

- **CHAPTER 1: FORMULATING SPACE FOR THE INTRODUCTION OF A LIVING CUSTOMARY LAW IN SOUTH AFRICA**

This chapter dealt with the background and introduction of the study. The aims, objectives, research questions and the methodology are discussed as well.

- **CHAPTER 2: THEORETICAL AND CONCEPTUAL FRAMEWORK**

Study delimitation and clear theoretical framing is necessary for an investigation like the current one. The intention was to avoid epistemological schism in the framing, understanding, developing and application of customary law in the South African legal context. This chapter

debated issues of pedagogy and the political nature of education in an endeavour to highlight the need for customary law nuances to be properly understood in context. This study is aimed at advancing traditional justice as an embodiment of community cultural wealth.

- **CHAPTER 3: LITERATURE REVIEW**

This chapter is a more focused analysis of the available data on traditional justice. It drew on the historical perspectives and arguments from the inception of the BAA right through to the constitutional recognition. The most pressing issues of these courts relates to aspects of accountability, the culture of rights and the claims of inequality. It was imperative that these points be ventilated here so as to provide a clearer picture of the systematic functioning of these courts in later chapters.

- **CHAPTER 4: RESEARCH METHODOLOGY**

Legal research very rarely chatters into the terrain of ethnographic design. In light of this it is imperative to set it out in detail. This not only enhanced the depth of the theoretical underpinning of the methodology, but clearly outlined what it is and offer some limitations as well. This put perspective on the type of study and acted as a benchmark on how other legal scholars can develop their research methods and designs going forward.

- **CHAPTER 5: RESULTS PART I – SUMMARY OF THE DATA**

In this chapter, a presentation of the cases of the various *kgoro* is outlined. Evidently, this chapter is the manifestation of the field work undertaken. The presentation is done through the themes and sub-themes identified in the data.

- **CHAPTER 6: RESULTS PART II – DISCUSSION OF THE FINDINGS**

In this chapter, the research findings of the study are discussed. The chapter discusses the themes and sub-themes to reflect on best practices or lack thereof in the communities. This is done through the stages of thematic analysis as developed by Braun and Clarke.[79]

- **CHAPTER 7: SUMMARY, CONCLUSION AND RECOMMENDATIONS**

At the end, conclusions are drawn and a list of recommendations made with the aim of bringing to bear the phenomena of traditional justice.

[79] Uwe Flick, *An Introduction to Qualitative Research* (4th ed., Sage Publication Group 2009) 15.

7. Chapter Conclusion

McCaslin and Breton aptly note that "a shackle lined with cotton is still a shackle".[80] This is so true of customary law relating to the relationship it now has with the state law. Under the prism of the Constitution and a system of constitutionalism, customary law still does not enjoy the practical equality and freedom of application. Thus, although it is recognised in terms of various constitutional *provisos*, its application is qualified. Qualified recognition on its own is without suspicions and or questions. But South Africa has a plural legal system with historical injustices. Equally, the non-law that is "official" law has penetrated customary law so invasively that it may not always be clear which system is actually applied in a specific situation. As a response to this, the study contends that the oral tradition of customary law is its biggest undoing whilst the BAA is credited with being the single most destabilising act of draftsmanship in the space of customary law jurisprudence. When all is said and done, this study investigates the true customary law and properly defines its epistemological nuances so as to bring to bear the correct traditional justice phenomena.

[80] Wanda McCaslin, & Denise Breton, 'Justice as Healing; Going outside the Colonizers's Cage' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 512.

CHAPTER 2

THEORETICAL AND CONCEPTUAL FRAMEWORK

1. Introduction

> The pedagogy of the oppressed, which is the pedagogy of people engaged in the fight for their own liberation, has its roots [in the following ideological praxis]. And those who recognize, or begin to recognize, themselves as oppressed must be among the developers of this pedagogy. No pedagogy which is truly liberating can remain distant from the oppressed by treating them as unfortunates and by presenting for their emulation models from among the oppressor. The oppressed must be their own example in the struggle for their redemption.[1]

The above quotation captures what is now known as Freirean Pedagogy, whose theory derives from the work of Paulo Freire titled Pedagogy of the oppressed, first published in 1970. According to Freire, the central question in engaging in transformative or developmental studies is to ask "[h]ow can the oppressed, as divided, unauthentic beings, participate in developing the pedagogy for their own liberation?"[2] As part of dealing with the issue of legal transformation in general and the development of customary law in particular, this chapter grapples with what may, for years to come, be a fiercely contested legal question that relates to the true standing of customary law in the South African legal matrix. The relevance of this debate is supported, amongst others, with opinions by authors such as Ntlama who avers that common law ideology has infiltrated the space of customary law principles.[3] To answer the question of legal standing in the main, and address Freire's transformative or developmental concerns relating to the oppressed, this chapter will refer to Freirean pedagogical framework.

This study submits that to be properly engaged with Freirean pedagogy, it is critical to highlight the difference in epistemological makeup between state law and customary law. However, this objective will not be achieved through a restatement of the state law and its various

[1] Paulo Freire, *Pedagogy of the oppressed* (30th anniversary ed., Continuum 2005) 53 – 54.
[2] *Ibid* 48.
[3] Nomthandazo Ntlama, 'The Centrality of Customary Law in the Judicial Resolution of Disputes that Emanate from it – *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC' (2019) 40(3) *Obiter* 202, 202. This was previously expressed in Julia Sloth-Nielsen & Lea Mwambene, 'Talking the Talk and Walking the Walk: How Can the Development of Africa Customary Law Be Understood' (2010) 28(2) *Law in Context: Socio-Legal Journal* 27, 32.

manifestations or sub-fields.[4] Instead, it will locate the proper epistemological nuances of customary law in an endeavour to isolate it and free it of the dominant and essentially Eurocentric features of South African law.[5] This endeavour to separate customary law from state law is a response to the colonialist and apartheid South Africa's subjugation of customary law and or its relegation to primitive texts or myths.[6] It is worth noting that the subjugation and disregard of customary law was the direct result of colonialism and apartheid, which both ensured the epistemological dominance of the Eurocentric legal worldview. From an educationist perspective, Moloi[7] approves of Yosso's[8] view of formal schooling as a form of altering and subjugating the knowledge of those with lesser power. The view of this study is that the relegation of customary law to primitive texts or myths corresponded with the promotion of another system through formal education. The manifestation of this relegation is nowhere clearer than in the infamous repugnancy clause and continuation of this system as the other law in legal curricula.[9] For context, one must point out that the historical epoch of the promulgation of the BAA was during the Union of South Africa that was established in 1910.[10]

The far-reaching consequences of a foreign public policy in the determination of matters between or amongst natives have manifested in the non-law or paper law that is today called "official" customary law. It is submitted in this study that the BAA transcended the change of power from the colonisers to the Nationalists in 1948 when Apartheid officially started. While

[4] For conceptual clarity there exist, especially in institutional curricula, an entrenched system of dividing and/or categorizing the law modules into private, public and mercantile law. This conceptual demarcation and the specific reasons thereof is not of material effect to this chapter and study as a whole. The point is made here to draw attention to the fact that state law is not simply a single indivisible body of laws with a common law heritage.

[5] Joel Modiri, *The Jurisprudence Of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017) 252.

[6] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 89.

[7] Tshele Moloi, *Enhancing Problem-Solving Skills in a Grade 10 - Mathematics Classroom by Using Indigenous Games* (PhD in Education, University of Free State, 2014) 17.

[8] Tara Yosso, 'Whose Culture has Capital? A Capital race Theory discussion of community cultural wealth' (2005) 8 (1) *Race ethnicity and Education* 69, 70.

[9] M Maithufi & Charles Maimela 'Teaching the "Other Law" in a South African University: Some Problems Encountered and Possible Solutions' 2020 (41) *Obiter* 1 – 10.

[10] Section 4 of the Union of South Africa Act, 1909 proclaimed the former colonies as a union in the following terms: It shall be lawful for the King, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony, hereinafter called the Colonies, shall be united in a Legislative Union under one Government under the name of the Union of South Africa. On and after the day appointed by such proclamation the Government and Parliament of the Union shall have full power and authority within the limits of the Colonies, but the King may at any time after the proclamation appoint a governor-general for the Union.

the Apartheid state did not directly effect changes to the repugnancy clause, it systematically entrenched legislations that were a combination of creating a two or even three tier state within a single boarder. This tiered system of governance, though, completely marginalised the Natives and their reality. The following pieces serve as examples of such legislations; Prohibition of Mixed Marriages Act 55 of 1949, which prohibited mixed marriages between whites and non-whites; The Bantu Authorities Act 68 of 1951 which directly gave effect to a further two Acts, *vis* Promotion of Bantu Self-Government Act 46 of 1959 and the Bantu Homelands Constitution Act 21 of 1971. These two Acts created pseudo-independent homelands under the controlled leadership of chiefs. The Bantu Education Act 47 of 1953 which undermined the natives' intellectual capacity and relegated them to labourers.

It is in this spirit of domination and or disregard of the Natives and their indigenous cosmology that Ndima laments the audacity of the colonisers to aver that Roman-Dutch law was transplanted in South Africa upon arrival of the first settlers in 1652.[11] While the condemnation of the transplantation is justified, it provides more of a historical account of how the current legal system originated. Evidently, given that the state law as known today commenced with the purported transplantation at the Cape, it is arguable that the question of standing and epistemology of customary law is valid. This is so because there is no historical record of customs and laws reflecting customary law in its entirety as practised by Natives before the arrival of the settlers. Therefore, the issue or rather falsity of the transplantation of Roman-Dutch law at the Cape and its relation or contest with an unwritten customary law can never be fully explored.

Notwithstanding this challenge, the contest and or relations between these two systems of law ought to have been necessary to the nation-building project at the fall of Apartheid and the start of constitutional democracy. The best way, it is submitted, would have been some degree of acknowledgement of potential future tension under the umbrella of a supreme Constitution. Unfortunately, this point was not at all addressed. To this effect, it is contended that the Constitution has done nothing to correct the inaccurate claim of transplantation nor does it

[11] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 1. Transplant, Ndima goes on to explain, generally refers to the introduction of a foreign legal system at a place where there was no legal system. It is difficult, if at all possible to imagine, that the natives at the time of arrival did not have a system in place that managed and regulated human conduct and behaviour. The learned author goes on to attest the presence of customary law at the time when the colonists implemented their law. In Ndima's view, the term is used advisedly in his study to expose the colonial arrogance of regarding the imposition of Roman-Dutch law as a transplantation by treating it as the first legal system in South Africa.

attempt to rearrange the Eurocentric legal culture of the state law.[12] The Constitution *in* South Africa is thus inclined to the validation of transplantation than an acknowledgement of Native reality before the arrival of settlers.[13]

In contrast, while this position is open to debate, there is another school of thought that appears to aver that the existence of customary law before the arrival of the settlers is undeniable. As an advocate of this thought, Ramose is on record opining that it is untenable to argue for the non-existence of a legal system before the arrival of the settlers.[14]

From this contestation, it is submitted, it follows that the characterisation of South African law as plural proceeds from a debatable foundation. On the one hand that foundation claims that the settlers transplanted law in a place where none existed. On the other hand, it is unlikely that Natives existed without some form of legal order. From this latter viewpoint, it is arguable that there exists a chasm between the true customary laws, as existed before colonisation and formed a part of the reality of the Natives, and the official version of customary law, as perverted by the settlers and the governments they created. In this regard, Manthwa rightly notes the distance between the jurisprudence and the lived realities of the people supposedly living according to that law.[15] It is unsurprising that at best the jurisprudential reach of customary law in South Africa amounts to what can loosely be termed "paper law".[16] Thus, the system of customary law sits between two vices. Historically, it was overtly subjugated and bastardised[17] under colonialism and apartheid. Presently, it is covertly ostracised as the step-child[18] of South African law. To balance these extremes, it is important to sound off a Freirean word of caution when dealing with its epistemological emancipation. This is necessary

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[12] Joel Modiri, *The Jurisprudence Of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017) 73. To some degree, the attitude of the Constitution espouses the 'democratisation paradigm' as discussed by Ramose. See Mogobe Ramose, 'An African Perspective on Justice and Race' 2001 (3) *Polylog: Forum for Intercultural Philosophy* 1, 5.
[13] Joel Modiri, *The Jurisprudence Of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017) 73.
[14] Mogobe Ramose, 'An African Perspective on Justice and Race' 2001 (3) *Polylog: Forum for Intercultural Philosophy* 1, 2.
[15] Tshepo Manthwa, 'Proof of the Content of Customary Law in Light of *MM v MN*: A Constitutional Approach' (2017) 80 *THRHR* 300, 304.
[16] Tshepo Manthwa, 'Handing Over of the Bride as a Requirement for Validity of a Customary Marriage - *C v P* (1009/2016)' (2019) 82 *THRHR* 652, 657.
[17] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 129.
[18] Nomthandazo Ntlama, 'Equality Misplaced in the Development of the Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* (2009) 2 SA 66 (CC)' (2009) 20(2) *Stellenbosch Law Review* 333, 338.

if one endeavours to produce work that is practical and not only just theoretically transformative.[19] Wherefore, this study, though intended for the jurisprudential enrichment of the South African law through the nourishment of a proper customary law, it ought not to be oblivious to the overriding epistemological issues surrounding the law and education in general. Freire had previously and correctly expressed suspicion that the education policies and or political action plans of colonial governments could ever produce positive results for the colonised.[20] If anything, he opined, such education or political action plans will likely result in cultural invasion even where there are good intentions.

The history of customary law in South Africa is largely embedded in politics and the politics of episteme.[21] From this, it is arguable that there is a sense of disempowerment of Natives in the contribution to the body of knowledge and education on customary law.[22] This disempowerment historically, and to this day, resulted in the proliferation of non-Native 'experts' on customary law.[23] The overriding rationale of this study underscores the significance of the lived realities and or experiences of the Native peoples as a central tenet of customary law. Aligned to the overall theoretical lenses of Moloi,[24] the study seeks to ensure the validation of cultural knowledge, skills and abilities in dispute resolution. It is in this regard, therefore, that the 'expertise' of non-Native scholars in this area may be suspect or may amount to cultural invasion even with good intentions. Thus, this so called 'expertise' bellies the shortcomings of qualitative research. Furthermore, these provides a foil that privileges colonial knowledge, power and truth leading to (mis)education.[25] To juxtapose this problem of systematic (mis)education and regeneration of the Eurocentric worldview in the place of customary law and what should rightly be a southbound gaze of the law, this chapter undertakes the challenge on three fronts.

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[19] Mags Crean, & Kathleen Lynch, 'Resistance, Struggle and Survival: The University as a Site for Transformative Education' in Andrew O'shea, and Maeve O'Brien, (eds), *Pedagogy, Oppression and Transformation in a 'Post-Critical' Climate* (Continuum International Publishing Group 2011) 56.
[20] Freire, P *Pedagogy of the oppressed* (30th anniversary ed., Continuum 2005) 95.
[21] It is noted by Norman Denzin, & Yvonna Lincoln, 'Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications Inc 2008) 4 that by its very (and current) nature education is a European imperialism and colonial activity.
[22] Joel Modiri, *The Jurisprudence Of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017) 93.
[23] *Ibid*.
[24] Tshele Moloi, *Enhancing Problem-Solving Skills in a Grade 10 - Mathematics Classroom by Using Indigenous Games* (PhD in Education, University of Free State, 2014) 19.
[25] Norman Denzin, & Yvonna Lincoln, 'Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications Inc 2008) 4.

Firstly, the critical aspect that beset this (mis)education is the issue of language. Put crisply, the privileging of the English language and what is inherently a western worldview of the law undermines customary law epistemology. This is so in that indigenous reality and or experiences are transcript, translated and interpreted to the privileged language. This is notwithstanding the fact that language has the capacity to make social inequalities invisible.[26] For current purposes, it is submitted that the dominant academic ideology and norms should not assess a study on difference according to that dominant culture's entrenched methods.

Secondly, and closely related to the first point, is the epistemological nuances that underpin true customary law. It cannot be emphasised enough that customary law is triangulated in its natural setting and purport. It consists of an inseparable matrix of customs, religion and the lived realities or personal experiences of its adherents.[27] It is submitted that a properly located customary law can be advanced through Yosso's theory of community cultural wealth.[28] This is defined as "an array of knowledge, skills, abilities and contacts possessed and utilized by [Natives] to survive and resist racism and other forms of oppression".[29] The dominant paradigm in the academy does not always correspond with customary law in its unadulterated form and as a result it is literally a domination for its own sake. Ultimately, it is submitted, this domination is borne out of the foreign culture of the academy. For practical purposes, this has the effect of constraining researchers and intellectuals to Western standards and hegemony.[30]

Thirdly, this study attempts to contribute to the rehabilitation of customary law by specifically underscoring the practical reality and cultural knowledge, skills and abilities of the Native people sampled. As pointed out in Chapter 4 below, this study moved away from the lumping together of systems of customary law but instead focused specifically on the Bapedi people and their processes of justice. This decision is guided by the wisdom of Letseka who cautions against the presumption of homogeneity by or amongst Natives.[31]

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[26] Paulo Freire, *Pedagogy of the oppressed* (30th anniversary ed., Continuum 2005) 20.
[27] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 2.
[28] Tara Yosso, 'Whose Culture has Capital? A Capital race Theory discussion of community cultural wealth' (2005) 8 (1) *Race ethnicity and Education* 69 – 91.
[29] *Ibid* 77.
[30] Norman Denzin, & Yvonna Lincoln, 'Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln, and Linda Smith, LT (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications Inc 2008) 6.
[31] Moeketsi Letseka, 'In Defence of Ubuntu' (2008) 27(6) *Studies in Philosophy and Education* 47, 49.

The methodology of this study was imperative to capture the essence of justice and procedures according to first-hand experiences of the Natives in the various constituencies. It is important to highlight here that the endeavour in this study was to capture and analyse what the communities do in dispensing of justice and in no way attempted to determine whether their practices meet the state law's threshold of justice. The latter approach would amount to deficit thinking which, it is submitted, is undesirable.[32] It is, after all, the contention of this study that traditional customs are the *sine qua non* of the Native life that ought to be properly located and captured.

While disobedience to episteme may be unnecessarily antagonistic to the northbound and dominant legal culture, this study is not intended to continue with the privileged status of Eurocentric knowledge cultures and epistemologies.[33] An underlying feature of this study and the essence of ethnography is to take into account the specific time, place and social context in which the research is undertaken.[34] Care must be taken to note that it is a fallacy that a researcher is at all times objective, neutral and perspectiveless.[35] As such, social factors including but not limited to the researcher's approach, methods and vision play a role in the research inquiry.[36]

2. The language (mis)fit

> There is very little that is more important for any people to know than their history, culture, traditions and language; for without such knowledge, one remains naked and defenceless before the world.[37]

[32] Yosso and Burciaga encourage researchers to listen and learn about how knowledge is preserved and passed down. Tara Yosso & Rebecca Burciaga, 'Reclaiming our Histories, Recovering Community Cultural Wealth' (2016) 5 *Centre for Critical Race* 1, 2.
[33] Norman Denzin & Yvonna Lincoln, 'Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications Inc 2008) 4.
[34] Sam Hillyard, S 'Responding to Text Construction: Goffman's Reflexive Imagination' in Alexander Massey and Geoffrey Walford (eds), *Studies in educational ethnography* (Vol 2 Jai Press Inc 1999) 65; Norman Denzin & Yvonna Lincoln, 'Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln, and Linda Smith (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications Inc 2008) 9.
[35] Joel Modiri, *The Jurisprudence of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017) 5.
[36] *Ibid*.
[37] Hassimi Maiga, 'When the Language of Education is not the Language of Culture: The Epistemology of Systems of Knowledge and Pedagogy' in Joyce King, JE (ed), *Black Education* (American Educational Research Association 2005) 159.

In the South African context, the former justice of the Constitutional Court, Albie Sachs, espouses this view in the following terms: "[t]he language question is a question of communication, but it is also a matter of identity on the one hand, and empowerment and disempowerment on the other".[38] This sentiment is further echoed by Prah who considers language an integral part of culture.[39] It is in this regard that the miseducation and by extension the disempowerment of Natives throughout history and into the current constitutional epoch has largely been the manifestation of cultural adulteration and or misrepresentation and the systematic marginalisation of an African reality or experience.[40] The settlers and the nationalist Apartheid regime after them achieved these results through a combination of historically recorded deceit not least of which is language and its inherent cultural dominance.[41] This historical fact of the marginalisation of the Natives in general and the subjugation of their languages in particular is partially recognised by section 6(2) of the Constitution.[42]

From this recognition of a historical fact, section 6(4) proceeds to proclaim that the officially recognised languages enjoy equal standing and ought to be treated equally.[43] This implies that, at least if read with the provisions of section 29(2), people can receive education in any of the official languages, including any of the indigenous ones.[44] The hollow words of the

[38] Albie Sachs, 'The Language Question in a Rainbow Nation: The South African Experience' (1997) 20(1) *Dalhousie Law Journal* 5, 7.
[39] Kwesi Prah, 'Culture, Rights and Political Order in Africa' in Thandabantu Nhlapo, Emma Arogundade, and Harry Garuba, (eds), *African Culture, Human Rights and Modern Constitutions* (University of Cape Town 2013) 66.
[40] Hassimi Maiga, 'When the Language of Education is not the Language of Culture: The Epistemology of Systems of Knowledge and Pedagogy' in Joyce King, (ed), *Black Education* (American Educational Research Association 2005) 159.
[41] Mokgadi Mokgokong, & Moses Phooko, 'What Has the Constitutional Court Given Us? – *Afriforum v University of Free State* 2018 (4) BCLR 387 (CC)' (2019) 40(3) *OBITER* 228. Commenting on the dominance of English language and usage in the South African context, Sachs also remarked that its enforced omnipresence was not only inconvenient to its non-speakers but was equally suffocating as well. See Albie Sachs, 'The Language Question in a Rainbow Nation: The South African Experience' (1997) 20(1) *Dalhousie Law Journal* 5, 6.
[42] Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
[43] The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.
[44] Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.

esteem and parity of indigenous languages and the communities that speak these languages is further advanced by the establishment of one of the Chapter 9 institutions called the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.[45] Perhaps seduced by this constitutional insincerity of fair and equitable use of all official languages, Mokgokong and Phooko, in their critic of the judgment in *AfriForum v University of the Free State*,[46] forecasts the possibility of vernacularisation of curricular in higher education and lambasts the majority decision of the Constitutional Court for closing off this channel.[47] While their view seems to be premised on optimism and the idealism of section 6 of the Constitution, the possibility spoken of appears to be distant. This is so because of the knock-on effect of the judgment that subconsciously enthroned English as effectively the only medium that is none divisive to the plight of the so-called rainbow nation. The decision to side-line Afrikaans and its cultural hegemony as divisive is not only disingenuous but is also an incorrect reflection of the centuries-old English privilege. The wisdom of this enthroning of English and corresponding marginalization of Afrikaans and all other nine official languages is put into question in the minority judgment of Froneman.[48] While in no way underplaying the empowering effect of Afrikaans[49] by the Apartheid state, Froneman notes in footnote 68 of the judgment that English has enjoyed a position of privilege in South Africa for more than a century.[50] His sentiments belly those of Sachs that advances the position that the privilege

[45] Section 185. (1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are – (a) to promote respect for the rights of cultural, religious and linguistic communities; (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa. (2) The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities. (3) The commission may report any matter which falls within its powers and functions to the South African Human Rights Commission for investigation. (4) The Commission has the additional powers and functions prescribed by national legislation.

[46] (CCT101/17) [2017] ZACC 48.

[47] Mokgadi Mokgokong, & Moses Phooko, 'What Has the Constitutional Court Given Us? – *Afriforum v University of Free State* 2018 (4) BCLR 387 (CC)' (2019) 40(3) *OBITER* 228.

[48] *AfriForum v University of the Free State* (CCT101/17) [2017] ZACC 48 para 93.

[49] It was declared as an official language in terms of section 1 of the Official Languages of the Union Act 8 of 1925. The section was in effect an amendment of section 137 of the Union of South Africa Act, 1909. It provided that [t]he word "Dutch" in section one hundred and thirty-seven of the South Africa Act, 1909, and whosesoever else that word occurs in the said Act, is hereby declared to include Afrikaans.

[50] Section 137 of the Union of South Africa Act, 1909 provides that [b]oth the English and Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges; all records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages.

enjoyed by the English language requires other language rights to be protected against it (English).[51]

In the context of the majority decision, it is significant to restate the following points already made in this chapter; it is common cause that the start of Apartheid in South Africa is 1948. Notwithstanding this, the 'transplant' of Roman-Dutch law on what was arrogantly classified as a *terra nullius* South began soon after the settlers' arrival.[52] Furthermore, the BAA, whose debilitating effect on customary law still rings in the echoes of our time, was promulgated pursuant to the establishment of the Union of South Africa in 1910. The amnesic retelling of history and the underlying linguistic and cultural arrogance of the West by the majority judgment is regrettable. To ignore English and its cultural heritage and influence on the Natives is to subconsciously (and arguably negligently) endorse its continued domination. The disempowering effect of this positionality disempowers Natives insofar as their colonial conquest is concerned. The English culture dominated native cultures and enabled its speakers to claim expertise on the reality experienced by native communities.[53]

Some scholars have made the point that the identity of the speaker is a material point in all discourses.[54] It is contended here that on discourses that this chapter and by extension this study aims to contribute to, and guided by Freirean pedagogy,[55] not only does the identity of the speaker matter but so too is what the speaker talks about.[56] Inevitably, bar the right of academic freedom that we all ostensibly enjoy, everybody can and should speak on issues related to indigenous languages and customary law as a whole. Despite this noted freedom of research, if one underscores the significance of the interwoven nature of customary law as a cross-sectional mating of customs, religion and lived experiences, then it becomes obvious to

[51] Albie Sachs, 'The Language Question in a Rainbow Nation: The South African Experience' (1997) 20(1) *Dalhousie Law Journal* 5, 6 – 7.
[52] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 1.
[53] Joel Modiri, *The Jurisprudence Of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017) 93 – 94.
[54] Paul Carr & Gina Thesee, 'Discursive Epistemologies by, for and about the Decolonizing Project' in Ali Abdi (ed), *Decolonizing Philosophies of Education* (Sense Publishers 2012) 20.
[55] Freire was clear in his opinion that "[i]t would be a contradiction in terms if the oppressors not only defended but actually implemented a liberating education". Paulo Freire, *Pedagogy of the oppressed* (30th anniversary ed., Continuum 2005) 54.
[56] Paul Carr, & Gina Thesee, 'Discursive Epistemologies by, for and about the Decolonizing Project' in Ali Abdi (ed), *Decolonizing Philosophies of Education* (Sense Publishers 2012) 20; Norman Denzin, & Yvonna Lincoln, 'Critical methodologies and indigenous inquiry' in Norman Denzin, Yvonna Lincoln, and Linda Smith (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications Inc 2008) 9.

the naked eye that perhaps the time is right for new voices of indigenous episteme. Voices that are, as argued above, not only unconstrained by Eurocentric ethos of knowledge and epistemology but emerge as voices that speak for re-indigenisation of customary law. There must be clarity of both concept and reality in this regard. No doubt it is not going to be easy to argue for the rebirth and re-indigenisation of customary law to be embedded in epistemologically xenophobic theories.

The current study takes a more cautious approach premised on intention to reindigenise as opposed to an express need to exclude other races as advocated for by some authors.[57] Notwithstanding that improbable task, it is important to highlight also that the aim of this thesis is to ensure transformative action that will not leave the Natives "othered" by the process of research and its inherent Eurocentric paradigms. "Othering", as a term that is the foreclosure of one and all expressions of prejudice is defined as "a set *of* dynamics, processes, and structures that engender marginality and persistent inequality across any of the full range of human differences based on group identities".[58]

In the ethnographic present, it is submitted, it is difficult to argue that the political nature of research, with its embedded Eurocentric hegemony,[59] will not continue to validate its foreign conceptions of knowledge about the Natives and their law.[60] As such, the dominant Eurocentric research domain and the concomitant English language's privileged position (and to some extent Afrikaans in the South African order) continue to subjugate indigenous languages and other cultural artefacts which language embodies. The result of this subjugation and stifled research necessitates a difficult conversations on new methods of realising a re-indigenised customary law. In a transformative and or developmental study intended to advance the practicality of that transformation and or development, the significance of Natives playing a central or only role cannot be overstated. This desire for an active role and the

[57] Tshepo Manthwa, *Re-ordering the Existing Legal Hierarchy to Reinstate African Law to its Rightful Place as the Primary Component of the Legal System of South Africa (Azania)* (LLD thesis, UNISA 2022) 228.
[58] Othering is defined as "a *set of* dynamics, processes, and structures that engender marginality and persistent inequality across any of the full range of human differences based on group identities." John Powel & Stephen Menendian in *The Problem of Othering: Towards Inclusiveness and Belonging* (available at http://www.otheringandbelonging.org/the-problem-of-othering/) last accessed on 16 February 2021.
[59] Mogobe Ramose, 'In Search of an African Philosophy of Education' (2004) 18 (3) *SAJHE* 138, 139.
[60] Norman Denzin, & Yvonna Lincoln, 'Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications Inc 2008) 11.

enjoyment of monopoly over this period of re-indigenisation is a counter to the inherent prejudices of "othering". To further justify this drastic, and perhaps a polemic view, it is important to note that language matters significantly to "what we know, what we believe and what we may say".[61] In this regard, it is rightly noted that language has the power to breathe life into the essence of identity, selfhood and one's perception of reality.[62] On the whole, language must be seen as the embodiment of a community or a people's worldview.[63] This makes it central to their epistemology and ontological realities.

It is with this appreciation in mind that the use, by coercion or uninformed consent, of English and in later years Afrikaans as a medium through which customs and customary laws was analysed and criticised, only achieved the result of alienating Natives from the centre of their culture.[64] It is from this alienation from the centre that Natives were divorced from the intricacy of their language that breathed air into their realities.[65] From the foregoing was born a system of law foreign to them and which would, in later years, come to be christened as "official" customary law.

To decontextualize indigenous languages, and by extension customary law, in an endeavour to return it to its centre that is held by the practical realities and lived experiences of the Natives, it is important to appreciate its tradition and its economies. Historically, and to a large extent currently, traditional methods of the Natives are orated in nature.[66] The consequent result of this orality is the storage of large volumes of traditions, idioms, methods *et cetera* in the memory banks of each community's or people's sages. From this tradition of orality then, there is born a culture of folklore.[67] In legal terms, this folklore is a form of dialogue about the

[61] Paul Carr, & Gina Thesee, 'Discursive epistemologies by, for and about the decolonizing project' in Ali Abdi (ed) *Decolonizing Philosophies of Education* (Sense Publishers 2012) 20.
[62] John Schostak, 'The Cr/eye of the Witness' in Alexander Massey, and Geoffrey Walford (eds), *Studies in Educational Ethnography* (Vol 2 Jai Press Inc 1999) 127.
[63] Ali Abdi, 'Clash of Dominant Discourses and African Philosophies and Epistemologies of Education: Anti-colonial Analyses' in Ali Abdi (ed), *Decolonizing Philosophies of Education* (Sense Publishers 2012) 137.
[64] *Ibid* 139.
[65] It is noted that the extinction of language, and by extension culture, has the corresponding consequences that the people who use that language *de factu* exist as other people and not themselves. Kwesi Prah, 'Culture, Rights and Political Order in Africa' in Thandabantu Nhlapo, Emma Arogundade, and Harry Garuba, H (eds), *African Culture, Human Rights and Modern Constitutions* (University of Cape Town 2013) 67.
[66] Kwame Appiah, 'African Studies and the Concept of Knowledge' in Bert Hamminga (ed), *Knowledge Cultures* (Rodopi 2005) 53.
[67] Mogomme Masoga, 'Folklorisation and Reoralisation in Context: Some Narratives on the Current Challenges facing South Africa's Migrant Labourers' (2016) 4(2) *Africa's Public Service Delivery & Performance Review* 228, 232.

makeup of society and as such should act as a precursor to reform.[68] It is submitted that folklore, although disappearing on the current literate generation of Natives, can have a measured role in affirming the reality of people's lived experiences and form an important fabric of legal reform. Regrettably, one of the hallmarks of a literate jurisprudence is its innate obsession with the certainty of principles and their application. In essence, the immeasurable value of folklore then has had to naturally carve into the (mis)translation by none Natives.[69] Inevitably, the oral recollection by the cultural insider to the cultural foreigner tasked with transcriptions does not always proceed from the same epistemological and cultural assumptions.[70]

Against that backdrop, it is submitted, a fertile ground was laid for language, traditionally and for generations to come still, to discriminate with impunity.[71] In the South African context, this impunity is jurisprudentially endorsed by the courts as per the decision of *AfriForum v University of the Free State*.[72] On the whole, the language of customary law in South Africa is not only a representation of the people, but it is as well a negligible misfit that ought to be corrected through re-questioning the cultural dominance of Western pedagogy.

3. Paradigm dominance

This study posits that the academic medium and the jurisprudence of customary law in particular, is not a direct correspondence of the lived realities of the Natives. Consequently, it is logical to conclude that the epistemological and cultural dominance of foreign language and methodologies is but a misplaced dominance. To bring this point home, it is submitted that the denial of epistemic capital of Native culture by the settlers amounts to epistemicide. In research, this *mala fide* notably raises questions of epistemic equality of the paradigms espoused by all the people of South Africa.[73] It is contended by Ramose that the granting of this epistemic equality would fairly represent a diverse South Africa.[74]

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[68] Garrett Duncan, 'Critical Race Ethnography in Education: Narrative, Inequality, and the Problem of Epistemology in Adrienne Dixson & Celia Rousseau (eds), *Critical Race Theory in Education* (Routledge 2006) 192.
[69] Chancellor Williams, *The Destruction of Black Civilization* (Third World Press 1974) 179.
[70] Kwame Appiah, 'African Studies and the Concept of Knowledge' in Bert Hamminga (ed), *Knowledge Cultures* (Rodopi 2005) 54.
[71] Panayota Gounari, & Donaldo Macedo, 'Language as Racism: A New Policy of Exclusion' in Soula Mitakidou, et al, (eds), *Beyond Pedagogies of Exclusion* (Palgrave Macmillan 2009) 31.
[72] (CCT101/17) [2017] ZACC 48.
[73] Mogobe Ramose, 'In Search of an African Philosophy of Education' (2004) 18 (3) *SAJHE* 138, 156.
[74] Ibid.

The identity, selfhood and the interwoven nature of custom, religion and lived experiences of the Natives is embedded nowhere clearer than in their languages. To misrepresent, misinterpret and mistranslate their language and way of life *de facto* equates to thinking them away from the surface of the earth, education in general and legal jurisprudence in particular. To locate this misplaced domination, heed must be taken of the thoughts of Abdi who opined that the education of the colonisers was not meant to benefit the colonised nor serve their interest. [75] In fact, the opinion goes further, to ensure the sustenance of colonial interests among the colonised, the education created a buffer between itself and the illiterate.[76]

Before this opinion was expressed, Freire had long accepted that education is not value-neutral.[77] As such Abdi probably draws on that wisdom in order to conclude on the biased nature of colonial education on the colonised. Moloi's submission appears to support this proposition in asserting that formal schooling is a form of alteration and subjugation of knowledge.[78] For context, the study refers to what Ndima calls the "Roman-Dutching" of South African law and the subsequent loss of values by customary law.[79] Furthermore, Modiri goes so far as to opine that the Constitution itself continues the subordination of customary law and African jurisprudence on a whole.[80] In his view, because the South African law, under a supreme Constitution, is premised on Western constructions of the law which are inclined towards treating law as a separate and independent field.[81] As a result, there is a continuation of a non-neutral political agenda in education, further subjugating customary law jurisprudence to the dominance of Western praxis. In fact, to further point out the epistemic inequality of African theory and knowledge systems, Ramose argues that the settlers did not consider the philosophy and or epistemology of Native worthy to be included in the foundational paradigms of education as a whole.[82]

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[75] Ali Abdi, 'Clash of Dominant Discourses and African Philosophies and Epistemologies of Education: Anti-colonial Analyses' in Ali Abdi (ed), *Decolonizing Philosophies of Education* (Sense Publishers 2012) 137.
[76] Ibid.
[77] Paulo Freire, *Pedagogy of the oppressed* (30th anniversary ed., Continuum 2005) 54.
[78] Tshele Moloi, *Enhancing Problem-Solving Skills in a Grade 10 - Mathematics Classroom by Using Indigenous Games* (PhD in Education, University of Free State, 2014) 17.
[79] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 122.
[80] Joel Modiri, *The Jurisprudence Of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017) 76.
[81] *Ibid* 252.
[82] Mogobe Ramose, 'In Search of an African Philosophy of Education' (2004) 18 (3) *SAJHE* 138, 138.

In this context, the historical and ongoing miseducation, misinterpretation, and mistranslation of customary law in the South African jurisprudence lend support to the charecterisation of customary law as mere paper law within the state's legal system. Despite this, due to the continued cultural dominance of the academy, this study is compelled to conform to the educational standards set and enforced by the non-neutral and colonial system of knowledge creation.[83] That being so, it cannot be emphasised enough that the thesis statement of this study is the acceptance that there are material differences between true customary law and Western-style state law.[84]

In that respect, and localised to the topic under consideration, the study ventures into ethnography to determine first hand and from the lived realities of the selected communities, their fundamental understanding of traditional justice. The aim, well worth reiterating, is to establish how the community dispenses of justice. Following the pedagogical style of Freire, this aim is established "with and not for" the communities a systematic process of a humane traditional justice that will nurture a sense of personhood.[85] This methodology or attitude is fundamentally important as the study aims to capture the ontological aspects of the Natives in their natural habitat while also correctly capturing their lived experience. In this context, the study underscores the proper paradigm and epistemological nuances of customary law whilst also going outside the certainty and rigidity of colonial methodologies[86] that are common in legal research. The study avoids the cultural elitism of the academy and as such endeavour to stay grounded in transformative action and not engage in transformative knowledge for academic circulation.[87] It is contended that transformative knowledge will be of little to no help to the Natives in rural communities who have seen their system of law "othered" by legal jurisprudence bar the creation of paper law.[88] In essence, this study got a first-hand account

[83] Ali Abdi, 'Clash of Dominant Discourses and African Philosophies and Epistemologies of Education: Anti-colonial Analyses' in Ali Abdi (ed), *Decolonizing Philosophies of Education* (Sense Publishers 2012) 138; Mogobe Ramose, 'In Search of an African Philosophy of Education' (2004) 18 (3) *SAJHE* 138, 139.
[84] Freddy Mnyongani, 'Duties of a Lawyer in a Multi-Cultural Society' 2012 23(2) *Stellenbosch Law Review* 352, 353.
[85] Paulo Freire, *Pedagogy of the oppressed* (30th anniversary ed., Continuum 2005) 48.
[86] Paul Carr, & Gina Thesee, 'Discursive Epistemologies by, for and about the Decolonizing Project' in Ali Abdi (ed) *Decolonizing Philosophies of Education* (Sense Publishers 2012) 23.
[87] Mags Crean, & Kathleen Lynch, 'Resistance, Struggle and Survival: The University as a Site for Transformative Education' in Andrew O'shea, A and Maeve O'Brien, (eds), *Pedagogy, Oppression and Transformation in a 'Post-Critical' Climate* (Continuum International Publishing Group 2011) 56.
[88] Dial Ndima, 'The African Law of the 21st Century in South Africa' (2003) 36(3) *CILSA* 325, 335. It is noted here the contempt that Natives have treated customary law jurisprudence. The author notes that "[t]he Africans find this system in the courts and in the classrooms, but leave it there as there is nothing customary about it.

of traditional justice through observation of its practice with the participants and creators of justice.

4. Change of the guard – an epistemological shift

4.2.1. Past perceptions of paradigm

At the risk of overstating a fact to support the ideology of politics and knowledge, a truth for the Native is appropriately captured in this opinion by McCasling and Breton: "[t]he colonial system of laws was not designed with Indigenous values in mind or to favor Indigenous interests, nor does it inspire respect for how human beings are related".[89] It is evident that the perspective of the northbound view of the law is fundamentally opposed to customary law, and this opposition is either irreconcilable, or any attempt at reconciliation would result in one system losing its identity. As Ramose and his ilk have suggested, the settlers opted for complete disregard instead.[90]

It is submitted that humanness and being human are situated at the apex of a system of customary law that embodies the cosmology of the Natives.[91] Instead of appreciating this fact and seeking reconciliatory grounds between customary law and their Roman-Dutch law, the settlers declared the Cape a *terra nullius*.[92] This arrogant historical fact birthed the "Roman-Dutching" of South African law which continues to be the dominant paradigm of law to this day.[93] The disregard of Native laws and ways of life had the adverse consequence that resulted in its loss of value.[94] In relation to this continuing historical fact and while the sagacity of these views cannot in the main be faulted, it is key to distinguish legal theoretical disregard from practical application. This distinction is important in light of the reverse development that

[89] Wanda McCaslin, & Denise Breton, 'Justice as Healing; Going Outside the Colonizers's Cage' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 524.
[90] Mogobe Ramose, 'In Search of an African Philosophy of Education' (2004) 18 (3) *SAJHE* 138, 138.
[91] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 2.
[92] Joel Modiri, *The Jurisprudence Of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017) 73.
[93] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 122.
[94] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 122.

follows herewith. Furthermore, it is the contention of this study that the nuanced customary law notions that underlie law are the *sine qua non* of Native life and its varied cosmology.

The fact of failure to recognise customary law, while depriving it of its economic and paper value through mainstream recognition, does not suggest that people abandoned or lived beside their rules and ways of life. If anything, this contention holds of rural South Africa and the Limpopo Province in particular as the focus of this study. Be that as it may, this is not to argue as well that a combination of urbanisation and the endorsement of a foreign epistemology has not robbed true customary law off its fabric. If anything at all, this study argues that the colonialists were intentional in their pervesion of true customary law through the promulgation of the BAA, amongst others.

The *terra nullius* notion of the settler colonialists was not only arrogant but it was equally impractical. The Natives and their laws could just simply not be thought away and disappear from the surface of their land. This study argues that research is inherently political and taken in that light it is unsurprising that ethnography loses its innocence as well. Furthermore, it contends that the laws of the settlers lack indigenous values and interests. The BAA is a clear example of bad faith in legislation and underscores the colonial intention to control the systematic knowledge and ways of Native life. This piece of legislation privileged the colonialists and their laws. As such, this period is essentially the manifestation of the northbound view of the law that asserts paradigm dominance, if not stranglehold, of western ideology and attitude to the law. Building on this, the study posits that Westerners continue to write from positions of privilege, stemming from the alleged transplantation of Roman-Dutch law and the subsequent promulgation of the BAA and other Acts that further enforced colonial domination.

With the passage of time and the turbulence of political tensions in the country, the legislature made some advancement in the recognition of customary law through the Law of Evidence Amendment Act 45 of 1988. Whilst the insurgencies of a foreign public policy and natural justice remained, the barest minimum in section 1(1) was that for the first time in the history of customary law, the courts could take judicial notice of it. If one reflects on this critically, a closer reading of section 1(1) tends to equate customary law with foreign law and makes that recognition conditional on certainty. This fact is central in the shaping of the current perspectives on the customary law paradigm.

4.2.2. Current perceptions of paradigm

The half-hearted and qualified recognition of customary law in the phasing out of the cycle of colonialism ushered some rays of light as the post-1994 constitutionalism promised so much as far as customary law is concerned. Literature is abounding with case law and commentary from scholars with different philosophical understanding of customary law under the umbrella of the constitution.[95] The following notable philosophical standings have been recognised: firstly, there is a view that customary law retains a status of perpetual inferiority post constitutionalism; secondly, there is a notion of unending inconsistency between customary values and the Constitution; thirdly, there are propositions that seek to create a synergy between the customary value system and the Constitution; fourthly, there is also a liberal view that reconciles the communal nature of customary culture and the values embodied by the Constitution; and finally, there is a view that certain rules, principles and concepts of traditional customary law are central to the resolution of socio-legal disputes.[96] The current investigation adds its voice to the fifth philosophical point of departure and ventures to establish true customary law procedures and processes of justice to expose the lived reality of Natives.

Notwithstanding the ray of light sparked by the Constitution, it is noted in this study that not much has been achieved. This boils down to what Manthwa notes as the creation of "paper law" emanating from the distance between communities and the jurisprudential reach of the courts.[97] As well, the legacy of half-hearted and qualified recognition of customary law continues under the Constitution.[98] It would be ill-advised and not supported by available jurisprudence, irrespective of the misgivings one has, to aver that current perceptions regarding customary law have been all reversing the gains of development. Nonetheless, it is

[95] Dial Ndima, 'The Shape and Content of Post-Apartheid Africa Law: Academic Scholars in Conversation' 2017 38(1) *OBITER* 15, 18 – 32.

[96] Dial Ndima, 'The Shape and Content of Post-Apartheid Africa Law: Academic Scholars in Conversation' 2017 38(1) *OBITER* 15, 18 – 32; Lesetja Monyamane, & Mpho Bapela, '*Gongqose v Minister of Agriculture, Forestry and Fisheries* – A Tale of Customary Rituals and Practices in Marine Protected Areas' 2019 22 *PER/PELJ* 1, 6 – 7.

[97] Tshepo Manthwa, 'Handing Over of the Bride as a Requirement for Validity of a Customary Marriage - *C v P* (1009/2016)' (2019) 82 *THRHR* 652, 657.

[98] Section 30 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*. Section 31 provides 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, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. Section 39(2) provides 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. Section 211(3) provides that: The courts must apply customary law when that law is applicable, *subject to the Constitution and any legislation that specifically deals with customary law*.

equally disingenuous to not note that there are problems that cannot be divorced from the history of neglect, disregard, contempt and politics of knowledge and research in customary law.[99]

Be that as it may, judgments like *Alexkor Ltd v Richtersveld Community and Others*[100] are commendable for acknowledging problems with a two-tier system of customary law; *to wit* official customary law and living customary law. In paragraph 51 of the judgment, the court famously expressed the view that customary law must be divorced from the foreign construction of the common law. Elsewhere in the judgment, the court sounded a warning call in the treatment of customary law materials in the South African jurisprudence. This judicial recognition of a distinct value system of customary law is in line with the point of departure from which this research study is proceeding. This point of departure is that customary law consists of an inseparable matrix of customs, religion and the lived realities or experiences of its adherents.[101] The significance of the *Alexkor Ltd* judgment is, it is submitted, equally heightened by the unequivocal qualifier for the use of literature and old authorities on customary law. In paragraph 54 the court sounds a merited warning that these sources have a "tendency to view [customary] law through the legal prism of legal conceptions that are foreign to it".

The credibility, confirmability, and dependability of both the study method and the results must undoubtedly be measured against some standard. Despite this, it is clear, at least from these pronouncements in *Alexkor Ltd*, that the measuring test must not lose sight of the different value systems.[102] In essence, the submissions made in this chapter decrying the privileged status of the English language and the hegemonic Eurocentric dominance of research methodology are not just rumblings. They are intended to shine some light on the fact of foreign prisms that ought not to be imposed on customary law research or re-indigenisation theories.

In *Gongqose v Minister of Agriculture, Forestry and Fisheries* the Supreme Court of Appeal (hereunder referred to as the SCA) bluntly acknowledges that insufficient progress has been

[99] Ntebo Morodu, & Charles Maimela, 'The Indigenisation of Customary Law: Creating an Indigenous Legal Pluralism Within the South African Dispensation: Possible or Not? (2021) 54(1) *De Jure* 54, 54-55.
[100] [2003] ZACC 18.
[101] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 2.
[102] Nomthandazo Ntlama, 'The Centrality of Customary Law in the Judicial Resolution of Disputes that Emanate from it – *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC' (2019) 40(3) *Obiter* 202, 208.

made in integrating customary law into the South African legal framework.[103] The optimism expressed in *Alexkor Ltd* is an invaluable step in the right direction as far as the re-indegenisation of customary law is concerned. However, *Gongqose* highlights the very real issue which is the application of customary law jurisprudence. In paragraph 1 of *Gongqose*, the court, in the researcher's opinion, rightly questions the standing of customary law in the South African legal matrix. Despite the SCA's candid acknowledgement of the challenges related to the standing of customary law, *Gongqose* makes a positive contribution to the body of jurisprudence that advocates for the independent assessment and consideration of customary law within the appropriate framework.[104]

In principle, such judgments should be the benchmark for a carefully crafted customary law jurisprudence that responds to the re-indigenisation theories. Regrettably, years of subjugation, underdevelopment, the formulation of paper law and any such factors that beset customary law are brought to bear in such cases as *Mbungela v Mkabi & others*.[105] It is the view of this study that this judgment stands as one of the recent examples of a jurisprudence that casts customary law back to its challenging terrains. See Bapela and Monyamane for a critic of this decision and how a misalignment of epistemology may have dire consequences.[106] It is submitted that *Mbungela* stands as evidence of the erstwhile use of foreign lenses and ideals that beset the lack of development of customary law. For a truly transformative jurisprudence in customary law, the gap must be bridged between the high-seating courts of the land and the communities that practice living customary law. In this context, ethnography appears to be a fitting methodology to address this divide.

When all is said and done, current perceptions on customary law are a mixed bag and do not lay a fertile ground for future development. The seminal works of scholars such as Ndima highlights the historical imposition and impact of a foreign paradigm on customary law in South Africa. The author succeeds in detaching living customary law from the paper law of officialdom

[103] (1340/16, 287/17) [2018] ZASCA 87 para 1; Lesetja Monyamane, & Mpho Bapela, '*Gongqose v Minister of Agriculture, Forestry and Fisheries* – A Tale of Customary Rituals and Practices in Marine Protected Areas' **(**2019) 22 *PER/PELJ* 1, 3.
[104] Lesetja Monyamane & Mpho Bapela, '*Gongqose v Minister of Agriculture, Forestry and Fisheries* – A Tale of Customary Rituals and Practices in Marine Protected Areas' 2019 22 *PER/PELJ* 1, 8 and 14.
[105] (820/2018) [2019] ZASCA 134.
[106] Mpho Bapela, & Lesetja Monyamane, 'The "Revolving Door" of Requirements for Validity of Customary Marriages in Action – *Mbungela v Mkabi [2019]* ZASCA 134' (2021) 42(1) *Obiter* 186, 191.

and ends by calling for a theory of re-indigenisation which is important to the ethnographic pursuit herewith undertaken.[107]

To respond properly to that invitation, one is hard pressed to opine that constitutionalism is not in and of itself a solution. This study puts its weight behind the misgivings raised by Modiri on his critique of the Constitution as an embodiment of the erstwhile colonial arrogance and episteme.[108] The Constitution imbues itself with supremacy in section 2 and as a consequence demands respect. That being so, the paradigm of customary law and its future as investigated here through ethnography is relative to the time and place of the study. No assumptions were made and no imposition of the constitutional ideals were shoved on the communities. The analysis of the ethnographic data had to, unfortunately, heed the constitutional imposition when recommendations were made at the end. Navigating this divide is a challenging task when striving for a truly representative voice of the sampled population.

4.2.3. Re-indigenisation centred around the community itself

To justify community cultural wealth, as the lens through which the future of customary law is considered, the following factors are critical. Firstly, lack of value-neutrality in the educational enterprise as espoused by Freire[109] and advanced by Abdi[110] among others. Secondly, the deprivation of cultural capital by the BAA and the embodiment of a deficit thinking by the Constitution demand the centering of the Natives in the re-indigenisation project. Thirdly, Maithufi and Maimela rightly argue that legal curricula is the systemic relegation of customary law as the "other law".[111] As a result, community cultural wealth can be used as a "tool of social justice".[112] This is undergird by the need to explore the extent of the Natives' cultural resources in the search for answers and their educational experience.[113] This, it is argued, is achieved through listening and learning from the Natives' body of work

[107] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 244 – 247.
[108] Joel Modiri, *The Jurisprudence Of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017) 73.
[109] Paulo Freire, *Pedagogy of the oppressed* (30th anniversary ed., Continuum 2005) 54.
[110] Ali Abdi, 'Clash of Dominant Discourses and African Philosophies and Epistemologies of Education: Anti-colonial Analyses' in Ali Abdi (ed), *Decolonizing Philosophies of Education* (Sense Publishers 2012) 137.
[111] M Maithufi & Charles Maimela 'Teaching the "Other Law" in a South African University: Some Problems Encountered and Possible Solutions' 2020 (41) *Obiter* 1 – 10.
[112] Tara Yosso & Rebecca Burciaga, 'Reclaiming our Histories, Recovering Community Cultural Wealth' (2016) 5 *Centre for Critical Race* 1, 2.
[113] Nancy Acevedo & Daniel Solorzano, 'An Overview of Community Cultural Wealth: Toward a Protective Factor Against Racism' (2021) *Urban Education* 1, 2.

in advancing justice. Yosso's community cultural wealth also corresponds with the methodology of choice for this study.[114]

As apparent from Chapter 4, the emphasis of ethnography falls on the realities of the communities. The utilisation of the community cultural wealth lens and the chosen methodology in this context is an effort to empower the indigenous people and position them as central stakeholders in their quest for truth. This lens consists of six forms of capital possessed by the communities. These are: aspirational, linguistic, familial, social, navigational and resistant capitals.[115] The presentation of these capitals, firstly, follows their definitions by Yosso. Secondly, the definitions are preceded by an interpretation of these capitals for the purposes of traditional dispute resolution.

Aspirational capital espouses the resilience of Natives and the fighting spirit to retain hopes and dreams of a better tomorrow even in the face of social and structural adversity.[116] Linguistic capital refers to the broadened intellectual depth of Natives gained through the social skills of communicating in more than one language.[117] Familial capital carries with it the bonds of family and kinship that inculcates community history, memory and cultural intuition.[118] Social capital embodies the social networks of people and the community resources necessary to ensure success.[119] Navigational capital refers to the skills necessary to manoeuvre through the social structures that have not always welcomed Natives.[120] Finally, resitant capital epitomise new knowledge and skills learned through opposition to forms of inequality.[121]

Moloi posits that for Natives, *Ubuntu* or *botho* (the seSotho corresponding term) is a beacon of hope and light that underlie their courage in the face of obstacles.[122] To support this thesis, it is argued in this study that aspirational capital and navigational capital are bounded together by *Ubuntu*. Traditional dispute resolution has outlived attempts to erode it through the

[114] See definition offered by Kahryn Hughes, et al (eds), *Contemporary approaches to ethnographic research* (Vol I Sage Publications 2018) xxiii.
[115] Tara Yosso, 'Whose Culture has Capital? A Capital race Theory discussion of community cultural wealth' (2005) 8 (1) *Race ethnicity and Education* 69, 78 – 81.
[116] *Ibid* 78.
[117] *Ibid* 79.
[118] *Ibid*.
[119] *Ibid* 80.
[120] *Ibid*.
[121] *Ibid* 81.
[122] Tshele Moloi, *Enhancing Problem-Solving Skills in a Grade 10 - Mathematics Classroom by Using Indigenous Games* (PhD in Education, University of Free State, 2014) 23.

insertion of foreign lenses in the litigation of disputes.[123] It is contended by some that the use of endogenous systems and local actors has enhanced this resilience.[124] It is apparent from the study findings that traditional dispute resolution has outlived the BAA and continues largely unadulterated in the indigenous cosmology of rural Limpopo Province. Underlying this resilience and defeat is the "consciousness of mutual dependence"[125] by each individual forming a community. This mutual dependence is underscored by the phrase *motho ke motho ka batho*.[126] In the cosmic present, harm and the search for its resolution involves the "victims, offenders and [whole] community".[127] In this light, the aspiration of the community is to maintain harmony and restore same in instances of breach.[128] The achievement of this harmony is through respect of conscious and mutual dependence. Being alive to this dependence, it is submitted, the community centres its process (navigation) of restorative justice on *Ubuntu*.[129] However, the effort to address breaches in harmony through *Ubuntu* does not imply that everything is ideal within the communities. It simply underscores the attempt to ensure the harmony of all and mutual dependence. In some instances, as this research proves, this may be a difficult process in the space of competing interests.

On the other hand, it is submitted that social capital and familial capital underlie the overriding essence of traditional dispute resolution; *to wit* reconciliation.[130] Humanness or *botho*[131] is a critical aspect in Native communities. Notwithstanding this, the characterisation of *botho* is not guaranteed or conferred to everyone. As a qualifier, one must display the characteristics

[123] Nomthandazo Ntlama, 'The Centrality of Customary Law in the Judicial Resolution of Disputes that Emanate from it – *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC' (2019) 40(3) *Obiter* 202, 208.
[124] Tsegai Ghebretekle & Macdonald Rammala, 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' (2018) 12(2) *Mizan Law Review* 325, 326.
[125] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 2.
[126] Loosely translated, this means that a human being is a human being because of other human beings. Moeketsi Letseka, 'In Defence of Ubuntu' (2008) 27(6) *Studies in Philosophy and Education* 47, 48.
[127] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 26 – 27.
[128] Patience Sone, 'Relevance of Traditional Methods of Conflict Resolution in the Justice System in Africa' (2016) 46(3) *Africa Insight* 51, 52.
[129] *Ibid* 60.
[130] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 20; Tom Bennett, 'Re-introducing African Customary Law to the South African Legal System' (2009) 57(1) *American Journal of Comparative Law* 1, 3; Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 26.
[131] Defined as "an assemblage of qualities such as humaneness, compassion, gentleness, hospitality, generosity, empathy, kindness, friendliness, and related terms, all of which emphasise the essence of being a human person" in Tholene Sodi, Diphete Bopape & Mpsanyana Makgahlela, 'Botho as an Essential Ingredient of African Psychology: an Insider Perspective' (2021 51(3) *South African Journal of Psychology* 441, 442.

of personhood to be recognised as such.[132] Those who meet the criteria of personhood form a community with set values. According to Sodi, Bopape and Makgahlela, this demands a show of certain charecteristics including humanness, emphathy, friendliness and others.[133] In the event of a breach of the harmony curated by *Ubuntu*, restorative justice aims to achieve reconciliation. Generally, this is achieved through legal storytelling.[134] *Ubuntu*, as the curator of community values, is the vehicle through which reconciliation is achieved.[135] In sum, it is argued here that *Ubuntu* and reconciliation creates close ties amongst aspirational and navigational capitals with familial and social capitals.

The language capital, while well defined by Yosso, is contested in this study. As an important cultural artefact,[136] it can be used as a form of disempowerment.[137] To appreciate the cultural location of this study with the aim of re-indigenisation, it is critical to retain idioms in their original language. Rammala expresses the view that idioms actually represent a shared living experience amongst the Natives.[138] Furthermore, *Motsepe v Khoza*[139] underscores their importance and educational value for Natives. It is submitted that the idioms carry intellectual capital for Natives and as such much caution is necessary in the use and interpretation in a foreign language. To firmly locate the Natives at the centre of this study, I argue for the retention of their language where the context demands it.[140] To advance *botho* and demonstrate reconciliation, this may be underlined by the language in its original form. In essence, the linguistic capital advances other capitals already discussed through a combination of folklore and legal storytelling. The resilience of this system of law, curated by *Ubuntu*, can

[132] *Ibid*.
[133] *Ibid*.
[134] Garrett Duncan, 'Critical Race Ethnography in Education: Narrative, Inequality, and the Problem of Epistemology in Adrienne Dixson & Celia Rousseau (eds), *Critical Race Theory in Education* (Routledge 2006) 192.
[135] Patience Sone, 'Relevance of Traditional Methods of Conflict Resolution in the Justice System in Africa' (2016) 46(3) *Africa Insight* 51, 60.
[136] Kwesi Prah, 'Culture, Rights and Political Order in Africa' in Thandabantu Nhlapo, Emma Arogundade, and Harry Garuba, (eds), *African Culture, Human Rights and Modern Constitutions* (University of Cape Town 2013) 66.
[137] Albie Sachs, 'The Language Question in a Rainbow Nation: The South African Experience' (1997) 20(1) *Dalhousie Law Journal* 5, 7.
[138] MacDonald Rammala, 'Lekgotla and Idiomatic Expressions in Traditional Dispute Resolution: The Case of Makapanstad, North West Province, South Africa' (2021) 16(1) *International Journal of African Renaissance Studies* 220, 222.
[139] [2013] ZAGPJHC 162 para 11.
[140] MacDonald Rammala, 'Lekgotla and Idiomatic Expressions in Traditional Dispute Resolution: The Case of Makapanstad, North West Province, South Africa' (2021) 16(1) *International Journal of African Renaissance Studies* 220, 222.

best be reflected in the wisdom of idioms. To achieve the harmony in the network of people, *Motsepe* invites us to respect the Native languages and their capital.

The resistant capital is where the current study comes in to create new knowledge on a properly located system of traditional dispute. This is done in Chapter 7.

5. Chapter conclusion

This chapter is a part of the thesis to demonstrate the travel mileages of a western and dominant epistemology even in the place of indigenous knowledge. The deprivation of epistemic capital, or to put it more crudely the epistemicide of Native culture in the legal academy has been beneficial to the advancement of a Roman-Dutched outlook of the law. In advancing the decoloniality ideals and in an effort to re-indigenise customary law, the study cautions against the prescript of the West in these and similar type investigations. This is in line with an appreciation of the political nature of research in general. It is suggested here that traditional communities must be represented honestly by taking into account their consciousness in the cultivation of law. The essence of this chapter belies the notion that "colonisation is colonisation, whatever new name we may like to give to it".[141] Effectively, the nation-building emergence of English to "unite" South Africa is not itself without paradigm faults. This study is, as such, grounded in the significance of language as a cultural artefact and representation of the Native worldview. At the end, the re-indigenisation of customary law is achieved through community cultural wealth theory in the space of justice.

[141] Beth Swadener, & Kagendo Mutua, 'Decolonizing Perfomances: Deconstructing the Global Postcolonial' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 40.

CHAPTER 3

LITERATURE REVIEW

1. Introduction

Traditional philosophy finds its most explicit definition within the Traditional Health Practitioners Act[1], particularly in section 1 of the Act. This is defined as [where relevant for current purposes];

> […] indigenous African techniques, principles, theories, ideologies, beliefs, opinions and customs […] communicated from ancestors to descendants or from generations to generations, with or without written documentation, whether supported by science or not […].[2]

It cannot be emphasised enough that the current study advances an African worldview to knowledge and traditional justice in particular. Put in context, a worldview has been defined as "basic assumptions that a group of people develops in order to explain [their] reality and their place and purpose in the world".[3] Flowing from this definition and to provide perspective on the thoughts of this current investigation, it suffices to further define and locate an African worldview. This speaks to how Africans perceive their world and reality, which inevitably has an impact on their cultural capital.[4]

The fact that the Traditional Health Practitioners Act provides a regulatory framework for traditional healers and in no way deals with traditional justice should not be lost on anyone. Notwithstanding this, the definition of traditional philosophy actually captures the notion of African worldview better and is supported as correct for this study. Interestingly, neither of the Traditional Courts Bills[5] nor the Traditional and Khoi-San Leadership Act[6] attempts to assert itself as advancing a particular philosophy let alone an African one. While the reasons

[1] Act 22 of 2007.
[2] Traditional Health Practitioners Act 22 of 2007.
[3] Mpsanyana Makgahlela, *The Psychology of Bereavement and Mourning Rituals in a Northern Sotho Community* (PhD in Psychology, University of Limpopo, 2016) 10.
[4] *Ibid.*
[5] B1 – 2012 and B1 – 2017.
[6] Act 3 of 2019. This Act repealed the Traditional Leadership and Governance Framework Act 41 of 2003 in its entirety.

for that omission may be debated, as shall be demonstrated in heading 5 below, the absence of a similar pronouncement has led to further epistemological divorces from the practical realities embodied by indigenous cosmology on the one hand and traditional justice on the other.

Against this backdrop, it is critical to bear in mind that this study is an ethnographic inquiry into traditional justice in the true sense of what communities are doing and not what they ought to be doing.[7] The opening statement to this study by Nhlapo retains its relevance in this chapter and how it is structured.[8] The phenomenon of traditional justice is investigated within the confines of its true ontological and epistemological grounding. In keeping with this intended end goal, the study appreciates a need to advocate for a loyalty to the philosophical convictions of the Natives.[9] Be that as it may, it is prudent to acknowledge that the advancement of the philosophical grounding must be aligned to the legal regime of the country to some extent.[10] It is common cause within the South African jurisprudence that the overriding legality is premised on the Constitution as the supreme law. Despite this, it must be borne in mind that the noting of the Constitution's supremacy as impressed by section 2 thereof and the acceptance of that legal status are distinct matters of law.

The contestation in this study in general, and this chapter in particular, is based on the view that the Constitution is an endorsement of a Western ideology of law and the legitimisation of colonial conquest.[11] Furthermore, heed must be taken of contentions that reserve doubt about legal dualism as no more than an effective usurpation of the legal standing of the dominant system of law over the servient one.[12] The argument advanced in this chapter will demonstrate

[7] *Bangindawo & Others v Head of the Nyanda Regional Authority; Hlantlala v Head of the Western Tembuland Regional Authority & Others* (1998) 2 All SA 85 (Tk) supports this proposition in the following express provision: "there [is] … no reason whatsoever for the imposition of the western conception of the notions of judicial impartiality and independence in the African customary law setting" 97.

[8] Thandabantu Nhlapo, 'Indigenous Law and and Gender in South Africa: Taking Human Rights and Cultural Diversity' (1994) 13(3) *Third World Legal Studies* 49, 71.

[9] Tom Zwart, 'Relying on Africa's Strengths in the Area of Human Rights: The Receptor Approach' in Thandabantu Nhlapo, Emma Arogundale, and Harry Garuba (Eds) *African Culture, Human Rights and Modern Constitutions* (University of Cape Town 2013) 14.

[10] *Ibid*.

[11] The Policy Framework on Traditional Justice System under the Constitution (Guideline 2008) makes it clear that "[t]he values and systems brought about by the democratic order were foreign to the [Native's] cultural way of doing things" 23. Thus, although it may not have been intended as such, it is the submission of this study that this sentiment is an admission that the Constitution *in* South Africa is NOT an embodiment of an African value system, but instead the confirmation of colonial conquest.

[12] Sanette Nel, 'Community Courts: Official recognition and criminal jurisdiction - A Comparative Analysis' (2001) 34(1) *CILSA* 87, 89. See also Adenike Aiyedun & Ada Ordor, 'Integrating the Traditional

that the alleged equality of standing that customary law ostensibly enjoys is limited to the pages of case laws and legal text elsewhere but not in the Traditional Courts Bill. This Bill, it is argued, best belies the underlying difficulty of legislating on living customary law within the correct prescripts while attempting to remain constitutionally compliant.[13] In fact, a critical overview of the Bill may tempt one to throw their weight behind views that aver that living customary law is negated by statutory interventions.[14]

The chapter proceeds from the premise that traditional justice has survived long enough to simply be submerged into the state law under the ambit of constitutionalism. It goes without saying that the continued practice of this phenomenon as presented in Chapter 5 is proof of the system's resilience[15] and advancement of the traditional philosophy as defined above. The data evidences a somewhat difficult relationship this system has with the dictates of external philosophies and system of law.[16] While this may be so, traditional justice remains an evolving phenomenon within the system of customary law.[17] To promote and advance its legacy in the law, it is submitted that a balancing act is necessary. On the one hand, a case for the relevance and retention of traditional justice as an innate phenomena is made and, on the other hand, an awareness of the social complexities that beset South Africa and its rural constituency is necessary.[18] These complexities are underlined by such aspects as urbanisation.

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with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law Democracy & Development* 154 who posit that the received law is reserved a dominant role 155.

[13] Yetunde Aiyedum, *Fair Trial and Access to Justice in South Africa: How Traditional Tribunals Cater to the Needs of Rural Female Litigants* (PhD in Law, University of Cape Town, 2013) 39.

[14] Rita Ozoemena, 'Living Customary Law: A Truly Transformative Tool?' (2013) *Constitutional Court Review* 147, 148.

[15] Tsegai Ghebretekle & Macdonald Rammala, 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' (2018) 12(2) *Mizan Law Review* 325, 326.

[16] See Thwadi Komane, 'African Tradition vs. Western Modernity Conundrum in Post-Apartheid South Africa: A Case of the Traditional Courts Bill' in Tomas Machalik, and Katerina Mildnerova, (Eds) *Tradition v Modernity in Contemporary Africa* (Cultural Africa Association 2013) where the intolerable arrogance of westernisation manifest in the contemptuous remark that "the[re is an] assumption that African tradition and its ways will eventually succumb or graduate into an industrialised western type value system as part of economic historical evolution" 77. Sanele Sibanda, 'When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation' (2010) 17(3) *Human Rights Brief* also reflects on the practical subordination of customary law to the state law and dupes it the "tolerated but unloved stepchild" 1, 1.

[17] Vijyalakshmi Singh, *South African Indigenous Courts: Challenge for the Future* (LLM, UNISA, 1994) 1.

[18] In *Bangindawo & Others v Head of the Nyanda Regional Authority; Hlantlala v Head of the Western Tembuland Regional Authority & Others* (1998) 2 All SA 85 (Tk) the court affirmed the standing of these courts as different from the state's courts. In fact, the courts quoted with approval the views of Bekker who posit that "judging one court by the other is senseless" 103.

For that reason, an unending contest that has enjoyed attention in literature since the coming into being of the Traditional Courts Bill becomes somewhat inevitable in the developing complexities of society. This contest relates to the balance to be struck between the advancement of customary law and the rights of women as a supposedly vulnerable group. This contestation owes its relevance and practicality to the default patriarchal inclement of the customary law system. The notion of patriarchy is apparently so embedded in customary law settings that it is recognised as *de facto* endemic.[19] Against the backdrop of endemic patriarchy and its consequent lack of protection for women, this chapter attempts a fair and critical balance of this contest. Significantly, it must be emphasised, customary law is the value centre of that critique. This balance must be considered in light of the appreciable knowledge limitations of the true episteme of customary law in South African jurisprudence.[20] In the end, a myriad of issues need to be discussed and or analysed to arrive at an informed decision. The changing social matrix, an endemic patriarchy and the perpetual vulnerability of women as a special interest group is critiqued in light of growing literature on cultural relativism, romanticisation of culture, the advancement of Western taxonomy in the place of traditional justice and the right to equality.

In the context of the myriad of potentially competing issues and or interests in the place of customary law in general and traditional justice in particular, the chapter is formulated as follows: Firstly, the composition of the traditional court will be discussed. The point of inquiry that falls to be made in this regard relates to the make-up of the *kgoro* in the indigenous cosmology. Who is eligible to attend? In the immediate, the available data was presented here in the light of the provisions of the Traditional Courts Bill B1 2017. With this in mind and unless otherwise necessitated by the context, the legal provisions used will be those of this latest Bill. Another point of inquiry is the issue of the presiding officers. How are they constituted and who makes these decisions? Finally, on the issue of court composition, the determination falls to be made on the attendance of women in these courts. This is a direct response to the alleged endemic patriarchy supposedly embedded in customary law than a desire to position women as perpetual victims of customary law as a system in its own right.

[19] Sanele Sibanda, 'When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation' (2010) 17(3) *Human Rights Brief* 1, 1.

[20] See Marius Pieterse, 'Killing it Softy: Customary Law in the Constitutional Order' (2000) 33 *De Jure* 35 where the author declares that "many judges and lawyers have little knowledge of customary law" 36. Despite this declaration, the same author characterises customary law as underdeveloped. It appears logic defying to characterise something as underdeveloped and unknown at the same time. This of course, it is submitted, is if the declaration of under development is some form of protection of shared ignorance.

Secondly, this chapter considered the structure of customary courts. The different types or layers of the system are set out diagrammatically and thereafter followed by an explanation of the matrix of each type or layer in the hierarchy.

Thirdly, and closely linked to the second issue, the phenomenon of traditional justice is discussed. Justice in action is interrogated in the light of the type of matters that are determined in the *kgoro* and how these matters are dispensed with.

Finally, this chapter grapples with epistemic matters in the context of the traditional court system. The submission in this regard is that the Traditional Courts Bill blurs the line of traditional taxonomy by saddling traditional courts with the burden of resembling the administration of justice as carried out in the state courts.

2. Composition of the Court

2.1 Introduction

The research undertaken by the South African Law Commission is an important starting point on this aspect for very practical reasons.[21] The Commission recognised the existence of traditional courts and, as such, pursued an endeavor to modernise these courts by aligning them with the constitutional framework.[22] This modernisation and conformation with the constitutional framework is made clear from the outset of the report. This is more evident in the summary of the recommendations where the customary law composition of the court is pitted against the South African democratic values and the right to equality in particular. From the start, it is apparent that the right to equality is centralised in the discussion on the recognition and legal effect and or standing of traditional justice. The endemic patriarchy, a notion already highlighted as besetting customary law and its application,[23] must have necessitated this need for centralisation of a rights culture in traditional courts and the right to equality as the focus of that worldview. Inevitably, the equality clause of the Constitution, as outlined in section 9, must be at the center of that inquiry into rights.[24]

[21] Project 90 'Report on Traditional Courts and the Judicial Function of Traditional Leaders' (2003).
[22] *Ibid* 1.
[23] Sanele Sibanda, 'When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation' (2010) 17(3) *Human Rights Brief* 1, 1.
[24] (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

It is important to note that the discussion of the equality provision and endemic patriarchy in the system of customary law is based on available data related to traditional justice. This discussion does not constitute an endorsement of the propositions presented in the report or those posited in other literature. Interestingly for this study, there is a concession in the report that women in the Limpopo Province acceded to the men as far as the right and duty to attend *Kgoro* was concerned.[25] This concession by the Law Commission and the specificity thereof is relevant to this study because of its locality, if anything. Therefore, when blanket provisions of gender bias and exclusions are mentioned anywhere in this chapter, it is important to consider their applicability to specific areas rather than applying them to the entire Limpopo Province. In negotiating this issue, sight should not be lost of the principles affecting constitutional invalidity as pronounced in *Merafong City v Anglogold Ashanti Ltd*.[26] This means that the invalidity of a provision is not dependent on the facts of the particular case. In the context of this investigation, it is crucial to clarify that women in the Limpopo Province cannot necessarily forfeit their constitutionally guaranteed rights. This is unless and until a proper balancing between the rights given up and the rights advanced can be achieved.

Against these qualifiers, the question that falls to be answered is; who is eligible to attend *Kgoro* according to existing literature?

2.2 Eligibility for attendance

A commonly held view is that the traditional courts are "sexist and gerontocratic".[27] The Law Commission report devotes some space to the sexism issue, as a hotly contested constitutional issue, while nothing is said on favouritism towards senior citizens. In keeping with the

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social, origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[25] Project 90 'Report on Traditional Courts and the Judicial Function of Traditional Leaders' (2003) 8.
[26] 2017 (2) SA 211 (CC).
[27] Ann Skelton, 'Tapping Indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and the Denunciation of Crime in South Africa' (2007) 1 *ACTA JURIDICA* 228, 237. Sexism is also pointed out in Discussion Paper 82 'The Harmonisation Of The Common Law And Indigenous Law: Traditional Courts And The Judicial Function Of Traditional Leaders' (1999) 4 and Project 90 'Report on Traditional Courts and the Judicial Function of Traditional Leaders' (2003) 10.

apparent stance of focusing on the much maligned sexism, the Discussion Paper 82, published four years before the Law Commission's Project 90 report, seem to suggest that women are not at all allowed in traditional courts except as litigants.[28] This position, although not expressed in such clear terms as in the Discussion Paper 82, is implied in the monograph of Tshehla.[29]

Tshehla moves away from the contestation between the cultural composition and the rights of equality that women enjoy. Wherefore, instead of pitting the cultural and equality rights against each other, he questions whether a fairer representation of women in these courts would alter the nature of these courts and their proceedings.[30] However, it should be acknowledged that this view is not universally held. Mnisi Weeks expressly calls for the integration of women in the traditional court set ups and in the decision making processes as well.[31] The call for integration suggests as well that she is writing from the position of women being excluded as a point of departure. Unlike Tshehla, who seem content with the status *quo* by expressing this as a comfort issue for Limpopo women, Mnisi Weeks envisages an active role for women in nourishing traditional justice. This nourishment draws from the presentation of traditional justice as a socially embedded system that operates from the ground up.[32] In essence, a well-integrated social system, aligned with indigenous cosmology, should recognise women as contributors to the establishment of a shared equilibrium. In fact, there is a school of thought that avers that the reconstitution of customary law demands the involvement of women in these courts and in the reconstitution of the social matrix and shared values.[33]

Furthermore, the comfort that Limpopo women apparently have in the endorsement of sexism is not shared everywhere. Claasens laments this sexism and avers that it leaves women actually vulnerable to harm at the hands of a biased and patriarchal system.[34] To justify her critique of the system, she draws on the evidence of women across the other parts of the country.[35]

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[28] Discussion Paper 82 'The Harmonisation Of The Common Law And Indigenous Law: Traditional Courts And The Judicial Function Of Traditional Leaders' (1999) 4.
[29] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 26.
[30] *Ibid.*
[31] Sindiso Mnisi Weeks, 'Beyond the Traditional Courts Bill: Regulating Customary Courts in Line with Living Customary Law and the Constitution' (2011) 35 *SA Crime Quarterly* 31, 35.
[32] *Ibid* 34.
[33] Jennifer Williams, & Judith Klusener, 'The Traditional Courts Bill: A Woman's Perspective' (2013) 29 *SAJHR* 276, 292.
[34] Aninka Claassens, 'Who Told Them We Want This Bill? The Traditional Courts Bill and Rural Women' (2009) 82 *Agenda* 9, 11.
[35] *Ibid* 11 – 13.

Considerable literature is geared towards discussing sexist composition of the traditional court system while claims of gerontocracy appears to be left unexamined in the main. This is notwithstanding that age is one of the factors to consider in determining equality in terms of section 9(3) of the constitution. In light of the aforementioned, the legislative text of the 2017 Traditional Courts Bill is provided herewith in depth to satisfy the inquiry into eligibility of persons in these courts. Clause 5 of the Bill provides that:

> (1) Members of a traditional court must —
> *(a)* consist of women and men, pursuant to the goal of promoting the right to equality as contemplated in section 9 of the Constitution; and
> *(b)* be convened by a traditional leader or any person designated by the traditional leader.
> (2) Traditional courts must promote and protect the representation and participation of women, as parties and members thereof.
> (3) *(a)* The Cabinet member responsible for the administration of justice must —
> (i) put measures in place in order to promote and protect the fair representation and participation of women, as parties and members in traditional courts in order to create an environment that facilitates and promotes the meaningful and voluntary participation of women in accordance with the constitutional value of non-sexism;
> (ii) put measures in place in order to promote and protect vulnerable persons, with particular reference to the elderly, children and the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity; and
> (iii) by not later than 30 September of every year, submit a prescribed report to Parliament containing the information contemplated in subparagraphs (i) and (ii).
> *(b)* The Commission for Gender Equality referred to in Chapter 9 of the Constitution must, in its report to Parliament each year, report on the participation of women and the promotion of gender equality in traditional courts and may, to this end, make recommendations on legislative and other measures.

Following the outcry emanating from the Traditional Courts Bill B1 – 2012 from rights groups,[36] it is no surprise that such a strong emphasis was put on gender equality in the composition of the courts. Not only does the clause require the advancement of the equality rights as enshrined by the Constitution but actually puts measures in place to ensure both the realisation of this need and its monitoring. Clause 5(3)(a)(i) is prescriptive of the measures to

[36] A summary of the outcry and process of consultation is succinctly captured in Thuto Thipe, Monica De Souza, & Nolundi Luwaya, 'The Advert Was Put up Yesterday: Public Participation in the Traditional Courts Bill Legislative Process' (2015) 60 *New York Law School Law Review* 519 – 551.

be taken in ensuring the realisation of equality while clause 5(3)(b) takes care of the monitoring by a Chapter 9 institution. The intended legislative text underscores the opinion by Mnisi Weeks that traditional justice is a socially embedded system operating from the ground up. When all is said and done, the Bill envisages a system of traditional justice that is representative of women as a previously excluded group.

The current study is not quantitative by any stretch of the imagination. Despite this concession, it is not rocket science to make a fair assumption that the cosmic matrix is constituted of the youth as well. Clause 5(3)(a)(ii) makes these important facets of indigenous cosmology more of an afterthought than an integral part of the system. In fact, the clause talks about the promotion and protection of youth with other identified vulnerable groups. Treating the youth as a mere footnote assumes that a system favouring older generations (gerontocracy) is acceptable as long as the rights of the young are protected and promoted. This positioning is not without deeper problems in reality.

A Sepedi idiom proclaims that *rutang bana ditaola gore le seye le tsona Badimong*. The essence of this idiom is skills and or knowledge transfer. At the core of it, it implores the old (sages of community values, morality and knowledge) to share their knowledge and skills with the young to ensure continuity of culture, customs and or practices. This study posits that the wisdom of this idiom is applied across the full spectre of cultural life. Naturally, this means that traditional justice should not be exempted from the idiom's instructional wisdom. To not specifically embed the participation of the youth as an interest group and successors in title in the composition of traditional courts is actually a violation of a cultural tenet and an infringement of the equality provisions in terms of section 9(3).

Unfortunately, the preoccupation in jurisprudence is on the involvement of women in traditional justice. This is implicitly accepted as a far more pressing issue compared to the equally offensive gerontocracy. It is in that spirit that the involvement, or lack thereof, of women is considered as an independent subheading in the composition of the court.

2.3 Involvement of women

Another appreciable caveat must be put forward in dealing with customary law matters in general and the rights of women as an interest group. This caveat is intended to underlie the fact that the distortion of customary law is not a claim that falls to be made at the feet of the colonisers alone. Natives have reacted to the unjust wars of colonisation by participating in the erosion of shared interests and development of customs. In this regard, it is important to

signal that the relegation of women to the status of perpetual minors and the sufferance of endemic patriarchy is a design of both colonisation and a response or defence by men to loss of power to the colonisers.[37]

On this view, it is submitted that the pervasion of customary law is a negotiated one. The re-indigenisation theories, therefore, not only have to content with colonial and or ruins of apartheid but equally the negotiated pervasion involving customary elites.[38] To support the opinion of Williams and Klusener, it is arguable that patriarchy is a design system and not necessarily an innate cultural practice. The essence of this is that the endemic nature of patriarchy in customary law is the progressive manifestation of officialdom as opposed to the true position of living laws of the Natives.[39] The stains of this pervasive negotiation has, regrettably, maintained a foothold on the indigenous cosmology of Natives. That foothold has, to a large degree, enabled literature to pass off perversion as if an ahistorical feature of the reality of Natives.[40] This official position has been unduly ossified in written documentations of customary law as if the natural order or the worldview of the people. As a result, the stain of official customary law prevents living law from evolving towards greater recognition of the rights of women.[41]

The pervasion of the cosmic traditional order as a collusion between settlers and customary elites may be a topic of an independent study on its own. But despite its potential interest, this does not fall within the broad and narrow scopes of this current investigation. For this study, it suffices to record the experiences that women have had with traditional justice according to available literature. No source enjoys precedence over any other because the intention here is to bring to light the experiences of women in traditional courts as recorded. The validity of this literature is analysed in Chapter 6 against the data gathered

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[37] Alice Armstrong, et al 'Uncovering Reality: Excavating Women's Rights in African Family Law' (1993) 7 *International Journal of Law & the Family* 314, 325.

[38] Jennifer Williams, & Judith Klusener, 'The Traditional Courts Bill: A Woman's Perspective' (2013) 29 *SAJHR* 276. The authors record this pervasion in the following terms: "[c]ustomary law took on a particularly authoritative and patriarchal cast because it was the product of negotiation between colonial and customary elites. It was in the interests of traditional leaders to provide an account of indigenous law which emphasised the privileges of senior men whose power was under threat, not only from colonial encroachments but also from increased opportunities for youth and women to achieve independence from tribal structures through migrancy and wage labour" 278.

[39] Jennifer Williams, & Judith Klusener, 'The Traditional Courts Bill: A Woman's Perspective' (2013) 29 *SAJHR* 276; 278.

[40] Tshepo Manthwa, *Re-ordering the Existing Legal Hierarchy to Reinstate African Law to its Rightful Place as the Primary Component of the Legal System of South Africa (Azania)* (LLD thesis, UNISA 2022) 65.

[41] Jennifer Williams, & Judith Klusener, 'The Traditional Courts Bill: A Woman's Perspective' (2013) 29 *SAJHR* 276; 278.

ethnographically. The monograph by Tshehla[42] is of particular interest because it is located in the Limpopo Province. However, it must be noted that this occurred in various parts of the province and outside the regions sampled in this study.

What is of interest about the monograph is that it records proceedings of two cases before a traditional justice *fora*. In both cases, the complainants are women appearing in their own name and person. In case 1, the complainant is recorded as Sylvia,[43] and in case 2 just as the wife.[44] The question that cannot be avoided is whether this fact of women appearing as complainants in their own names and persons is an endorsement of the proposition advanced in the Discussion Paper 82 as highlighted above?[45] While Tshehla does not offer a direct response to that proposition, he sheds some light on the issue in less than idealistic terms. His gripe with traditional courts handling domestic dispute arises from the male domination in the attendance of the cases.[46] Two inferences can be drawn from Tshehla's reservations about the composition of traditional courts and their jurisdiction in domestic issues. Firstly, nothing suggests from the male domination in the composition that women are completely barred from attendances. In fact, if one was to use logical deduction from the phrase "male domination" it would be that women are or were in attendance though not in pleasing numbers. To further support this deduction, Tshehla alludes that "it could boost the image of the court if women were represented in a more active way".[47] All things considered, it cannot be emphasised enough that the women in the sample area were comfortable with the composition. This fact and its legal ramifications, as already noted, must be separated.

Secondly, the male domination is an endorsement of the official culture of patriarchy. This philosophical outlook of the court is best reflected in this question by one of the councillors: "*Where was your husband because it is strange that it should be your son's responsibility to buy a goat for the function"?*[48] Tshehla correctly interprets this as evidence of the family arrangement in terms of which the man assumes the position of head of the family and the woman as a subordinate.[49] It is evident from the presentation in the two cases that the involvement of the women in the cases does not suggest a clear commitment to the rights guaranteed in terms of section 9 of the Constitution. Such evidence, naturally keeps the

[42] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005).
[43] *Ibid* 21.
[44] *Ibid* 22.
[45] See footnote 23 above.
[46] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 26.
[47] *Ibid*.
[48] *Ibid* 24.
[49] *Ibid* 26.

contest between the culture of Natives and the protection of women's rights lively. To put this debate under microscopic lenses, the following recorded response to the public hearings on the Traditional Courts Bill is crucial.

> The thing is that we in South Africa, we are one. We, who live in the rural areas and in the towns and in the townships and in the farms - we are all South Africans. When we vote we use the same ballot papers. But then why do we remain outside democracy? We are saying that we don't want this law. We repeat. We don't like it and we have never been comfortable with it... Now we have voted and we have a parliament that allows us to talk. Who told them we want this Bill? Rural Delegate from Nkomazi – Mpumalanga.[50]

Before engaging with the text of the above quotation, it suffices to point out that it is a response to the Traditional Courts Bill B1 – 2012 and not the B1 – 2017. The significance of this location is important to avoid grouping the cultures together in these matters. Furthermore, its relevance is retained by the interpretation this study attaches to it. As such the following deep lying issues relating to traditional justice are necessary to ventilate.

The first issue relates to the seemingly negligible idea of othering so far as traditional justice is concerned. This is discussed fully in heading 4 under the justice factor. Secondly, there is a direct opposition of the comfort, or in this case the lack thereof, that rural women share with the traditional court set up. Thirdly, this delegate expresses a lack of interest in traditional justice through the legislative process. The rejection of the B1 – 2012 *in toto* underscores the notion that a reformulation that protects or reproduces colonial legacy will naturally ossify living law evolution.[51] What is not as apparent from this rejection is whether the delegate rejects traditional justice or an attempt to validate traditional leadership through B1 – 2012. The safe inference appears to lie in favour of a total rejection of Bill B1 – 2012 and traditional justice as a form of exclusion of the benefits of democracy. For context and locality, the fourth observation relates to the fact that the quoted delegate noted her views in the Mpumalanga Province. This study is not in any way advancing a 'homogenous ideology'[52] nor does it ignore individual views across the gender divide. Equally, the cultural diversity existing amongst the

[50] Aninka Claassens, 'Who Told Them We Want This Bill? The Traditional Courts Bill and Rural Women' (2009) 82 *Agenda* 9, 9.
[51] Sanele Sibanda, 'When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation' (2010) 17(3) *Human Rights Brief* 1, 1.
[52] This ideology "assumes that indigenous culture is the same across a designated racial/cultural group and ignores variations of culture between individuals as well as between different subgroups within the broader group". See Marius Pieterse, 'Its a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism' (2001) 17(3) *SAJHR* 364, 373.

Natives must be appreciated and an observation of the groups studied for ethnographic sampling must retain its authenticity for a valid study.

The underlying reservations expressed by the interviews as captured by Claassens is directed at the male domination facet of traditional justice.[53] A short synopsis of the experiences of women in traditional courts is provided for context:

i) The court promotes the notion of the perpetual minority status of women. This is because it is expected that women be represented by a male relative. Furthermore, the composition of the court would naturally mean that only men are consulted in the decision making process;

ii) There is a lack of accountability in the courts. The direct result is the persecution of women who challenge the status *quo*;

iii) There is an apparent desire to affirm old customs that void the woman's consent. The example made here was the practices relating to *ukungena* (a practice that allows the male relative of the deceased husband to take over his conjugal benefits). The complaint of the interviewee is such that her consent was not sought nor deemed necessary;

iv) An imbalance in relation to the death rituals. Widows are completely barred from traditional courts. This inevitably mean that they have no protection were they to suffer some form of injustice;

v) The court is insensitive to the issues affecting women. A direct consequence of lack of representation manifests an attitude that leaves rape victims without comfort, as a noted example in the interviews;

vi) The promotion of gender bias. Resolution of matters is not based on merits but standing in society. Women naturally come worse off in terms of standing as perpetual minors.[54]

The recorded interviews paint a very grim picture of women's experiences in traditional justice. What is apparent though, is that there are serious problems and the central feature of these problems is patriarchy. It would appear that this pervasive negotiation of officialdom has

[53] Aninka Claassens, 'Who Told Them We Want This Bill? The Traditional Courts Bill and Rural Women' (2009) 82 *Agenda* 9 – 22.
[54] Aninka Claassens, 'Who Told Them We Want This Bill? The Traditional Courts Bill and Rural Women' (2009) 82 *Agenda* 9, 11 – 14.

resulted in a situation where traditional justice is the preserve of adult males.[55] In principle, this relegates traditional justice to some sort of a gerontocratic gentlemen's lounge. This analogy and its practical result is the total exclusion of women from the development of the jurisprudence in traditional courts.[56]

The experiences of women in traditional courts appear consistent as recorded in literature. One interesting intersection of legal text and reality is the issue of effectiveness. Most of the complaints recorded in the interviews seem to have been made moot by an expansive provision of equality in clause 5 of the B1 – 2017 as already alluded to above. Regardless of this, one issue that Mnisi Weeks has raised is the ideal of effective protection from some of the harmful customary practices.[57] For example, the practice and or ritualisation of mourning and the unequal treatment of men and women in this regard is worth pointing out. Makgahlela highlights that some aspects of mourning and widowhood are perceived as dehumanising.[58] Over and above the dehumanising aspects of widowhood, the records show a complete barring from the traditional court setup. This social implications of widowhood has far reaching effects and impacts on the life of the widow in many ways. Whilst the psycho-social aspects fall outside the purview of this study, it is equally worth pointing out that the exclusion of widows is not a standalone legal issue. A determination of the validity of this exclusion requires a more comprehensive inquiry than a mere comparison to the equality provisions in the Constitution. The logic and conceptualisation of this exclusion must be determined against customary law's values of fairness amongst other things.[59] According to Aiyedun and Ordor, the concept of fairness in the traditional setup is different from the common law notions as endorsed by the state law.[60] According to this view, the difference does not necessarily mean that the traditional setup is not rights based.[61]

The example above is grounded in the underwhelming experience of women in traditional courts. With that being so, the matrix of effective protection is one that must be considered

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[55] Sindiso Mnisi Weeks, 'Traditional Courts Bill: Access to Justice or Gender Trap?' in Thandabantu Nhlapo, Emma Arogundale, and Harry Garuba (Eds) *African Culture, Human Rights and Modern Constitutions* (University of Cape Town 2013) 25.
[56] *Ibid.*
[57] *Ibid* 33.
[58] Mpsanyana Makgahlela, *The Psychology of Bereavement and Mourning Rituals in a Northern Sotho Community* (PhD in Psychology, University of Limpopo, 2016) 42.
[59] Tom Zwart, 'Relying on Africa's Strengths in the Area of Human Rights: The Receptor Approach' in Thandabantu Nhlapo, Emma Arogundale, and Harry Garuba (Eds) *African Culture, Human Rights and Modern Constitutions* (University of Cape Town 2013) 9.
[60] Adenike Aiyedun & Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law Democracy & Development* 154, 163.
[61] *Ibid*.

widely and not simply within the purview of the state's law. The limitation of legal monism has been flagged already as unjustifiable and impractical.[62] Subsequently, the engagement with issues of experience need not be considered in isolation or as a strict legal phenomenon. The broad effective protection of women must be championed through traditional courts in lieu of a customary law value central inquiry. This, in essence, require a bottom up system which involves the participation of women in all facets of traditional life in the indigenous cosmology, especially those that have a direct bearing on their rights.[63] The idea remains that culture ought not to be used as a form of privatisation of offences.[64]

The overall lack of involvement of women in traditional justice may lull one into supporting wild propositions that aver that the cosmic arena is inherently dangerous to women's interests.[65] This position again goes back to the negotiated perversion of customary law by colonialists and the traditional elites.[66] And as well, considers matters of women's rights in terms of indigenous cosmology as distinct legal issues and not so much part of the myriad of matters in the influx of traditional life. This argument is expounded fully in heading 5 below. What is apparent, by way of summary on this matter, is that the official position adopted by the legislature in the Traditional Courts Bills is an endorsement of patriarchy and best reflects the power dynamics in the making of law.[67] The B1 – 2012 had various opposition to it not least coming from women interest groups and was consequently changed in the B1 – 2017. Clause 5 in B1 – 2017 seems to be going someway in the correction of the dynamics of law making in traditional courts. It is evident, on the strength of the current clause 5, that lobby groups won the day and ensured that the voice of women in this *fora* will matter once formally promulgated as an Act of Parliament.

In sum, the evidence on women involvement points towards clear problems and current exclusion in the composition of the court. The gerontocratic gentlemen's lounge besetting the

[62] Chimu Himonga, & Fatimata Diallo, 'Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law' (2017) 20 *PER / PELJ* 1, 14.
[63] Sindiso Mnisi Weeks, 'Beyond the Traditional Courts Bill: Regulating customary courts in line with living customary law and the Constitution' (2011) 35 *SA Crime Quarterly* 31, 35.
[64] Tom Bennett, 'Legal Pluralism and the Family in South African Law: Lessons from Customary Law Reform' (2011) 25 *Emory International Law Review* 1029, 1034. See also Kgopotse Maunatlala & Charles Maimela, 'The Implementation of Customary Law of Succession and Common Law of Succession Respectively: With a Specific Focus on the Eradication of the Rule of Male Primogeniture' (2020) 53 *De Jure* 36, 52-53.
[65] Aninka Claassens & Sindiso Mnisi, 'Rural Women Redefining Land Rights in the Context of Living Customary Law' (2009) 25 *SAJHR* 491, 491.
[66] *Ibid* 516.
[67] Aninka Claassens & Sindiso Mnisi, 'Rural Women Redefining Land Rights in the Context of Living Customary Law' (2009) 25 *SAJHR* 491, 512.

system at present suggest that appointment of presiding officers will again fall to be made along patriarchal lines.

2.4 Appointment of presiding officers

The Preamble to the Traditional Courts Bill B1 – 2017 confirms that some provisions of the BAA are currently still applicable in the administration of traditional justice. One such provision is section 12(1) of the BAA.[68] The provisions of section 12(1) are limited to only civil litigation between and or amongst Natives. The second qualifier relates to the cause of action. The section further limits the Chief's powers to matters arising out of Native law. In effect, the Chief only had powers of adjudication in respect of matters arising out of customary law. The corresponding jurisdiction in respect of criminal offenses is decreed by section 20(1).[69]

Similarly, the powers of the Chiefs are limited to offences that arise out of Native law as well. In the absence of legislation regulating traditional justice, these provisions shall remain in force. To say this is scandalous would be an understatement. The BAA introduced the infamous repugnancy clause and oversaw the most severe pervasion of customary law by making its application subject to a foreign value system. To reward it with continuous application, it is submitted, is to suggest that its perversion of customary law is legally insignificant, or worse, justifiable. As already highlighted in this study, the Law of Evidence Amendment Act[70] is no price either. The application of customary law is still qualified in section 1(1) thereof.

The long and short of it is that the old order legislation remains applicable and continues to confer traditional leaders with judicial authority. In the Discussion Paper 82, the position was advocated for the retention of these powers.[71] In fact, it is duly noted that traditional leaders were in favour of the increase of their powers and those of their councils.[72] The councillors were previously appointed by the chief in the exercise of his powers.[73] This position is altered

[68] The Governor-General may authorize any native chief recognised or appointed under sub- section (7) of section two to hear and *determine civil claims arising out of native law* and custom by Natives against Natives resident within his area of jurisdiction brought before him. [Emphasis added].
[69] The Governor-General may grant to any native chief jurisdiction over members of his own tribe resident or being upon tribal land or in a tribal location within his area *in respect of offences punishable under native law and custom*. [Emphasis added].
[70] 45 of 1988.
[71] Discussion Paper 82 'The Harmonisation Of The Common Law And Indigenous Law: Traditional Courts And The Judicial Function Of Traditional Leaders' (1999) 7.
[72] *Ibid.*
[73] Project 90 'Report on Traditional Courts and the Judicial Function of Traditional Leaders' (2003) 7.

by section 16 of the Traditional and Khoi-San Leadership Act.[74] This is a layered provision in the establishment, management and operation of a traditional council in the following respects; first, in sub-section (1) the Act makes provision for the Minister and the Premier to appoint councils.[75] The former appoints a council for a Kingship or Queenship whilst the latter appoints for a principal traditional leader or a traditional community as the case may be. Second, there is a democratisation of the process of appointment of council. This is derived from the fact that in terms of sub-section (2)(a) the Minister and the Premier, as the case may be, must effect the appointment of council in consultation with the relevant stakeholders as provided by the provisions hitheto.[76] Furthermore, subsection 4(a)(1) specifically limits the term of office of each council to five years.[77] Third, the provisions of sub-section 2(b) makes it compulsory to include a minimum of no less than a third of female representatives in council.[78] Fourth, sub-section (5) gives the Premier the prerogative to determine the

[74] 3 of 2019.

[75] (1) Once the President has recognised a kingship or a queenship, or a community has been deemed to be a principal traditional community as contemplated in section 63 (8) (c), or the Premier has recognised a traditional community as contemplated in section 3, that kingship or queenship, principal traditional community or traditional community must, within a period of two years of such recognition or any such further period as the Minister, in the case of a kingship or a queenship, or a Premier, in the case of a principal traditional community or a traditional community, may determine by notice in the Gazette or Provincial Gazette, as the case may be, establish a kingship or queenship council, principal traditional council or traditional council, as the case may be: Provided that in any instance where a kingship or queenship, principal traditional community or traditional community has been recognised prior to the publication of the formula contemplated in subsection (2), the period of two years shall commence from the date of publication of such formula.

[76] (2)(a) A kingship or queenship council, a principal traditional council and a traditional council consists of the number of members as determined by the Minister, by formula published by notice in the Gazette after consultation with —

(i) in the case of a kingship or queenship council or principal traditional council—

(aa) the king or queen, or principal traditional leader, as the case may be;

(bb) a forum of not more than five members of the royal family designated by the royal family; and

(cc) a forum of not more than 20 senior traditional leaders under the kingship or queenship or principal traditional community, designated by the senior traditional leaders from amongst themselves;

(ii) in the case of a traditional council, the relevant Premiers and provincial houses:

Provided that the formula must be published in the Gazette within two years from the date of commencement of this Act.

[77] The term of office of the members of a traditional council, excluding the senior traditional leader, is not more than five years and must be aligned to the term of office of the National House: Provided that, notwithstanding anything to the contrary contained in any law, the term of any traditional council that was established and constituted prior to the commencement of this Act, will expire on 31 March 2022: Provided further that any term of office of any such council constituted or established after the commencement of this Act, shall expire every five years on 31 March, calculated from 31 March 2022.

[78] (b) At least a third of the members of a kingship or queenship council, principal traditional council or traditional council must be women: Provided that if this requirement cannot be met, the Minister may determine a lower threshold for the particular kingship or queenship council or the relevant Premier may determine a lower threshold for the particular principal traditional council or traditional council.

jurisdictional limits of traditional councils.[79] Fifth, the provisions of sub-section (14) provides for an eligibility criterion for appointment into council,[80] and on the converse, sub-section (11) makes provision for removal of a councillor for any of the factors mentioned therein.[81]

It is fair to opine that the layered application of section 16 is clear and an improvement from the repealed section 3 of Act 41 of 2003, bar the retention of erstwhile minimum application of female representation in council. In an attempt to balance the constitutional guarantee of equality and the demand for more power by traditional authorities, subsection 2(b) makes it mandatory to include a minimum of 33 percent of women in the composition of councils. It is evident that, at least that is the submission of this study, the legislature fails in that balancing

[79] (a) The Premier concerned must, by notice in the relevant Provincial Gazette and in accordance with this Act, recognise a kingship or queenship council, principal traditional council or traditional council for such kingship or queenship, principal traditional community or traditional community and define its area of jurisdiction, indicating the portions of land forming part of such area of jurisdiction, and having regard to the provisions of section 3 (1) (b) and (2) (a) in the case of a kingship or queenship: Provided that the Premier must inform the President and the Minister of any recognition of a kingship or queenship council: Provided further that the area of jurisdiction of a traditional council must include the area of a traditional sub-council, where applicable.
(b) The notice referred to in paragraph (a) must contain the names of the council members.
(c) The area of jurisdiction contemplated in paragraph (a) must be mapped and such map must be published under the notice referred to in paragraph (a).

[80] (14) A person is not eligible to be elected or selected as a member of a kingship or queenship council, principal traditional council or traditional council if that person —
(a) is not a South African citizen;
(b) is under 18 years of age;
(c) has been convicted of an offence in respect of which he or she was sentenced to imprisonment for more than 12 months without the option of a fine;
(d) is an unrehabilitated insolvent or has entered into a compromise with his or her creditors;
(e) is of unsound mind and has been so declared by a competent court;
(f) is or becomes a full-time member of a municipal council;
(g) is elected as a member of a provincial legislature;
(h) is elected as a member of the National Assembly;
(i) is appointed as a permanent delegate in the National Council of Provinces;
(j) is elected to a full-time position in any house of traditional leaders; or
(k) does not reside within the area of jurisdiction of the kingship or queenship council, principal traditional council or traditional council, as the case may be.

[81] (11) A member of a kingship or queenship council, principal traditional council or traditional council must vacate his or her office if —
(a) he or she ceases to be a South African citizen;
(b) he or she has been convicted of an offence and sentenced to imprisonment for more than 12 months without the option of a fine;
(c) he or she tenders his or her resignation;
(d) he or she is declared mentally unfit or mentally disordered by a court;
(e) the period for which the member was selected or elected, as the case may be, has expired;
(f) he or she becomes disqualified in terms of subsection (14);
(g) he or she has been removed from office in terms of the code of conduct;
(h) he or she no longer resides within the area of jurisdiction of the kingship or queenship council, principal traditional council or traditional council, as the case may be; or
(i) he or she is a selected member and his or her recognition as a traditional leader has been withdrawn.

act. 33 percent is not an equal representation of women in council and as well, it is submitted, betrays the bottom-up structure of traditional communities.

But for the three points of contention raised in the discussion paper, *vis* (i) the absence of separation of power, because traditional leaders perform both executive and judicial functions; (ii) the qualification requirement necessary to adjudicate. Traditional leaders have, unless otherwise established by fact, no Western style legal training; and (iii) failure to record proceedings.[82] These criticisms in fact confirm the legal standing of traditional leaders as presiding officers in traditional courts. So this point is accepted without exception. The same cannot be sustained in respect of criticism (ii) – (iii). Who is or should be qualified to preside over traditional courts? Indigenous cosmology is best understood by the people living according to that system. Ordinarily, the qualification aspect should be derived from the fact of living according to that system and not being trained in respect of a foreign worldview. Any suggestion to the contrary, is no less than the promotion of epestimicide and the corresponding deprivation of traditional capital.[83] On the other hand, decrying the absence of official records is a tricky issue to negotiate. The traditional capital relies on the storage of folklore in the wisdom of community sages. Conversely though, the storage is vulnerable to a lack of continuation and possible abuse as evidenced by the perversion of law through the manifestation of patriarchy. At the end, despite all other appearances, the two criticisms have this in common; an unflattering attempt to level up these courts with the state courts. This benchmarking has inherent problems of eroding traditional knowledge and law as argued in Chapter 2 above.

At the end, it is clear that the BAA remains applicable in traditional courts in so far as it grants these courts civil and criminal jurisdiction, on the one hand. While on the other hand, the Traditional and Khoi-San Leadership Act[84] enters the fray to determine the constitution and appointment of traditional councils. The next question is, what is the structure over which these appointees preside over?

[82] Discussion Paper 82 'The Harmonisation of The Common Law and Indigenous Law: Traditional Courts And The Judicial Function Of Traditional Leaders' (1999) 13 – 15.
[83] In fact, there is a view that customary is a human rights based system of law that should be used to resolve issues emanating from it. See Nomthandazo Ntlama, 'The Centrality of Customary Law in the Judicial Resolution of Disputes that Emanate from it – *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC' (2019) 40(3) *Obiter* 202, 208.
[84] Act 3 of 2019.

3. Structure of the Courts

Traditional dispute resolution is a fluid and layered system.[85] The fluidity of this layered system is intended to increase the effectiveness of dispute resolution.[86] At least two layers of this system were recognised by Natives prior to colonisation.[87] The operation of the two-tier system applied, the study surmises, unadulterated living customary law during this period. This position was changed by the BAA in section 10, which constituted the Natives Commissioners' Court,[88] and section 11 which introduced the infamous repugnancy clause. Until 1986 when the Commissioners' Courts were abolished in terms of the Special Courts for Black Abolition Act,[89] it set as an apex court in all customary law matters. This section made the governor general the person responsible for the constitution and appointment of commissioners. Deductible logic would seduce one into the suggestion that a three tier system was created by the addition of the commissioner's court. However, the omission of the headmen's courts from the ambit of the BAA suggests that from a colonial perspective, traditional justice retained a two tier system of dispute resolution that is: the chiefs' court as the lowest court and the commissioner's court as the apex court of traditional dispute resolution. This position prevailed until abolition of section 10 of the BAA by Act 34 of 1986.

Pursuant to this abolition of the commissioner's courts, Project 90 of the Law Commission was undertaken. The discussion paper appears to recognise the same pre-colonial two tier system of traditional dispute resolution.[90] The headmen's courts are the lowest recognisable form while the chief's court is the apex. In spite of this, the final report takes a more practical approach and acknowledges the role of the family council in dispute resolution.[91] The Project 90 report maintains that this practicality of an added base forum does not affect the fluidity

[85] Jennifer Williams, & Judith Klusener, 'The Traditional Courts Bill: A Woman's Perspective' (2013) 29 *SAJHR* 276, 281.
[86] *Ibid.*
[87] Vijyalakshmi Singh, *South African Indigenous Courts: Challenge for the Future* (LLM, UNISA, 1994) 1.
[88] Section 10(1) provides that [t]he Governor-General may, by proclamation in the Gazette, constitute courts of native commissioners for the hearing of all civil causes and matters between Native and Native only.
[89] 34 of 1986. Section 1(1) provides that [w]ith effect from the date of commencement of this Act the Commissioners' Courts constituted under section 10 of the certain courts. Black Administration Act, 1927 (Act No. 38 of 1927),and the Appeal Courts for Commissioners' Courts constituted under section 13 of that Act, are abolished, and the powers conferred on a Commissioner in terms of section 9 of that Act shall lapse.
[90] Discussion Paper 82 'The Harmonisation of The Common Law and Indigenous Law: Traditional Courts And The Judicial Function Of Traditional Leaders' (1999) 16.
[91] Project 90 'Report on Traditional Courts and the Judicial Function of Traditional Leaders' (2003) 5.

of traditional justice.[92] The diagrammatic representation in figure 3.1 is an illustration of this position.

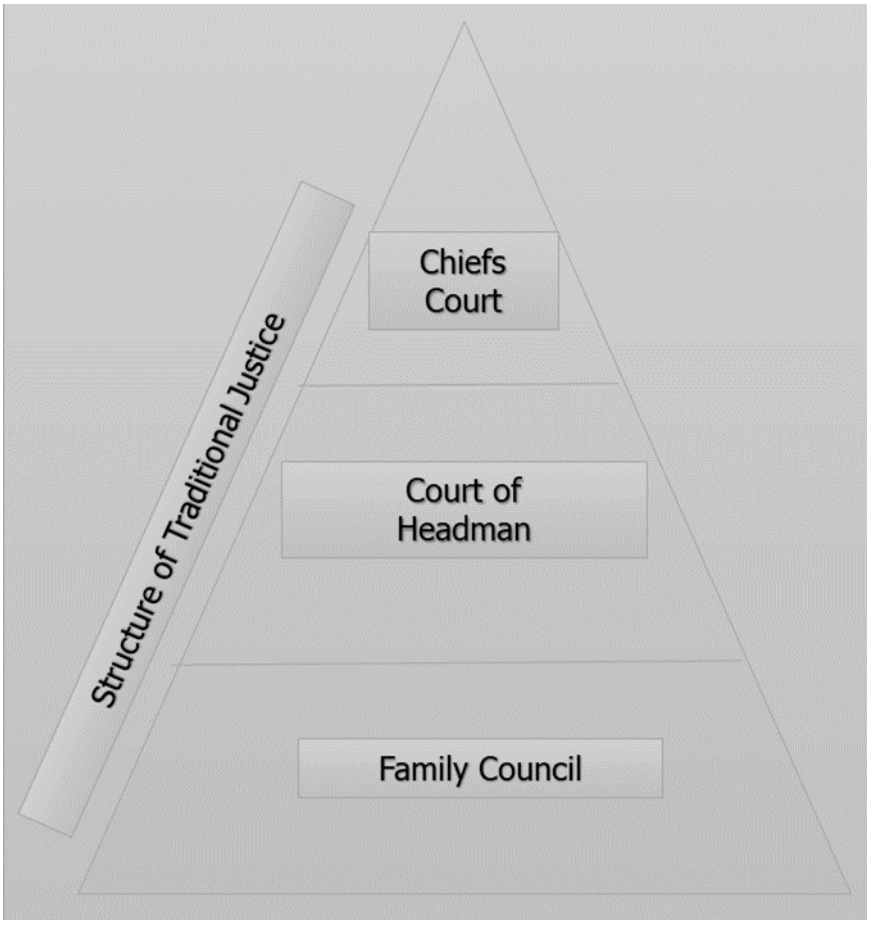

Figure 3.1. Diagrammatic representation of traditional justice.

The diagrammatic representation in figure 3.1 above confirms the view that these courts are constructed from the ground up.[93] In effect, the lowest form of dispute resolution is in the family council. To buttress the point of a ground up notion of traditional justice, regard is had to case 2 of Tshehla's monograph.

> *Q: Are you aware that if there is a family dispute you should go and report to the people who stay next to you?*
> *A: Yes.*[94]

[92] *Ibid*.
[93] Sindiso Mnisi Weeks, 'Beyond the Traditional Courts Bill: Regulating customary courts in line with living customary law and the Constitution' (2011) 35 *SA Crime Qaurterly* 31, 34.
[94] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 25.

The councillor in the court was the inquirer, while the complainant in the case provided the answer. The nature of the question and directness of the given answer suggests that the family council is the norm as opposed to an exception. Despite this, it is submitted that the question can actually be understood in another way as well. Firstly, and the obvious understanding would be its literal meaning as referring to the immediate family or clan members of the complainant. Secondly, by way of an extensive interpretation, this may refer to the specific community members of the complainant. Nothing should, without evidence, suggest that the addition of multiple layers to traditional justice would affect its fluidity. If anything, within the boundaries of good practice and advancement of true traditional justice, the complainant should get the most satisfaction from the available forums for dispute resolution. Clause 6(3) of the Bill provides that "[t]he traditional court system is made up of such different levels as are recognised in terms of customary law and custom".[95] This may mean that the various communities are free to add to the structure of the courts according to their own social matrix. What is important, the study surmises, is heralding substantive justice in the resolution of disputes.

4. The justice factor

4.1 Introduction

Generally, the presiding officers are familiar with the disputants and as such there is a natural inclination to mediate the issue.[96] The implication is that there is often a shared sense of camaraderie embedded in the system of traditional justice. This factor underscores the substantive informality [and flexibility] of the court and the inducement of comfort about the ambience of the court.[97] Yet, the substantive informality of the process must be distinguished from a relegation of the court as an administration of informal justice as suggested by some authors.[98] This relegation to informality, whatever the intention, trivialises the nature of traditional justice as a phenomena of South African law.[99] It equally furthers the lack of express recognition in terms of section 166 of the Constition. Furthermore, it opens the court to ridicule as per the view of Somaru and Rautenbach questioning whether traditional courts

[95] B1 – 2017.
[96] Rajesh Choudree, 'Traditions of Conflict Resolution in South Africa' (1999) 1 (1) *AJCR* 9, 14.
[97] *Ibid.*
[98] Jennifer Williams, & Judith Klusener, J 'The Traditional Courts Bill: A Woman's Perspective' (2013) 29 *SAJHR* 276, 276.
[99] WA Baloyi et al, '"When the law fails to serve us, we must serve as the law": The Role of Traditional Leaders in Conflict Resolution at Bungeni, Limpopo Province' (2022) 1(2) *AJLJS* 61, 61.

should be referred to as courts to begin with.[100] The audacity of this questioning is perhaps the premise on which the authors relies to justify their opinion that this *fora* has a minimal role to play in the future justice of South Africa, and criminal law in particular.[101]

Notwithstanding these reservations, care must be taken to reiterate that traditional courts were formally recognised in terms of the BAA and as such unless otherwise regulated by another legislation, the provisions of the BAA will remain in force. Furthermore, the continued validity of the provisions of sections 12 and 20 of the BAA, quoted above, is supported by section 2 of schedule 6 of the Constitution.[102] Therefore, any reference to these courts as informal courts is not legally justifiable. In fact, section 16 of schedule 6 actually refers to traditional courts in name.[103] Additionally, *In re Certification of the Constitution of the Republic of South Africa,* the Constitutional Court recognised these courts as falling within the scope of section 166(e).[104] In a different but related issue, in *Bangindawo & Others v Head of the Nyanda Regional Authority; Hlantlala v Head of the Western Tembuland Regional Authority & Others* the court declared that the failure by the interim Constitution to outlaw Regional Authority Courts suggests that they should continue to be operational.[105] This proposition must be qualified by the fact that the existence of these courts must pass constitutional scrutiny.[106]

The effect of the above is that these are courts of law and the discussion on their nature and purport proceeds from that premise. The aspect of informality is no more than an attempt to trivialise them.[107]

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[100] Navilla Somaru & Christa Rautenbach, 'The Indian Approach to Criminal Justice: The Role of Traditional Courts as Alternative Dispute Resolution Mechanisms' (2020) 53(2) *CILSA* 1, 4.
[101] *Ibid* 5.
[102] (1) All law that was in force when the new Constitution took effect, continues in force, subject to -
(a) any amendment or repeal; and
(b) consistency with the new Constitution.
(2) Old order legislation that continues in force in terms of sub item (1)-
(a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
(b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.
[103] Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone 'holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office […].
[104] [1996] ZACC 26 para 199.
[105] (1998) 2 All SA 85 (Tk) at 94.
[106] *Mhlekwa v Head of Western Tembuland Regional Authority & Another; Feni v Head of the Western Tembuland Regional Authority & Another* [2000] JOL 7021 (Tk) at 22.
[107] WA Baloyi et all, '"When the law fails to serve us, we must serve as the law": The Role of Traditional Leaders in Conflict Resolution at Bungeni, Limpopo Province' (2022) 1(2) *AJLJS* 61, 61.

4.2 The nature of trials

The trivialisation of traditional courts is not something that is limited to academic discourse, unfortunately. The Law Commission itself seems to endorse such a view without just cause and or to the detriment of a system of law duly recognised in terms of indigenous cosmology. A summary of the recommendations in Discussion Paper 82 had already boldly declared that traditional courts deal with "relatively minor offenses".[108] This declaration, coupled with the contention that this is an informal court, perhaps explains the attitude towards this court by the state through legislative inaction or bad faith.[109] The question then is, how does the court dispense of the minor offenses and all matters brought before it?

Ideally, one could unflinchingly aver that traditional courts apply living customary law as a point of departure.[110] The knock-on effect of this is that the constituencies falling within the jurisdiction of the court would be amenable to its exercise of authority.[111] This position is, regrettably, more idealistic than real. This is because, as have already been noted above, patriarchy is a designed perversion of customary law that is already embedded and endemic. Consequently, what is apparent is that not everyone shares the enthusiasm of these courts and equally the purity of the applicable law cannot be guaranteed without thorough investigation.

While this may be so, the procedure in these courts is simple, flexible and expeditious.[112] The simplicity of these courts is linked more to the fact that the law and language applied is expected to be known to everyone. And as such the people are able to better relate to its operation.[113] To this end, it is noted that the procedure is one that lends itself to common sense.[114] The flexibility of these courts relate to the fact that these courts are not slaves of predetermined rules of procedures.[115] The proceedings are inquisitorial in nature and

[108] Discussion Paper 82 'The Harmonisation of The Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders' (1999) ix.
[109] Ntebo Morodu, & Charles Maimela, 'The Indigenisation of Customary Law: Creating an Indigenous Legal Pluralism Within the South African Dispensation: Possible or Not? (2021) 54(1) *De Jure* 54, 55.
[110] *Ibid* 2; Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 29.
[111] Project 90 'Report on Traditional Courts and the Judicial Function of Traditional Leaders' (2003) 18.
[112] Discussion Paper 82 'The Harmonisation of The Common Law and Indigenous Law: Traditional Courts And The Judicial Function Of Traditional Leaders' (1999) 2.
[113] Discussion Paper 82 'The Harmonisation of The Common Law and Indigenous Law: Traditional Courts And The Judicial Function Of Traditional Leaders' (1999) 2.
[114] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 27.
[115] Caiphas Soyapi, 'Regulating Traditional Justice in South Africa: A Comparative Analysis of Selected Aspects of the Traditional Courts Bill' (2014) 17(4) *PER/PELJ* 1441, 1442.

everyone present is entitled to ask questions in the fact finding mission of the court.[116] This, in turn, allows each witness to adduce any testimony that he or she deems appropriate.[117] This suggests that evidence and *bohlatse* do not necessarily carry the same practical meaning. This point is further supported by the fact that perjury is not an offense in traditional courts.[118] Naturally, this means that in giving *bohlatse* the risk remains a constant one that the parties may be less than truthful. Despite the presence of this threat, it is significant to point out that these courts are inclined to arrive at an outcome that is "fair and just".[119] It arrives at this end result on the passport of forensic debate by those present in the court.[120] It is in the light of this that these courts are often referred to as courts of justice and not necessarily courts of law.[121]

The generic participation by all present renders the process close enough to transparency and democracy.[122] This transaction of proceedings seduced the Law Commission in the Discussion Paper to conclude that traditional justice is tantamount to reducing these courts to something of a "popular justice" *fora*.[123] In fact the popularity of these justice *fora* is underscored by the evidence in the Sekhukhune district of the Limpopo Province. Seemingly, this popularity has affected some academics' views of these courts in general. As far as Ubink and Mnisi Weeks are concerned, this popularity poses enormous challenges on governments.[124] These challenges seem to be concerned more with the assimilation of these *fora* by what the authors call formalised courts.[125] This view is opposed to the notion of advancing traditional justice as a system within its own right and delinking its legitimacy from the state law.

A diagrammatic display of this popularity is indicated below in figure 3.2. If anything, the depiction is an indication of the continued relevance of traditional courts in the Limpopo

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[116] Discussion Paper 82 'The Harmonisation of The Common Law and Indigenous Law: Traditional Courts And The Judicial Function Of Traditional Leaders' (1999) 2; Project 90 'Report on Traditional Courts and the Judicial Function of Traditional Leaders' (2003) 18; Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 27.
[117] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 27.
[118] Project 90 'Report on Traditional Courts and the Judicial Function of Traditional Leaders' (2003) 19.
[119] Alice Armstrong, et al 'Uncovering Reality: Excavating Women's Rights in African Family Law' (1993) 7 *International Journal of Law & the Family* 314, 325.
[120] Rajesh Choudree, 'Traditions of Conflict Resolution in South Africa' (1999) (1) 1 *AJCR* 9, 22.
[121] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 28.
[122] *Ibid* 27.
[123] Discussion Paper 82 'The Harmonisation of The Common Law and Indigenous Law: Traditional Courts And The Judicial Function Of Traditional Leaders' (1999) 3.
[124] Janine Ubink & Sindiso Mnisi Weeks, 'Courting Custom: Regulating Access to Justice in Rural South Africa and Malawi' (2017) 51(4) *Law & Society Review* 825, 825.
[125] *Ibid* 825 – 826.

Province in particular. As well, it proves that justice or the resolution of disputes is not a singular phenomenon.[126] Participatory, community based justice is alive and well.

Subject	Kgosi	Magistration
Marriage matters	53	57
Family matters	71	22
Petty theft	67	19
Maintenance cases	19	77
Land issues	62	35
Assault/body harm	49	38
Theft other than petty theft	9	90
Witchcraft	68	35

Figure 3.2. Diagrammatic representation of popular justice in Sekhukhune.[127]

Expeditiousness is more a consequence of the processes involved in these courts. If one considers that these courts are a part of the villages themselves,[128] then it is easy to see the socialisation of cases becoming a factor in ensuring the discharge of the case. The essence is that the process adopted for cases is justified by the general goal of litigation. This, it must be reiterated, is the restoration of the equilibrium that has been disturbed by the harm.[129] It is undeniable, as a result, that a case that drags on for longer inevitably disturbs the shared harmony in the villages and constitutes a continued violation of the equilibrium.

The Bill captures the spirit and purport of this process in clause 7 in the following terms:

> (1) Sessions of a traditional court are held at the time and at a place which is accessible to members of the community in question.

[126] Ann Skelton, 'Tapping Indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and the Denunciation of Crime in South Africa' (2007) 1 *ACTA JURIDICA* 228, 230.
[127] The Policy Framework on Traditional Justice System under the Constitution (Guideline 2008) 21.
[128] Navilla Somaru & Christa Rautenbach, "The Indian Approach to Criminal Justice: The Role of Traditional Courts as Alternative Dispute Resolution Mechanisms' (2020) 53(2) *CILSA* 1, 23.
[129] Mogobe Ramose, 'An African Perspective on Justice and Race' 2001 (3) *Polylog: Forum for Intercultural Philosophy* 1, 2. Caiphas Soyapi, 'Regulating Traditional Justice in South Africa: A Comparative Analysis of Selected Aspects of the Traditional Courts Bill' (2014) 17(4) *PER/PELJ* 1441, 1443. The second mentioned author uses the more popular phrase of "restorative justice and reconciliation".

(3) During its proceedings, a traditional court must ensure that—

(b) the following rules of natural justice are adhered to:

(i) That persons who may be affected by a decision must be given a fair hearing by the traditional court before the decision is made; and

(ii) that any decision by the traditional court must be impartial.

(6) Traditional courts must be open to all members of the community.

(7) Subject to the provisions of section 4(3)*(d)*, proceedings of traditional courts must be conducted in the presence of both parties to the dispute and traditional courts must allow the full participation of all interested parties without discrimination on any of the prohibited grounds of unfair discrimination referred to in section 9(3) of the Constitution.

(8) The customary law of procedure and evidence applies in traditional courts.

(9) Subject to the provisions of subsection (10), the proceedings and records of traditional courts, as contemplated in section 13, must be in the language most widely spoken in the area of the traditional court in question.

Clause 7 properly captures the essence of the transaction in traditional courts as explained hitherto. The emphasis on the right to equality in the proceedings of the court underscores the democratic dimension of these courts and is, this study surmises, a further attempt to cement the standing of women as equals with men and not perpetual minors (this point is prescribed by clause 3(a)(i) –(ii) and excluded here merely for purposes of avoiding duplication with the composition of the court already covered in 2.3 above).

How then does the court arrive at its decisions?

4.3 Decision making processes

It must be remembered that according to some criticism of traditional justice, the presiding officers in these courts lack proficiency in law.[130] Interestingly, so the argument goes, this lack of proficiency extends to include customary law.[131] An online definition from Oxford languages defines proficiency as meaning "a high degree of skill". This so called disadvantage of traditional justice is, at its centre, questioning traditional courts' knowledge of customary

[130] Discussion Paper 82 'The Harmonisation of The Common Law and Indigenous Law: Traditional Courts And The Judicial Function Of Traditional Leaders' (1999) 5.
[131] *Ibid.*

law.[132] It is the audacity with which such criticisms are made that makes this more astonishing than the criticism itself. If anything, the significance of this bold criticism is a measure of contempt of traditional dispute resolution and indigenous knowledge foundations. It goes without saying that to arrive at this conclusion of lack of proficiency, one must have been using a different set of knowledge hegemony. This, it is submitted, is the perpetuation of epistemic inequality and the imbalance that exist between indigenous epistemology and the arrogance of Western hegemony. To justify the exclusion of traditional justice as illegitimate, the provision of section 174(1) of the Constitution is used.[133] The contention of this criticism cannot be supported because doing so would have us arrive at a dubious conclusion.

The knowledge limitations of the courts and academics[134] has already been duly noted as creating paper law[135] in the place of an authentic living system. This is further compounded by the fact that customary law elites have contributed to the distortion of customary law in an effort to preserve some power for themselves.[136] If presiding officers in traditional courts lack proficiency to adjudicate on customary matters, who then is qualified enough to deal with same? This line of argument has the propensity to relegate traditional courts to the abyss. Somewhere in the bottom up structure of the indigenous cosmology lies the true customary law. The re-indigenisation projects are less likely to arrive at a clear answer by considering documented and ossified data. The determination should be done in an inclusive system of participatory research.

The forensic discussion by those present, admittedly the senior males, commences the process of decision making.[137] The councillors actually play a more active role in this process than the presiding officer himself (sexism and gerontocracy are noted).[138] This is also apparent from the monograph in case 1.[139] Project 90 report observes that the presiding Chiefs hardly

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[132] *Bangindawo & Others v Head of the Nyanda Regional Authority; Hlantlala v Head of the Western Tembuland Regional Authority & Others* (1998) 2 All SA 85 (Tk) goes some way to establishing the proper standing of traditional courts in that the court emphatically dismissed any suggestion that presiding officers in these courts (traditional courts) are not proficient in customary law 102.

[133] This section provides that that "[a]ny appropriately qualified woman or man who is a fit and proper person, may be appointed a judicial officer".

[134] Marius Pieterse, 'Killing it Softy: Customary Law in the Constitutional Order' (2000) 33 *De Jure* 35, 36.

[135] Tshepo Manthwa, 'Handing Over of the Bride as a Requirement for Validity of a Customary Marriage - *C v P* (1009/2016)' (2019) 82 *THRHR* 652, 657.

[136] Alice Armstrong, et al 'Uncovering Reality: Excavating Women's Rights in African Family Law' (1993) 7 *International Journal of Law & the Family* 314, 325.

[137] Rajesh Choudree, 'Traditions of Conflict Resolution in South Africa' (1999) (1) 1 *AJCR* 9, 22.

[138] Project 90 'Report on Traditional Courts and the Judicial Function of Traditional Leaders' (2003) 6 – 7.

[139] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 21.

disagree with the general views of his councillors.[140] The essence is that decision making is a shared responsibility and not the preserve of any one person.[141]

4.4 Judgments and enforcement

The case of King *Buyelekhaya Dalindyebo v S* is an interesting one on the powers of the courts and the enforcement of judgments.[142] The judgment of the SCA is not relevant to this study because the scope of the appeal was based primarily on the unfairness of the trial. Notwithstanding this, the facts are significant for the study in so far as this relates to the slippery slope of unrestricted powers of traditional leaders. Emanating from this slippery slope, it is tempting to engage the right to 'opt out' of traditional courts either at the start or during the course of the case. However, collected data does not justify the discussion of this contentious issue in this thesis. The two results chapters in this study support this proposition.

In the light of King Dalindyebo case, it suffices to balance the unending risks of a repetition of the abuses against the legislative jurisdiction that the Traditional Courts Bill will confer on traditional courts and leaders. In terms of clause 8,[143] the Bill will confer the traditional courts

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[140] Project 90 'Report on Traditional Courts and the Judicial Function of Traditional Leaders' (2003) 7.

[141] Nomboniso Gasa, 'The Traditional Courts Bill: A Silent Coup' (2011) 35 *SA Crime Quartely* 23, 25.

[142] [2015] ZASCA 144 (1 October 2015). The facts are that the Paramount Chief of the AbaThembu in the Eastern Cape, who is also referred to as the King of that tribe, set fire to dwellings that housed three complainants, who were his 'subjects' and tenants, to secure their eviction when he considered that they had breached tribal rules. In all three instances the families of the people concerned looked on as their homes were set on fire. In that regard the appellant was charged with three counts of arson. The King was also alleged to have publicly assaulted three young men so brutally that some of the p eople present could not bear to continue to observe and had it not been for later medical intervention they might very well have died. The assaults were perpetrated, so the State contended, as punishment, without a trial, for criminal acts allegedly committed by the young men in question, being, inter alia, housebreaking and rape. It is common cause that one of the young men, Mr Lunga Pama, subsequently became mentally impaired. It is uncertain whether the impairment was caused by the assaults. In respect of the alleged assaults the appellant was charged with 3 counts of attempted murder and was convicted of the lesser offence of assault with intent to do grievous bodily harm. A fourth young man, who was alleged to have been party to the alleged crimes referred to above, was killed by members of the community who were supporters of and loyal to the appellant.

[143] A traditional court may make any of the following orders after having deliberated on a dispute before it: *(a)* An order in favour of the party who instituted proceedings in terms of section 4(1), expressed in monetary terms or otherwise, including livestock —
(i) accepting a settlement between the parties to the dispute;
(ii) for the payment of any damages in respect of any proven financial loss;
(iii) for the payment of compensation; or
(iv) for the payment of damages to an appropriate body or organisation which is not connected in any manner whatsoever to a member of the traditional court or a traditional leader: Provided that any such order expressed in monetary terms or otherwise, including livestock, may not exceed the value of the damage giving rise to the dispute in question or the amount determined by the Minister from time to time by notice in the *Gazette*, for this purpose, whichever is the lesser;

with powers to make orders that closely resemble those of the state's courts. It is apparent from clause 8(1)(a)(i) – (iv) that damages will play a central role in these courts after promulgation. Alternatively, clause 8(1)(b) and (c) is grounded in the economic reality of what is mostly expected to be a rural jurisdiction for the courts. For this reason, the clause makes provision for services being provided in the place of any such damages in the event of inability to pay the damages levied. To prevent the potential repeat of the slippery slope witnessed in King Dalindyebo's matter mentioned hitherto, clause 8(1)(c)(ii) specifically exclude the traditional leader and his family from benefiting from any such service. The social equilibrium does not equate to the enjoyment of perpetual peace by the traditional leaders without a consideration of the entire populace. This despite the fact that they have an interest in their constituency's upkeep.

(b) an order directing a party against whom proceedings were instituted in terms of section 4(1) who is financially not in a position to comply with any order contemplated in paragraph *(a)*, to render to the aggrieved party some specific benefit or service instead of compensation for damage or pecuniary loss, with the consent of both parties;
(c) an order directing a party against whom proceedings were instituted in terms of section 4(1) who is financially not in a position to comply with any order contemplated in paragraph *(a)*, to render without remuneration some form of service—
(i) for the benefit of the community; or
(ii) for the benefit of any person or persons in the community in need who, in the opinion of the members of the traditional court, are deserving of that service, under the supervision or control of a person or group of persons identified by the traditional court who, in the opinion of the traditional court, promote the interests of the community and who must upon the completion or otherwise of the service in question report to the traditional court thereon: Provided that no service whatsoever may be rendered to a traditional leader or his or her family or to any person acting in an official capacity in that traditional court;
(d) an order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct being complained of;
(e) an order that an unconditional apology be made;
(f) an order directing that a party or parties to the dispute be reprimanded for the conduct being complained of;
(g) an order requiring a party or parties to keep the peace;
(h) an order that a party attends any form of training, orientation or rehabilitation that is consistent with the relevant customary law and customary practices, the Constitution and this Act and does not include any form of detention or deprivation of any customary law benefits;
(i) an order requiring any party to the dispute to make regular progress reports to the traditional court regarding compliance with any condition imposed by the traditional court;
(j) an order directing that the matter be submitted to the national prosecuting authority for the possible institution of criminal proceedings in terms of the common law or relevant legislation; or
(k) an order, containing a combination of any of the orders contemplated in paragraphs *(a)* to *(i)*, except where the matter is referred to the national prosecuting authority under paragraph *(j)*, in which event the decision of the national prosecuting authority prevails.
[…].

These orders, it is provided in the Bill, may be enforced in terms of clause 9.[144] Clause 9(1) – (4) introduces a role reserved for a clerk of the court. What is apparent, and in support of clause 13,[145] is the fact that traditional courts envisaged by the Bill are going to be courts of records. Clause 9(4) also introduces a role for a justice of the peace officer. The underlying attempt in this regard, read with clause 13, is a rationale to continue a single system of justice in South Africa. This attempt though, has inherit risks of depriving traditional justice of its uniqueness.

5. Traditional Courts as envisaged by the Bill - Epistemic inequality on display

A dishonest attempt in the South African jurisprudence to celebrate legal pluralism or dualism[146] as encompassing customary law seems to always think away the *mala fide* of the

[144] (1) If an order made by a traditional court is not satisfied within the period determined by the traditional court, the party in whose favour the order was made, may bring the matter to the attention of the clerk.
(2) The clerk must inquire into or cause to be inquired into, the reasons for non-compliance with the order and make a determination as to whether the non-compliance is due to fault on the part of the party against whom the order was made.
(3) If the clerk finds that the non-compliance is not due to fault on the part of the party against whom the order was made, he or she must assist the party to comply with the order on such conditions as may be agreed upon between the parties.
(4) *(a)* If the clerk finds that the non-compliance is due to fault on the part of the party against whom the order was made, he or she must make a determination to that effect and must thereafter refer the matter to a justice of the peace appointed by the Minister in terms of section 2 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963), for purposes of this Act, who must deal with the matter in terms of the powers and duties as may be conferred or imposed on him or her under section 3 of the Justices of the Peace and Commissioners of Oaths Act, 1963.
(b) The role of the justice of the peace referred to in paragraph *(a)* is to facilitate compliance with the order made by the traditional court and for this purpose the justice of the peace has the following powers:
(i) If non-compliance is not due to fault on the part of the party against whom the order was made, the power to negotiate with the parties on how and when the order will be complied with and to make a determination in accordance therewith; and
(ii) if non-compliance is due to fault on the part of the party against whom the order was made, the power to summons the party to appear in the traditional court again in order to have the matter transferred to the Magistrate's Court having jurisdiction, as contemplated in section 14(1)*(a)*, to be dealt with afresh.

[145] A traditional court must, in the prescribed manner, record or cause to be recorded in the language contemplated in section 7(9)—
(a) a file number of the dispute;
(b) the date on which the dispute was dealt with;
(c) the nature of the dispute;
(d) a summary of the facts of the dispute;
(e) the names and addresses of the parties and their witnesses;
(f) the decision of the traditional court, including the decision or order of the traditional court;
(g) a list of exhibits; […].

[146] Adenike Aiyedun & Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law Democracy & Development* 154, 155.

BAA and its pervasive purpose so far as living customary law is concerned. The inclusion of a foreign taxonomy of rights and the cultural rights without a clear indication of how the chasm was to be negotiated further suppresses the notion of a living customary law.[147] This study submits that no re-indigenisation theory or project will succeed if it proceeds from a lack of appreciation of the reality of the imagined dualism and the rift that exist between the Western idea of rights and the corresponding perception by the Natives. The scope has not been corrected to address the fact that the dualism is a product of segregation,[148] and customary law has its own logic of fairness and rights.[149]

In context, the fact that the provisions of sections 12 and 20 of the BAA are still valid as conferring powers on traditional courts appears to be an attempt to insulate these provisions from an act of bad faith by the union government. It should not be forgotten that this very Act had the repugnancy clause that positioned white and Western values as central and seminal values. To further compound the matter of jurisprudential dishonesty as far as traditional courts and traditional leadership are concerned, the Traditional Leadership and Governance Framework Act (now repealed) retained the same jurisdictional boundaries as determined by past segregationist regimes.[150] To think that this was based on justice would be insincere. The new Act, the Traditional and Khoi-San Leadership Act, does not create any departure from this position except to saddle the Premier with the authority to determine the jurisdictions of councils.[151]

This positioning of unequal dualism[152] cannot merely have been corrected by a simple act of constitutionalism. Not least, when the rights to culture as embodied in sections 30 and 31 are qualified in a manner unlike any other rights in the Constitution.[153] It is correct to point out that the internal limitations in so far as the cultural rights were concerned was intentional to

[147] Thwadi Komane, T 'African Tradition vs. Western Modernity Conundrum in Post-Apartheid South Africa: A Case of the Traditional Courts Bill' in Tomas Machalik, and Katerina Mildnerova (Eds) *Tradition v Modernity in Contemporary Africa* (Cultural Africa Association 2013) 65 – 66.
[148] Marius Pieterse, 'Its a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism' (2001) 17 *SAJHR* 364, 371.
[149] Tom Zwart, 'Relying on Africa's Strengths in the Area of Human Rights: The Receptor Approach' in Thandabantu Nhlapo, Emma Arogundale, and Harry Garuba (Eds) *African Culture, Human Rights and Modern Constitutions* (University of Cape Town 2013) 9.
[150] Janine Ubink & Sindiso Mnisi Weeks, 'Courting Custom: Regulating Access to Justice in Rural South Africa and Malawi' (2017) 51(4) *Law & Society Review* 825, 837.
[151] Act 3 of 2019. See section 16(5)(a).
[152] Adenike Aiyedun & Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law Democracy & Development* 154, 155.
[153] Jennifer Williams, & Judith Klusener, 'The Traditional Courts Bill: A Woman's Perspective' (2013) 29 *SAJHR* 276, 277.

ensure an elimination of competition with other rights embraced by the Bill of Rights.[154] With that being so, what is equally intentional about this internal limitations is the insurance they offer a foreign taxonomy of rights at the expense of customary law rights and duties. The essence, it is submitted, is that the Bill of Rights and by extension the Constitution secures the dishonest dualism that includes customary law. Although this intentionality is neither an endorsement of devaluation nor static ideologies[155] of customary law, there is ample reason to suspect that customary law is seen as inherently bad in some respect. This default setting of the Constitution is of course a product of proceeding from a different epistemic philosophy. A lot is made in Chapter 2 of the English hegemony in research and of the Constitution being an endorsement of colonial conquest.[156] By declaring the Constitution as the supreme law of South Africa, the security of that hegemony and conquest was properly ensconced. The ensuing result has been the stifling of customary law by debates on its true version[157] and an unending contest between cultural rights and the right to equality.

It would be disingenuous to suggest that the Constitution has not provided a fertile environment for the enhancement of rights of women in the indigenous cosmology.[158] A particular right that is significant is the right to equality which cured the perpetual minority status of women. It is important to point out that culture and the right to equality are not necessarily inimical. It must be expressly indicated though that this view is in contrast to that held by Ubink and Mnisi Weeks in particular. These authors advance the notion that there is oddity between the two.[159] The idea though, it is argued in this study, would be to find a

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[154] Jennifer Williams, & Judith Klusener, 'The Traditional Courts Bill: A Woman's Perspective' (2013) 29 *SAJHR* 276, 277.

[155] The former defines culture as 'primitive', 'uncivilised' and 'devoid of law' in comparison to dominant (Western) culture, while the latter defines it as unchanging across time, as immune to social change. Indigenous law and practices are specifically regarded as non-adaptive and resistant to socio-legal development. See Marius Pieterse, 'Its a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism' (2001) 17 *SAJHR* 364, 372 – 373.

[156] See Paulo Freire, *Pedagogy of the oppressed* (30th anniversary ed., Continuum 2005); Joel Modiri, *The Jurisprudence Of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017); Albie Sachs, 'The Language Question in a Rainbow Nation: The South African Experience' (1997) 20(1) *Dalhousie Law Journal* 5; Hassimi Maiga, 'When the Language of Education is not the Language of Culture: The Epistemology of Systems of Knowledge and Pedagogy' in Joyce King (ed), *Black Education* (American Educational Research Association 2005); Mogobe Ramose, 'In Search of an African Philosophy of Education' (2004) 18 (3) *SAJHE* 138 to name but a few sources on this proposition.

[157] Marius Pieterse, 'Its a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism' (2001) 17 *SAJHR* 364, 377.

[158] Catherine Albertyn, 'Cultural Diversity, "Living Law" and the Women's Rights in South Africa' in Daniel Maldonado (ed), *Constitutionalism of the Global South* (Cambridge University Press 2013) 180.

[159] Janine Ubink & Sindiso Mnisi Weeks, 'Courting Custom: Regulating Access to Justice in Rural South Africa and Malawi' (2017) 51(4) *Law & Society Review* 825, 831.

balance between the values that customary law is attempting to advance against the right to equality instead of assumity enmity.

In this respect, it suffices that not all customary exclusions should be deemed as a violation of the right to equality as a point of departure.[160] The example already made above relates to the exclusion of widows from the traditional courts. It is pointed out above that the rituals related to death are not in any way legal matters but instead have far reaching psycho-social consequences. However, to only exclude widows and not widowers cannot, it is submitted, be sustained as culturally sound. Whatever the rationale and value of such exclusion, the psycho-social consequences appear to be gendered. As such, it is difficult to advance a sound reason for the legal exclusion of widows from the business of the *Kgoro*.

To remedy this, it may suffice to include or exclude both widows and widowers. This feat can be achieved by a simple evolution of the ritualisation of death and its related traditional African grief processes. It is worth bearing in mind that culture is not static and must evolve to respond to social changes.[161] This evolution should not result in the substitution of non-customary law values in the place of this system of law.[162] In contrast, the dehumanising post death rituals that silenced and demeaned women must be addressed.[163] Another factor pushing for this change is the evolution of the social and the family structure as effected by such factors as urbanisation.[164]

This has to some degree yielded a state of anomie, which by definition mean a state of "normlessness or chaos that takes place when social structures break down due to rapid changes in a society".[165] These changes threaten African cultural values with extinction.[166] The threat is further exacerbated by the choice that Natives have to submit to the authority of traditional leaders and traditional courts.[167] In context, the dual threat of anomie and the

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[160] Catherine Albertyn, 'Cultural Diversity, "Living Law" and the Women's Rights in South Africa' in Daniel Maldonado (ed), *Constitutionalism of the Global South* (Cambridge University Press 2013) 170.
[161] Marius Pieterse, 'Killing it Softy: Customary Law in the Constitutional Order' (2000) 33 *De Jure* 35, 40; Jennifer Williams, & Judith Klusener, 'The Traditional Courts Bill: A Woman's Perspective' (2013) 29 *SAJHR* 276, 280.
[162] Catherine Albertyn, & Sandra Fredman, 'Equality beyond Dignity: Multi-Dimensional Equality and Justice Langa's Judgments' (2015) *Acta Juridica* 430, 440.
[163] *Ibid*.
[164] *Ibid* 447; Alice Armstrong, et al 'Uncovering Reality: Excavating Women's Rights in African Family Law' (1993) 7 *International Journal of Law & the Family* 314, 323.
[165] Marelize Schoeman, 'A philosophical view of social transformation through restorative justice teachings – a case study of traditional leaders in Ixopo, South Africa' (2013) 13 (2) *Phronimon Volume* 19, 25.
[166] *Ibid.*
[167] Fatima Osman, 'Third Time a Charm? The Traditional Courts Bill 2017' (2018) 64 *SA Crime Quarterly* 45, 46.

convenience of blackness (the consensual nature of traditional authority)[168] should be recognised in the same light as the stubbornness of customary law to emerge from expressive pervasion of the BAA. What is perhaps at stake here is the manifestation and or proliferation of urban cultures that are neither traditional nor truly "civilised".

It is conceded that culture cannot operate outside the bounds of the change of social and family structures.[169] Indigenous cosmology is increasingly constituted of women and child headed households as a result of a myriad of factors that are not relevant to this study. If these women are refused entry into the traditional *fora* as a result of patriarchy, and children denied entry as a result of gerontocracy, the exclusion has far reaching consequences. Primarily, their right to participate in the democracy of dispute resolution would be lost without just cause. To improve on this situation, it is submitted, requires a response to the lived reality effected by urbanisation and a myriad of factors than to impose constitutionalism as a solution. A bottom up approach would appropriately address this unsustainable social fact.

That patriarchy is not an original norm of living customary law but a response to colonialism and a loss of power by traditional elites cannot be emphasised enough. Yet, its continued validity in the face of a changing world is unsustainable. In the social order, no legal position has a permanent and irreversible standing as valid for all times.[170] What is a constant though, is the nature and essence of personhood or the virtue of what it is to be human in the eyes of traditional communities. There is an innate interrelatedness and interdependence on each other amongst all inhabitants.[171] The Natives famously proclaimed that *motho ke motho ka batho*. That sense of personhood as depended on the relation with others in mutual existence, coupled with the unending social changes and the lack of permanent legal principles in the social cosmos is capable of creating solutions with customary law values as central tenets. This system, it is reiterated, must be respected as having its own rationale.[172]

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[168] Kgopotso Maunatlala & Charles Maimela, 'The Implementation of Customary Law of Succession and Common Law of Succession Respectively: With a Specific Focus on the Eradication of the Rule of Male Primogeniture' (2020) 53 *De Jure* 36, 37.

[169] Catherine Albertyn, 'The Stubborn Persistence of Patriarchy: Gender Equality and Cultural Diversity in South Africa' (2009) 2 *Constitutional Law Review* 165, 176; Rajesh Choudree, 'Traditions of Conflict Resolution in South Africa' (1999) (1) 1 *AJCR* 9, 26.

[170] Mogobe Ramose, 'An African Perspective on Justice and Race' 2001 (3) *Polylog: Forum for Intercultural Philosophy* 1, 3.

[171] Pitika Ntuli, 'Personhood an African Perspective' Preamble in Thandabantu Nhlapo, Emma Arogundale, and Harry Garuba (Eds) *African Culture, Human Rights and Modern Constitutions* (University of Cape Town 2013) xiii.

[172] Tom Zwart, 'Relying on Africa's Strengths in the Area of Human Rights: The Receptor Approach' in Thandabantu Nhlapo, Emman Arogundale, and Harry Garuba (Eds) *African Culture, Human Rights and Modern Constitutions* (University of Cape Town 2013) 9; Thwadi Komane, 'African Tradition vs. Western

The allure of romanticising unadulterated living customary law remains a constant in the re-indigenisation theories. This study avoids the traps of this romantic idealism and stayed clear of attempts to imagine a pristine Africa without the influence of the West. However, equally unenlightening will be attempts to consider this study within the precepts of modernity as determined by the West.[173] Arguments in the scope of Western modernity include those that aver that the exclusion of legal representation from this court is prejudicial to the accused and compromise his rights to a fair trial; those put forward regarding the lack of proper training by presiding officers to dispense of justice in traditional courts and any related argument. To sum up the multitude of arguments on the Traditional Courts Bill B1 – 2012 in particular, Komane rightly posits that these views have the tendency to position traditional dispute as hostile to development and human progress.[174]

The above discussion, if anything, proves that the rift between Western ideology of law and African value system is a great one. What is equally apparent is the fact that whoever has power in this negotiation has the advantage. The bad faith in the BAA repugnancy clause, the endorsement of non-African value centre in the constitution, the hegemonic domination of Western cultures in research, the epistemisticide of African philosophies, knowledge and the idea of modernity as having a western construction are the factors highlighted in this study. It comes as no surprise that the Traditional Courts Bill is itself an endorsement of the power politics.[175]

The first issue was always going to be the supreme Constitution. It cannot be sustained to argue that the Constitution and the living customary law are inimical. The challenge, nonetheless remains to negotiate the difference between the two while appreciating the rationale and value centrality of customary life and law. The triadic system of law, culture and religion as besetting customary life is pointed out in Chapter 1. As well, an endeavour to appreciate that in terms of indigenous cosmology something is never considered simply as law but within a myriad of issues. A demonstration of this is drawn by the ritualisation of death and the consequences this has on the remaining widow in particular. When all is said and

Modernity Conundrum in Post-Apartheid South Africa: A Case of the Traditional Courts Bill' in Tomas Machalik, and Katerina Mildnerova, K (Eds) *Tradition v Modernity in Contemporary Africa* (Cultural Africa Association 2013) 69.

[173] Thwadi Komane, 'African Tradition vs. Western Modernity Conundrum in Post-Apartheid South Africa: A Case of the Traditional Courts Bill' in Tomas Machalik, and Katerina Mildnerova (Eds) *Tradition v Modernity in Contemporary Africa* (Cultural Africa Association 2013) 75.

[174] *Ibid* 76.

[175] Fawzia Cassim & Nombulelo Mabeka, 'The Africanisation of South African Civil Procedure: The Way Forward' (2019) 6(1) *Journal of Law, Society & Development* 1, 9.

done, by subjecting traditional justice to the Constitution without attempting to negotiate the chasm between the two, the Bill retains the potential for an unending rights versus culture arguments. Nothing in this space will be new, the study submits. Equally this extents to include the continued stifling of customary law jurisprudence by keeping the equality jurisprudence alive.

Secondly, and a natural flow from the first issue, there is an overriding constitutional feel about the Bill. There is an overemphasis on the rights of women to equality. This is a response from the criticism of the 2012 Bill. But, the insistence on this constitutionalism can be achieved without unnecessary overemphasis. The guarantee of women as equals is in keeping with the proper bottom up approach to the social changes in the indigenous cosmology.

Thirdly, an issue that will no doubt be controversial relates to jurisdictional boundaries. The Governor-General was given authority to define jurisdictional boundaries of traditional authorities in terms of section 5 of the BAA.[176] There is no an attempt to speak to this in the Bill. The inference to be drawn from this is that the Bill endorses erstwhile boundaries.[177] The land question is a conversation that South Africa has not properly engaged with at the time of concluding this research. There is no doubt that the boundaries so determined by the colonial governments served the interests of the settlers and not those of the Natives. A traditional courts Bill in good standing must consider this issue. Alternatively, the Traditional and Khoi-San Leadership Act missed an opportunity to properly reset the colonial boundaries. This is notwithstanding the fact that section 16(5)(a) gives the Premier authority to determine the jurisdictional area of councils. It is submitted that this authority is insufficient to alter colonial boundaries because councils are not independent of Kingship or Queenship and or principal traditional leaders. Effectively, the authority given to the Premier in terms of these provisions are of a secondary nature in that councils cannot operate outside the jurisdictions of the Kingship or Queenship and or principal traditional leader to whom they are appointed.

Fourthly, the introduction of the clerks and the keeping of records is an attempt to 'formalise' these courts. There is an overriding intention to preserve the certainty of the jurisprudence and secure it through literacy. It is a known fact that folklore is a phenomena of traditional

[176] (1) The Governor-General may –
(a) define the boundaries of the area of any tribe or of a location, and from time to time alter the same, and may divide existing tribes into one or more parts or amalgamate tribes or parts of tribes into one tribe, or constitute a new tribe, as necessity or the good government of the Natives may. in his opinion require.

[177] Janine Ubink & Sindiso Mnisi Weeks, 'Courting Custom: Regulating Access to Justice in Rural South Africa and Malawi' (2017) 51(4) *Law & Society Review* 825, 837.

life. Despite this, traditional courts are not necessarily in any way going to lose its value by merely being courts of records. For all that, it must be accepted that legal certainty is premised of the *stare decisis* principle. The nature of traditional dispute resolution will lose its uniqueness as a form of restorative justice if legal certainty is forced on these courts. The set goals of traditional justice, which ought to justify the means, is the restoration of the social equilibrium. It necessarily follows that the equilibrium can be achieved through a multitude of ways to respond to the rapid changes in society. The sterile certainty of the state law will not be helpful in the place of traditional courts. As well, it would appear that the Bill forces the literacy conventions of the West on these courts. *Di hlogo putswa* (the wise elders or sages) have retained a system of folklore from generation to generation. The perversion of customary law at the hands of the elites and the settlers could somewhat be attributed to this folklorisation. This point is arguable though because bad faith was equally established and retained through literacy in the form of the BAA. If anything, the contest here is eligible to go in circles without a clear end.

In the end, the attempt to ensure that traditional justice is not the "other" system, will through a passage of time, result in traditional justice losing its fabric and become embedded in the state justice without enriching it. Of course from time to time the courts would feel inclined to point out *Ubuntu* as a shining light of the uniqueness of Natives and their human nature. This, after all, is the epistemic centre of the African worldview.[178] The terrain for a proper plurality in South African jurisprudence is indeed muddy on account of a chequered history. This reconstruction can do without pretence and paying lip service through legislative text. To bring this home, the view of Sibanda who avers that reform is not simply customary by term is supported.[179] In effect, reform that lacks substance suits the convenience of power in the political struggle.[180]

6. Chapter conclusion

The continued stifling of customary law is not fooling anyone and is untenable. The subordination of traditional knowledge system to the precepts of the West is intolerable as a consequence. Equally, using *Ubuntu* to shore up the pervasion of customary law is

[178] Marelize Schoeman, 'A philosophical view of social transformation through restorative justice teachings – a case study of traditional leaders in Ixopo, South Africa' (2013) 13 (2) *Phronimon Volume* 19, 23.
[179] Sanele Sibanda, 'When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation' (2010) 17(3) *Human Rights Brief* 1, 4.
[180] Ibid.

unacceptable. The call is for a proper recognition of the African value system in legislation and all matters relating to customary law. Traditional justice must, as a consequence, be regulated within its own rationale of fairness and dignity. It has been argued in this chapter that the Traditional Courts Bill is yet another attempt to harmonise the state's law and customary law whilst retaining the foreign lenses. The end result is an inaccurate reflection of the traditional justice structures and the overemphasis of the rights of equality. The promotion of equality is a welcome change in response to urbanisation and the general change in the social order. However, the Bill reflects a more top down approach using the Constitution to justify the change. While this is not necessarily incorrect, a bottom up solution involving everyone in the solution order would have responded to this social change without a need to repeat the section 9 right at every turn in the Bill. In the end, the taxonomy of the Natives matter and must be appreciated in all reforms to their laws. So far as traditional justice is concerned, it cannot be overstated that the significance of the process lies in the goals set. The intention is primarily to ensure the social equilibrium.

CHAPTER 4

RESEARCH METHODOLOGY

1. Introduction

This study is executed through a comprehensive and multi-sited qualitative strategy and approach, which in part is oriented towards interpretivism. As shall become apparent below, this is largely through an ethnographic design that is augmented by case study and document analysis. From the outset, it must be pointed out that the acceptance and provenance of ethnography as a qualitative methodology has not always been easy to define. Despite this, it is necessary to formulate a working definition of this method than to be fixated on the idea of a comprehensive definition that is correct for all circumstances and all qualitative researchers.

From this, it can be discerned that qualitative research is broad in both scope and nature.[1] Despite this width and depth of qualitative methodologies, the notion that is supported by Braun and Clarke is that thematic analysis is the foundational strategy for all qualitative research.[2] However, this notion is disputed by Nowell *et al* who content that thematic analysis is a separate and independent method in its own right.[3] Whilst the definition of methodologies does not form a primary purpose of this study, it is crucial to clarify the conceptual framework of data collection and analysis for practical effect.[4] This issue is discussed in 2 below. Once the conceptual framework of data collection is clarified, this chapter will zoom in on the ethnographic design. The design and its working definition is set out in detail under this heading. The fourth heading focuses on the critical issue of sampling as, it is argued, it is important to reflect on the manner in which this study decided on its samples. Thereafter, a synopsis of the system of data analysis is briefly discussed. As shall become apparent,

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[1] Virginia Braun, & Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77, 80.

[2] Virginia Braun, & Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77, 80.

[3] Lorelli Nowell, *et al*, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria' (2017) 16 *International Journal of Qualitative Methods* 1, 2.

[4] Braun and Clarke very aptly note that "[i]f we do not know how people went about analysing their data, or what assumptions informed their analysis, it is difficult to evaluate their research, and to compare and/or synthesise it with other studies on that topic, and it can impede other researchers carrying out related projects in the future". Virginia Braun & Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77, 83.

ethnography is a contested methodology. As such, the quality criteria for this research must be specifically set out in this chapter. Finally, this chapter will conclude by offering a detailed discussion of the ethical considerations necessary to ensure that the quality criteria is fulfilled.

2. The conceptual framework for data collection

Ethnography, as the chosen methodology in this study, can be loosely defined as "[t]he act of observing, documenting and interpreting social life with the explicit aim of uncovering processes and meanings that undergird the […] realities of everyday life".[5] From this definition, it is apparent that the focal point of this methodology is a reflection on people's realities. Premised as it is on people's realities, it is unsurprising that this methodology has, overtime, attracted undertones of a political nature.[6] With this in mind, the ethnographer ought to put measures in place to exercise caution. This demand for caution is premised on the school of thought which suggests that ethnographic research is not only a way of hearing but also determines what counts as hearing.[7]

It is unsurprising, therefore, that Schostak notes that ethnography is often an abused term that for all intends and purposes is often deployed to fit the occasion necessitated by a specific author.[8] The foregoing paints a picture of contemporary ethnography as an unsettled and hotly contested research design.[9] In this light, Hughes *et al* posits that this method's capacity to both "illuminate and divide opinion", especially in the social sciences, anthropology, educational research *et cetera* is common discourse.[10] This study expands the scope of this method to legal research in an endeavour to correctly capture the law as practised by the rural Natives in some parts of the Limpopo Province, South Africa.

From the views of Hughes *et al* and the discourse discussed in this chapter, it will become apparent that this methodology is not a popular choice of method for legal research. It is the choice of methodology for this study because of a measured desire to pursue new regimes of

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[5] Kahryn Hughes, *et al* (eds), *Contemporary Approaches to Ethnographic Research* (Vol I Sage Publications 2018) xxiii.
[6] Norman Denzin, & Yvonna Lincoln, 'Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications Inc 2008) 1.
[7] Sam Hillyard, 'Responding to Text Construction: Goffman's Reflexive Imagination' in Alexander Massey, and Geoffrey Walford (eds), *Studies in Educationa Ethnography* (Jai Press Inc 1999) 59.
[8] John Schostak, 'The Cr/eye of the Witness' in Alexander Massey, and Geoffrey Walford (eds), *Studies in Educational Ethnography* (Jai Press Inc 1999)128.
[9] Kahryn Hughes, et al (eds), *Contemporary Approaches to Ethnographic Research* (Vol I Sage Publications 2018) xxiv.
[10] *Ibid*.

truth that is not only academically sound but will resonate with the lived experiences of the sampled peoples.[11] Against this background, it is arguable that ethnography will potentially be found to be a polemic and controversial research design. This argument is based on the view of this study that customary law has been perverted by privileged non-Native writers and traditional elites. As such, it is necessary for the current author to clarify the methodological framework for this study. This is to ensure that while the contestation of this method will likely outlast this thesis,[12] a clear position is adopted throughout the data collection process and beyond that as well.

It is commonly accepted that this design is neither an innocent practice[13] nor is it pure.[14] As a consequence of this admission, it is logical to expect that the quality criteria of this design may and should rightly often be called into question.[15] After all, it cannot be emphasised enough that the quality criteria of every research methodology and design are critical to both data collection and results. The quality criteria is discussed below under heading 6. The question that should be asked is how can the quality criteria for research be achieved using a method or design that is not itself settled? Phrased differently, how does one ensure credibility, confirmability and dependability of both method and results while using a methodology which has admittedly lost innocence? It is an established academic practice that the results of any study must, out of necessity, pass this muster.

The definition of ethnography offered by Hughes *et al* above essentially underscores the personal experiences and or everyday realities of the people that are the subject of a study. Whilst it is easier to have an idea of what one is talking about when mention is made of personal experiences and or everyday realities, it is not farfetched to equally argue that the

[11] Norman Denzin, & Yvonna Lincoln, 'Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications Inc 2008) 8.
[12] Geoffrey Walford, & Alexander Massey's introduction in Alexander Massey, and Geoffrey Walford *Studies in Educational Ethnography* (Jai Press Inc 1999) xiii.
[13] Charles Soukup, 'The Postmodern Ethnographic Flaneur and the Study of Hyper-mediated Everyday Life' in Kahryn Hughes, et al *Contemporary approaches to ethnographic research* (Sage Publications 2018) 98.
[14] Michaela Pfadenhauer, & Tilo Grenz, 'Uncovering the Essence: The Why and How of Supplementing Observation with Participation in Phenomenology-based Ethnography' in Kahryn Hughes, et al (eds), *Contemporary Approaches to Ethnographic Research* (Sage Publications 2018) 187.
[15] Sam Hillyard, 'Responding to Text Construction: Goffman's Reflexive Imagination' in Alexander Massey, and Geoffrey Walford (eds) *Studies in Educationa Ethnography* (Jai Press Inc 1999) 61 – 62; Keith Berry, 'The Ethnographic Choice: Why Ethnographers Do Ethnography' in Kahryn Hughes, et al (eds), *Contemporary Approaches to Ethnographic Research* (Vol I Sage Publication 2018) 25.

same experience or reality may lend itself to ambiguity in certain defined circumstances.[16] As such, it is almost undeniable that a singular methodology or research design is not plausible nor should it be encouraged.[17] Consequently, there is a need to engage in a "methodological pluralism" that is grounded on the specific context and topic under study.[18] This notion decidedly invites a casuistic inquiry of research.[19]

As it happened with the current study, the casuistic inquiry elicited the use of case study and document analysis as defined. According to Kekeya, case study as a qualitative design does not have a singular definition.[20] Maswanganyi defines it to include an exploration of different components of amongst others institutions and practices that are studied holistically.[21] Although the institution of traditional leadership features in the current study, the emphasis falls on the phenomena of traditional justice. Despite this definition finding meaning in the current study, a reference to case study as an investigation into a phenomena's real-life context is most suitable.[22] The cultural location of the investigation into traditional dispute resolution is a central feature of this thesis. The argument advanced is to promote, through community cultural wealth, the phenomena of traditional justice. As well, this creates a synergy with the definition of ethnography adopted for the study. On the other hand, document analysis is defined as a systematic review of documets, be it printed or electronically.[23] This method is used in combination with other qualitative designs to make the research inquiry whole.[24] In the current study, the constitutions of two *Kgoro fora* in jurisdictions A and B respectively are analysed.

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[16] Keyan Tomaselli, Lauren Dyll, & Michael Francis, 'Self and Other: Auto-reflexive and Indigenous Ethnography' in Norman Denzin, Yvonna Lincoln, and Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publication 2008) 348.
[17] *Ibid*.
[18] Michaela Pfadenhauer, & Tilo Grenz, 'Uncovering the Essence: The Why and How of Supplementing Observation with Participation in Phenomenology-based Ethnography" in Kahryn Hughes, et al (eds) *Contemporary approaches to ethnographic research* (Vol II Sage Publications 2018) 187.
[19] *Ibid*.
[20] Joseph Kekeya, 'Qualitative Case Study Research Design: the Commonalities and Differences between Collective, Intrinsic and Instrumental Case' (2021) 36 *Contemporary PNG Studies: DWU Research Journal* 28, 28.
[21] Ramokone Maswanganyi, *Assessing Teaching Approaches and Strategies of Foundation Phase Teachers in Developing Learners' Writing Proficiency: A Case Study in Warmbaths Circuit, Limpopo Province* (Doctor of Education, Tshwane University of Technology, 2022) 10.
[22] Joseph Kekeya, 'Qualitative Case Study Research Design: the Commonalities and Differences between Collective, Intrinsic and Instrumental Case' (2021) 36 *Contemporary PNG Studies: DWU Research Journal* 28, 28.
[23] Glenn Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) *Qualitative Research Journal* 27, 27.
[24] *Ibid* 28.

Despite this plurality of method or design and casuistry, it must be noted that ethnography as a methodology has never been denied its unifying feature. What is apparent is that the underlying rationale and its contested essence have survived the test of time and philosophies.[25] This refers to the marked emphasis on understanding the worldviews of the people.[26]

This study must reiterate a factor that though critical to the South African legal reality, is not emphasised enough in the rainbow obsessive ideology of post-1994. Be that as it may, this is not to suggest that this issue is so limited to law as it is to highlight its detrimental consequences on the course and trajectory of customary law in South African. This factor relates to the political nature of knowledge, its production or economy and research.[27] The starting premise of political research is in the grounding of the averment that links research to imperialism and colonialism.[28] According to this logic, qualitative research endorses colonial knowledge, truth and power.[29] To give credence to these views, one must take heed of the fact that a researcher's ontological make-up underlines the context from which the observations in the field are made.[30] Naturally, the inclination towards Western education of law is likely to manifest a production and preservation of that epistemology.[31] In law, and especially as far as procedural aspects of customary law are concerned, the preservation and continued dominance of the colonising epistemology cannot be sustained if one endeavours to change the status *quo*. Consequently, one accepts that a re-indigenised customary law cannot be attained through a model or dominant Western episteme, good intentions notwithstanding.[32] Though ethnography is qualitative in nature, it is the intention of the overall

[25] Susan Lewis, & Andrew Russell, 'Being Eembedded: A way Forward for Ethnographic Research' in Kahryn Hughes et al (eds), *Contemporary approaches to ethnographic research* (Vol II Sage Publication 2018) 137.
[26] Alexander Massey & Geoffrey Walford, *Studies in Educational Ethnography* (Vol 2 Jai Press 1999) vii.
[27] Norman Denzin & Yvonna Lincoln, 'Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln, and Linda Smith (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications Inc 2008) 11.
[28] *Ibid* 4.
[29] *Ibid*.
[30] Joe Kincheloe & Shirley Steinberg, 'Indigenous Knowledges in Education: Complexities, Dangers, and Profound Benefits' in Norman Denzin, Yvonna Lincoln, and Linda Smith (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 138.
[31] Norman Denzin, & Yvonna Lincoln, 'Critical methodologies and indigenous inquiry' in Norman Denzin, Yvonna Lincoln, & Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 6.
[32] Wanda McCaslin, & Denise Breton, 'Justice as Healing; Going Outside the Colonizers' Cage' in Norman Denzin, Yvonna Lincoln, and Linda Smith (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 513.

study not to endorse colonial knowledge and the perversion it has had on the system of customary law.

In the context of customary law in general and traditional justice specifically, it is important not to reassert the Eurocentric or northbound worldview of both research and legal education. To contest this positionality, the insufferable Eurocentric notion of viewing the Natives as a racialised other should be dismissed with the utmost contempt.[33] Essentially then, it follows that political questions concerning the topic of the ethnographic study must be a necessity to ascertain the study's agenda.[34] The questions, which mirror the notion of epistemological xenophobia as a measure to protect the Natives, are the following in no particular order:

(a) Who writes for whom?

(b) Who is representing [Natives]?

(c) How [and] for what purpose?

(d) For which audience?

(e) Who is doing science for whom?[35]

The political questions should not be raised for their own sake lest they achieve nothing other than serving to further give credence to the unscientific methods of the Natives. Instead, political knowledge creation as an indigeneity response to foreign epistemological dominance must resolve the gulf between transformative theory and transformative action. In this way, the academic endeavour, which this study is a part, moves to founder the indifference that now exists. It is submitted that this indifference tends to operate from two positions of extremes. On the one hand, there is the view that academic activity is of no worth to the studied Native whilst on the other hand, the academy positions itself at an elite level and places Natives as the primitive other.[36]

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[33] Norman Denzin & Yvonna Lincoln, 'Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln & Linda Smith, (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 5.

[34] Beth Swadener, & Kagendo Mutua, 'Decolonizing Perfomances: Deconstructing the Global Postcolonial' in Norman Denzin, Yvonna Lincoln, and Linda Smith (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 31.

[35] Norman Denzin, & Yvonna Lincoln, 'Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln, and Linda Smith (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 9.

[36] Joe Kincheloe & Shirley Steinberg, 'Indigenous Knowledges in Education: Complexities, Dangers, and Profound Benefits' in Norman Denzin, Yvonna Lincoln, and Linda Smith (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 143.

To respond appropriately to this indifference, this study proposes a divorce from the erstwhile epistemologies in an attempt to represent customary law procedures and processes of justice carefully in recognition of its true legal context as experienced by the Natives. Guided by Freirean pedagogy[37] and in appreciation of the political realities of research in general, it is important to accentuate the cultural location of customary law and justice episteme in South Africa. This demonstration is done in light of the ethnographic underscoring of time and place (or social context) as central guiders of the inquiry.[38]

3. Ethnographic design

The research design undertaken, as indicated, is one premised on ethnography. Ethnographic design is defined by Flick as follows;

> In its most characteristic form it involves the ethnographer participating, overtly or covertly, in people's daily lives for an extended period of time, watching what happens, listening to what is said, asking questions – in fact, collecting whatever data available to throw light on the issues that are the focus of the research.[39]

From this characterisation of ethnography, it is apparent that the ethnographer must enter the world of the people of his or her research and gain insight into their lives.[40] Evidently, a phenomenon and ethnography have the same goal of appreciating the lived experiences of the people within their social matrix. Essentially, what phenomenological studies and ethnographers have in common with the correct epistemological content of customary law is the lived experiences of a people. The phenomenon investigated herein relates to traditional justice as a subfield of a system of customary law. It cannot be emphasised enough that customary law in its proper context is the amalgamation of customs, religion and the lived experiences of the Natives. In effect, the ethnographic design naturally fits the bill of a customary law research, at least as far as its characterisation as an investigation of people's

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[37] Paulo Freire, *Pedagogy of the oppressed* (30th anniversary ed., Continuum 2005) 53 – 54 and 95.
[38] Norman Denzin, & Yvonna Lincoln, 'Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln, and Linda Smith (eds), *Handbook of Critical and Indigenous Methodologies* (Sage Publications 2008) 9; Charles Soukup, 'The Postmodern Ethnographic Flaneur and the Study of Hyper-mediated Everyday Life' in Kahryn Hughes, et al (eds), *Contemporary approaches to ethnographic research* (Vol I Sage Publication 2018) 93; Susan Lewis & Andrew Russell, 'Being Embedded: A Way Forward for Ethnographic Research' in Kahryn Hughes et al (eds), *Contemporary approaches to ethnographic research* (Vol II Sage Publication 2018) 138; Sam Hillyard, 'Responding to Text Construction: Goffman's Reflexive Imagination' in Alexander Massey, and Geoffrey Walford (eds), *Studies in educational ethnography* (Jai Press Inc 1999) 65.
[39] Uwe Flick, U *An Introduction to Qualitative Research* (4th ed., Sage Publication Group) 233.
[40] Preface in Alexander Massey, & Geoffrey Walford, *Studies in Educational Ethnography* (Vol 2 Jai Press Inc 1999) vii.

lived realities is concerned. In this thesis, the non-participatory observation was, in the main, used to gather the data. According to Flick, this is suitable to public observations where the number can neither be limited nor defined.[41] Traditional justice by its nature occurs in public spaces called *Kgoro* in the Sepedi language. The participants cannot be defined beforehand nor is there a prior determination of the number of people that would attend on the specific date. In principle, the non-participatory observation uses all five senses.[42] However, for practicality of the current study, emphasis falls on seeing and hearing.

How long is an ethnographer supposed to study their subject? Some authors argue that attitude and not time determine understanding of the phenomena studied.[43] Thus, if the ethnographer is, so to speak, in the moment of their study of phenomena, they are most likely to grapple with even the most salient points of the lived realities of the people.[44] All the same, ethnography as a research design is most susceptible to pitfalls that may not always manifests in other types of designs. This is a domino effect of the fact that education is not a value-neutral activity.[45] As a consequence, the data collection and analysis process is open to manipulation and abuse by each ethnographer in order to suit a particular agenda. To respond to this threat of data manipulation, a researcher must act ethically in keeping with the quality criteria for research.

4. Sampling

Sampling rears its head at different stages of the research study.[46] In an ethnographic study similar to the current one, it becomes pivotal on the decisions relating to either a *priori* determination of the communities (sample group of cases) or groups of people (case sampling) to observe, document and interpret.[47] A *priori* determination of communities and or groups of people to have conversations with is crucial in line with the caution to ensure that the author must take heed to avoid the temptation to lump together all indigenous cultures in the pursuit of new paradigms of truth. This in effect addresses the question of population. Population is

[41] Uwe Flick, U *An Introduction to Qualitative Research* (4th ed., Sage Publication Group) 225.
[42] *Ibid* 222.
[43] Susan Lewis, & Andrew Russell, 'Being embedded: A Way Forward for Ethnographic Research' in Kahryn Hughes, et al (eds), *Contemporary Approaches to Ethnographic Research* (Vol II Sage Publications Inc 2018) 125.
[44] *Ibid.*
[45] Anne Ryan, 'Conscientization: The Art of Learning' in Andrew O'shea, and Maeve O'Brien (eds), *Pedagogy, Oppression and Transformation in a 'Post-Critical' Climate* (Continuum International Publishing Group 2011) 86.
[46] Uwe Flick, *An Introduction to Qualitative Research* (4th ed., Sage Publication Group 2009) 114.
[47] *Ibid*.

the sum of all objects or subjects that conform to set research specifications.[48] Maswangwanyi defines research population as the number of elements in the field of a specific study that is concerned with the research problem or a pool of cases or elements on which a scientific study is focused.[49] In this study the population was from three separate and independent tribal authorities marked as jurisdiction A, B and C. The nature of traditional dispute resolution enables a situation where many people can act as participants. This arises from the fact that traditional *fora* allows for open access. In chapter 5, the register of cases indicates 45 cases and no less than 199 participants. In principle, the participants were more than the population indicated in the register of cases. The register is limited to the 199 participants on account of non-probability sampling.

Non-probability sampling is a sampling technique in which the researcher selects samples based on his or her subjective judgement as opposed to random selection.[50] This technique allows the researcher, in the exercise of his or her judgement, to decide what needs to be known and gather that information from people willing to provide it.[51] This study proceeded from the general assumption that the typicality and distribution of the phenomena of traditional justice is a rural occurrence. For the validity of study and to ensure sound comparative analysis, three tribal jurisdictions were sampled in the Limpopo Province. In no particular order, these regions or communities cover the jurisprudential reach of two tribal authorities falling under the Polokwane Municipality. These jurisdictions are identified as **jurisdiction A** and **jurisdiction B**. The third tribal authority identified as **jurisdiction C** is located in the Sekhukhune District Municipality.

In coming to the *priori* determination of the sampled communities, the following considerations influenced the current study. The demographic location of the University of Limpopo as the institution through which the researcher is registered. This aspect speaks to what is called convenience sampling, which falls under the genus of non-probability sampling. As a technique, convenience sampling refers to a sampling where the target population is selected for a combination of reasons including the ease of accessibility, geographic proximity, availability and willingness to participate in the reaserch.[52] The ethical clearance letter,

[48] Ramokone Maswanganyi, *Assessing Teaching Approaches and Strategies of Foundation Phase Teachers in Developing Learners' Writing Proficiency: A Case Study in Warmbaths Circuit, Limpopo Province* (Doctor of Education, Tshwane University of Technology, 2022) 10.
[49] *Ibid* 10.
[50] *Ibid* 73.
[51] *Ibid*.
[52] Ilker Etikan *et al*, 'Comparison of Convenience Sampling and Purposive Sampling' (2016) 5(1) *American Journal of Theoretical and Applied Statistics* 1, 2.

attached as appendix 1, with the consent, attached as appendix 2, and the request to conduct study form, attached as appendix 3, were hand delivered to four tribal authorities within the vicinity of the university. Only jurisdiction A and jurisdiction B responded positively to the request. Secondly, the diagrammatic representation in figure 3.2, clearly indicates that traditional justice in the Sekhukhune District Municipality enjoys overwhelming support. This data pointed to the centrality of this district to the aims and purposes of this study.

Inevitably, an appreciation of the hierarchies that are the feature of traditional authorities as provided for by the Traditional and Khoi-San Leadership Act [53] falls to be made. [54] Unfortunately, it is submitted, this Act too falls into the trap of not expressing itself properly so far as the scope of customary law and its varied applications is concerned. Section 15(1)(a) is yet another provision that makes the application of functions subject to "customary law". [55] Effectively, while section 7 makes provision for the hierarchy of authority, the Act does not commit to the parameters of their functions except to provide that the functions must be aligned to customary law. As such, it was not clear whether and if Headmen and Headwomen have powers to dispense of traditional justice and or if in fact that power is being utilised. For that reason, it was critical in the sampling to establish from the lowest level up, if traditional justice is being dispensed and how this was being done. Taken in clear terms, it means where the circumstances allow, more than a single community must be sampled for comparison firstly within that tribal authority and secondly for a cross comparison amongst the different authorities sampled.

In the main, a sampling of groups of cases was undertaken in this study in order to establish common themes and or sub-themes. The study was constituted through an observation of the *Kgoro* proceedings without any attempt to shape the result thereof to conform to the author's educational training. As evidenced by the secondary questions above, this study also touches on the issue of gender representation and equality in the composition of the *Kgoro*. Naturally it follows that case sampling was necessary. Therefore, the classification of all participants

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[53] 3 of 2019.

[54] See s. 7. (1) (a) There are the following traditional leadership positions —
(i) King or queen;
(ii) principal traditional leader;
(iii) senior traditional leader; and
(iv) headman or headwoman:
Provided that the position of principal traditional leader only applies to a person who is deemed to be a principal traditional leader as defined in section 1.

[55] (1) A traditional or Khoi-San leader performs the functions provided for —
(a) in terms of customary law and customs of the traditional or Khoi-San community concerned; and
(b) in terms of any applicable national or provincial legislation.

along the gender exes was necessary. Disputants, councillors and interested third parties in the cases were all identified on the gender exes to respond appropriately to the question of female representation.

At the end, the data collected was systematically analysed so as to enable the author to draw reasonable inferences regarding the application of phenomena.

5. Data analysis

The data analysis must take into account that the study has two sources of data information. This was analysed through thematic analysis (hereunder referred to as TA). Simply put, this is a way of seeing and making sense out of data[56] or a systematic method for identifying, analysing, and reporting patterns (themes).[57] This methodology is focused on the description of phenomena and a low level of interpretation.[58] At the end the collected data must, in the main, describe the phenomena of traditional justice and the process of justice itself. It is inescapable that a legal thesis requires some degree of interpretation to factor in the author's contribution to the academy. While this is so, the interpretation must follow the confines established in this study; which are firstly, that care was taken not to continue the adulteration of a living system of customary law by using old and or existing commercial shrines of "officialdom"; and secondly, the idea of ethnographic imagination always lingered in the author's mind to ensure that the phenomena of traditional justice was described for what it is and not what it ought to be. The descriptive features of this analysis ought to enable an author to develop new paradigms that are both sound and empirically grounded.[59]

The following stages established by Braun and Clarke have become accepted as part of thematic analysis;

a) Familiarising yourself with the data;
b) Generating initial codes;
c) Searching for themes;

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[56] Paula Brough (ed), *Advanced Research Methods for Applied Psychology; Design, Analysis and Reporting* (Routledge 2019) 213.
[57] Virginia Braun, & Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77, 79.
[58] Mojtaba Vaismoradi, Hannele Turunen, & Terese Bondas, T 'Content Analysis and Thematic Analysis: Implications for Conducting a Qualitative Descriptive Study' (2013) 15 *Nursing and Health Sciences* 398, 399.
[59] Uwe Flick, U *An Introduction to Qualitative Research* (4th ed., Sage Publication Group 2009) 15. Here Flick determines the goal of research as an endeavour to discover and develop new and empirically grounded theories.

d) Reviewing themes;
e) Defining and naming themes; AND
f) Producing the report.[60]

Once the analysis methodology is established, it also suffices to comment of the quality criteria for research.

6. Quality criteria

The following quality criteria aspects were given due consideration:

- Credibility: the main purpose of credibility in research is to uncover the veracity or otherwise of the findings of the study.[61] To ensure credibility, researchers adopt well-recognised methods, debrief participants, and describe the phenomenon under investigation. The chosen design of research in this study is ethnography. But, as already pointed out above, this design is open to possible manipulation not least of which is the so called 'ethnographic imagination'.[62] Although the term, ethnographic imagination is not expressly defined, it can be interpreted as a pervasive attempt or action by the ethnographer to impose his or her civic thoughts on the primitive subjects of his or her inquiry. It is arguable that this imagination, in the space of traditional justice, may tempt an ethnographer into shoring up the state law in the place of an authentic system of the Native people. It goes without saying that this will fall foul to the descriptive features of ethnography as the study of the lived experiences of the people. To confirm credibility of this study, no effort was made to compare traditional phenomena of justice with the state's version of dispute resolution. Traditional justice was considered in its cultural location and analysed accordingly to ensure its compliance with the constitutional injunction.
- Confirmability: this refers to the objectivity or neutrality of the data.[63] It speaks to the agreement between two or more external people about the relevance and meaning of

[60] Virginia Braun, & Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77.
[61] Alunamutwe Ranndítsheni, *An Investigation into Ritual Murders in the Vhembe District of the Limpopo Province in South Africa* (PhD in African Studies, University of Venda, 2015) 53.
[62] Anshuman Prasad, 'The Return of the Native: Organizational Discourses and the Legacy of the Ethnographic Imagination' in Anshuman Prasad (ed), *Postcolonial theory and organizational analysis* (Palgrave Macmillan 2003) 149 - 167.
[63] Alunamutwe Ranndítsheni, *An Investigation into Ritual Murders in the Vhembe District of the Limpopo Province in South Africa* (PhD in African Studies, University of Venda, 2015) 54.

the data collected and processed.[64] By way of a cautionary rule, each ethnographer must be careful of their beliefs and assumptions regarding the phenomena investigated.

- Dependability: indicates how the technique used will allow the same results to be obtained if the research were to be repeated with the same methods and participants.[65] There could be no claim of credibility without dependability. These two are interlinked and mutually dependent on each other with the result that the absence of the one automatically puts the other into question.

7. Ethical considerations

In appreciation of the historical perversion of customary law and in recognition of the litany of plausible abuse of ethnography, it is imperative that from the beginning one must ensure that ethical considerations are cleared. These ethical considerations are intended at addressing possible abuse and to maintain the scientific claims of the research enterprise.[66] Still, the scientific enterprise cannot operate in a vacuum. An interaction between the researcher and the researched require that the latter be protected in some way or another. As a consequence, there are calls for code of ethics as an answer to all questions relating to ethical behaviour in research.[67] The rationale for the necessity of these codes is guided by the desire to prescribe measures to avoid harming participants and ensuring that they are respected and that their interests and needs are taken into consideration.[68]

In light of the calls for codes, something called ethical theory has been advocated for as noted by Flick. This ethical theory has the following common features:

i) *Non-maleficence* - researchers should avoid harming participants;

ii) *Beneficence* - research on human subjects should produce some positive and identifiable benefit rather than simply be carried out for its own sake;

iii) *Autonomy or self-determination* - research participants' values and decisions should be respected; AND

[64] *Ibid.*
[65] *Ibid*.
[66] Luyanda Dube, Maned Mhlongo, & Patrick Ngulube, 'The Ethics of Anonymity and Confidentiality: Reading from the University of South Africa Policy on Research Ethics' (2014) 12(2) *Indilinga* 201, 201.
[67] Uwe Flick, *An Introduction to Qualitative Research* (4th ed., Sage Publication Group 2009) 37.
[68] *Ibid.*

iv) *Justice* - all people should be treated equally.[69]

The ethics theory cuts across many considerations of humanness and most significantly, appropriately underscores the value that attaches to the researched as people and not puns to be used in the achievement of the scientific enterprise.

7.1. Permission to conduct study

Prior to conducting this study, the researcher was granted permission from the Turfloop Research Ethics Committee, better known by its acronym TREC (project number TREC/82/2022: PG). See Appendix 1.

7.2. Informed consent and guarantee of privacy

Whereas the humanity aspects of ethics most probably cuts across all scientific enterprise, in law it is often quite important to guarantee confidentiality of both process and result, ensure that the privacy of the people is not infringed and the guarantee of informed consent.[70] Notwithstanding this ideal position, confidentiality is problematic when research is done in a public setting.[71] It has been established above that the traditional set up takes a broader participation in the resolution of the dispute.[72] Properly understood, this mean that confidentiality in its conventional meaning does not come into play. However, whereas in the community set up confidentiality is forfeited in the benefit of conflict resolution and the

[69] *Ibid*.

[70] In the Preamble of the Protection of Personal Information Act 4 of 2013, it is provided that the right to privacy includes a right to protection against the unlawful collection, retention, dissemination and use of personal information. More directly, section 5 of the Act make provision for the rights of data subjects. In relevant parts subsetion (1) provides that: A data subject has the right to have his, her or its personal information processed in accordance with the conditions for the lawful processing of personal information as referred to in Chapter 3, including the right —
(a) to be notified that;
i) personal information about him, her or it is being collected as provided for in terms of section 18; or
ii) his, her or its personal information has been accessed or acquired by an unauthorised person as provided for in terms of section 22;
(b) to establish whether a responsible party holds personal information of that data subject and to request access to his, her or its personal information as provided for in terms of section 23;
(c) to request, where necessary, the correction, destruction or deletion of his, her or its personal information as provided for in terms of section 24;
(d) to object, on reasonable grounds relating to his, her or its particular situation to the processing of his, her or its personal information as provided for in terms of section 11(3)(a)…

[71] Uwe Flick, *An Introduction to Qualitative Research* (4th ed., Sage Publication Group 2009) 42.

[72] Dial Ndima, *Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution* (LLD Thesis, UNISA, 2013) 26 – 27.

development of customs, it cannot be gainsaid that the forfeiture extends to include making the *Kgoro* hearing national or even international.

The tenets of conventional confidentiality and privacy must be ensured and guaranteed. Consequently, this study seeks to address not the specific details of cases but rather to look at the issues in dispute, the leading of evidence by the parties, the procedure adopted by the *fora* or put differently, how the case is prosecuted and or dispensed off. As such the information was decoded to protect the identity of the parties as required by law. It cannot be emphasised enough that voluntariness implies that the participants were free to withdraw from the research inquiry at any time before or during the data collection.[73] On the other hand, informed consent mean that the participants are fully aware of the scope, process and purpose of the research.[74] At the end, all participating tribal communities or authorities did so in line with the assurance guaranteed by methodology and the law. Furthermore, the consent forms attached to this study as Appendix 2 was approved as part of the application for ethical clearance by the ethics committee of the University of Limpopo.

7.3. Beneficence

This principle underlies the guarantee that participants in this study are free from all forms of harm and on the converse assured protection.[75] A consideration worth commenting on as well is the social value of this study. Quite a number of authors and cases on customary law are available on a cursory search of the internet. However, it was interesting to be immersed in the ethnographic method of dispute resolution not as a knowledge bearer but instead as an observer and learner. The reap opportunity was there for the sampled communities to go about their business of the *Kgoro* whilst narrating their own tales of the phenomena of traditional justice. In appreciation of the bias inherent in the educational pedagogy, it was endeavoured to ensure that subjects are studied in their own cultural location and not that imagined by the researcher. The idea remained that the pursuit of the paradigm of truth was not inhibited by the beliefs and assumptions of the present author.

[73] Gladys Sibanda, *Stakeholder Experiences of Enabling Children's Rights to Basic Education through Public Primary School Admission Policies* (PhD in Education, University of Pretoria, 2018) 98.
[74] *Ibid.*
[75] Lethabo Mabuza, *An Analysis of Current Healing Practices Based on Selected Mega-churches in the Vhembe District of Limpopo Province* (Master of Arts, University of Venda, 2017) 15.

7.4. Non-beneficence

As an opposite of beneficence, this entails potential risks of harm to the participants. The study is guided by the provisions of the Protection of Personal Information Act[76] as amended. As a result, the processing of personal information must, out of necessity, comply with section 5 as quoted above. An underlying factor to this section and the study as a whole is informed consent as discussed above. The data collected for this study is only used for research purposes. Taking leaf out of Varkey's book, it is contended that in the application of non-beneficence one must weigh the benefits against the burdens and endeavour to use methods that will result in less damage if at all damage is anticipated.[77] It cannot be emphasised enough that the researcher went into the communities as observer of traditional justice. Furthermore, the consent form (Appendix 2) made it clear to the participants that they can withdraw such consent at any given stage during the process. A combination of factors including the methodology, consent form and the Protection of Personal Information Act mean that the probabilities of burdens on the participants were lessened.

7.5. Autonomy or self-determination

As indicated above, this refers to respecting the values and decisions of the people.[78] Much has been made of the indignity that the Native law has suffered historically. This study intends to contribute towards returning that dignity to the Natives and their laws. For that reason, the worldviews of the Natives must be respected and their processes recorded as presented in the respective communities and or *kgoro*.

7.6. Justice

To buttress all of the other principles of ethical considerations, this calls on the researcher to act in a fair, equitable and appropriate manner towards the researched.[79] This invitation belies the fundamental essence of undertaking this study.

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[76] 4 of 2013.
[77] Basil Varkey, 'Principles of Clinical Ethics and Their Application to Practice' (2021) 30 *Medical Principles and Practice* 17, 18-19.
[78] Uwe Flick, *An Introduction to Qualitative Research* (4th ed., Sage Publication Group 2009) 37.
[79] Basil Varkey, 'Principles of Clinical Ethics and Their Application to Practice' (2021) 30 *Medical Principles and Practice* 17, 20.

8. Chapter conclusion

In conclusion, this chapter has delved into the methodological considerations central to the research objectives. The choice of methodology was a pivotal decision, given the nature of the study. In pursuit of the overarching goal of re-indigenisation, the study embraced a comprehensive and multi-sited qualitative strategy, with an ethnographic design as its foundational base. It is important to acknowledge that ethnography, as a methodology, has been the subject of debate, with contestations ranging from its definition, design purity, and the potential for results to lose their innocence.

Despite the controversies surrounding ethnography, there is a consensus among researchers that its purpose lies in the observation, documentation, and interpretation of people's lived realities. This aligns seamlessly with the core thesis of this study, which seeks to advance the notion of customary law as a composite of customs, religion, and the lived experiences of Native people. Moreover, this central thread of ethnography intertwines with the concept of phenomenology, further enriching the research framework.

It is herein submitted that a thematic analysis of the collected data, a method well-suited for the potentially politically-oriented study, will be conducted. In such an analysis, one retains the agency to determine what is considered significant. Nevertheless, the present author is committed to upholding the highest quality criteria for research and adhering to all ethical considerations. The author further continues with the assurance of thorough and fair results that will contribute to a deeper understanding of the intricate interplay between customary law, culture, and lived experiences.

This chapter sets the stage for the research to come, underscoring the commitment to a methodologically rigorous and ethically sound exploration of the complex issues at hand.

CHAPTER 5

RESULTS PART I - SUMMARY OF THE DATA

1. Introduction

This chapter presents a summary of the cases observed over a 10-month period in sampled jurisdictions. The presentation outline begins with a register of all cases sampled. This register is followed by a brief clarification of some of its salient features intended to contexualise its reading. Next, there is a sequential summary of the cases as they appear in Table 5.1 below. It must be pointed out from the beginning that the register of cases draws from the wisdom of Letseka who cautions us against the risk of assuming that Natives follow a homogenous system.[1] For that reason therefore, the sequential presentation is demarcated into the respective jurisdictions sampled. From the cases, a few themes and sub-themes emerged and require discussion. This discussion is premised on the commonalities amongst the cases in the various jurisdictions and are grouped together under each theme and or sub-theme. Table 5.2 highlights the major themes that were developed in this study.

A proper way to reading and or understanding this chapter is by fully appreciating the cultural location of Natives.[2] As such, this study underlies the Natives' values of idioms such that these are presented in the vernacular language with the English translations in the footnotes. The decision, it is contended, is aligned to *Motsepe v Khoza*[3] which rightly conceded the importance of idioms in the indigenous cosmology. The study furthers that wisdom through the use of idioms in the vernacular language.

2 Register of cases

[1] Moeketsi Letseka, 'In Defence of Ubuntu' (2008) 27(6) *Studies in Philosophy and Education* 47, 49.
[2] Mpsanyana Makgahlela, *The Psychology of Bereavement and Mourning Rituals in a Northern Sotho Community* (PhD in Psychology, University of Limpopo, 2016) 252.
[3] 15078/12 (22 May 2013) para 11.

Case number	Complainant	Respondent	Issue/dispute	Jurisdiction	Forum	Participant
1	Male	-	Inquiry into stolen donkeys	A	*Kgoro ya Ntona*	Member 1 (M) Member 2 (M) Complainant Member 3 (M) Member (4)
2	Female	Unspecified (Family)	Cross-jurisdiction inquiry or dispute (stolen sheets of iron)	A	*Kgoro ya Ntona*	Complainant Member 2 Member 5 (M)
3	Female	-	Request for transfer to the jurisdiction of another *Ntona*	A	*Kgoro ya Ntona*	Applicant Member 5 Member 4 Member 6 (M) Member 7 (M) Member 4 (M)
4	Female	Male	Dispute between neighbours	A	*Kgoro ya Ntona*	Complainant Member 1 Member 8 (M) Member 4 Member 2 Respondent
5	Female	-	Change of names on the PTO (inquiry)	A	*Kgoro ya Ntona*	Applicant Member 5 Member 2 Member 9 (M) Member 10 (M)

						Member 1 Member 6 Member 4
6	Male	Male	Cross-jurisdiction dispute (none payment for service rendered)	A	*Kgoro ya Ntona*	Member 5 Complainant Respondent Member 1 Member 4
7	Male	Three males	Dispute between neighbours	A	*Kgoro ya sechaba*	Complainant Respondent 1 Councillor 1 (M) Respondent 2 Interested party 1 (M) Councillor 2 (M)
8 (i) (ii) (iii) (iv) (v) (vi)	Five females Female Female Male Male Female	Two males Male Male Male Male Male	Seasonal claims	A	*Kgoro ya sechaba*	Councillor 1 Councillor 2 Interested party 1
9	Two females	Two females Two males	Family dispute (accusations of sorcery)	A	*Kgoro ya sechaba*	Complainant 1 (F) Councillor 3 (M) Complainant 2 (F) Councillor 1 Respondent 1 (F) Respondent 2 (F)

						Respondent 3 (M) Respondent 4 (M) Councillor 4 (M) Councillor 5 (M) Councillor 6 (M) Councillor 7 (F)
10	Male	Male	Inquiry (stolen goats)	A	*Kgoro ya sechaba*	Complainant Respondent Councillor 6
11	Female	Female	Sorcery	A	*Kgoro ya sechaba*	Complainant Respondent Councillor 3 Interested part 2 (F) Interested party 3 (F) Councillor 6 Councillor 7 Councillor 2
12	Four females	Three females	Social club affairs (insults)	A	*Kgoro ya sechaba*	Complainant 1 (F) Complainant 2 (F) Complainant 3 (F) Complainant 4 (F) Respondent 1 (F) Councillor 1 Councillor 5 Councillor 4

						Councillor 6 Councillor 8 (M)
13	Female	Male	Dispute between neighbours	A	*Kgoro ya sechaba*	Complainant Interested party 4 (F) Respondent Councillor 9 (M) Councillor 6 Councillor 8
14	Male	Female	Dispute over a stand	A	*Kgoro ya sechaba*	Complainant Respondent Councillor 4 Councillor 1 Councillor 10 (M) Councillor2
15	Male	Male	Breach of a contract – sale of land	A	*Kgoro ya sechaba*	Complainant Respondent Councillor 10 Councillor 8
16	Female	Male	Dispute over a stand	A	*Kgoro ya sechaba*	Councillor 11 (M) Councillor 1 Complainant Respondent Councillor 5 Councillor 3 Interested party 5 (F) Councillor 6 Councillor 12 (M) Councillor 8 Interested party 6 (F)

17	*Moshate*	Male	Bringing *Moshate* into disrepute	A	*Kgoro ya sechaba*	Interested party 7 (M) Interested part 8 (M) Respondent Interested party 9 (F) Councillor 6 Councillor 1 Councillor 4 Interested party 10 (M) Councillor 12 Councillor 13 (F) Councillor 8
18	Female	Male	Dispute over land	A	*Kgoro ya sechaba*	Councillor 12 Councillor 1 Respondent Councillor 14 (M) Complainant Councillor 15 (M) Councillor 4 Councillor 8
19	Male	-	Inquiry – request for an extension of stand	B	*Kgoro ya Ntona*	Applicant Member 1 (M) Member 2 (F) Member 3 (M) Member 4 (M)

						Member 5 (M)
20	Male	Male	Dispute between neighbours	B	*Kgoro ya Ntona*	Member 4 Member 5 Member 3
21	Three males One female	*Kgoro* One male	Dispute over land	B	*Kgoro ya Ntona*	Member 6 (M) Complainant 1 (M) Member 7 (M) Complainant 2 (M) Member 8 (M) Complainant 3 (F) Respondent 2 (M) Member 9 (M) Member 10 (M) Member 11 (M)
22	Female	Male	Dispute over money lend	B	*Kgoro ya Ntona*	Complainant Member 7 Member 6 Respondent Member 11 Member 12 (M)
23	Female	Male	Abuse and or harassment	B	*Kgoro ya Bakgomana*	*Mokgomana 1* (M) *Mokgomana 2* (M) *Mokgomana 3* (M)

						Respondent Member 4 *Mokgomana 4* (M) Complainant *Mokgoma* (M)
24	Burial society	Female	Issues of the social or burial club	B	*Kgoro ya Ntona*	Member 10 Member 8 Respondent Interested party 1 (F) Member 9 Interested party 2 (F)
25	*Kgoro*	Two females One male	Dispute over land	B	*Kgoro ya Ntona*	Member 6 Respondent 1 (F) Respondent 2 (M) Member 8 Respondent 3 (F) Member 10
26	Male	Female	Family dispute – abuse right to title and improper marriage celebration	C	Traditional council	Councillor 1 (M) Respondent Councillor 2 (F) Interested party 1 (F) Interested party 2 (M) Complainant Interested party 3 (M) Interested party 4 (F)

						Councillor 3 (M) Interested party 5 (F) Interested party 6 (F)
27	Female	Female	Family dispute – intestate estate	C	Traditional council	Complainant Respondent Councillor 2 Councillor 1 Councillor 4 F) Interested party 6 (M) Councillor 3
28	Male	-	Family dispute – request for protection in respect of a funeral	C	Traditional council	Applicant Councillor 2
29	Male	Male	Family dispute – in fighting	C	Traditional council	Complainant Councillor 3 Respondent Interested party 7 (F) Councillor 5 (F) Councillor 6 (F) Councillor 7 (F) Councillor 8 (M)
30	Male	Male	Dispute over land	C	Traditional council	Complainant Councillor 1 Councillor 3 Respondent

31	Male	Male	Customary procedure for laying a matrimonial complaint	C	Traditional council	Complainant Councillor 1 Interested party 8 (M) Interested party 9 (F) Interested party 10 (M) Councillor 4
32	Social club	Female	Issues of the social or burial club	C	Traditional council	Interested party 11 (F) Respondent Interested party 12 (M) Councillor 7 Councillor 1
33	Female	Social club	Issues of the social or burial club	C	Traditional council	Complainant Councillor 1
34	Male	Male	Family dispute – livestock	C	Traditional council	Interested party 13 (M) Complainant Councillor 3 Councillor 1 Respondent
35	Female	Female	Family dispute – maintenance	C	Traditional council	Complainant Interested party 14 (M) Interested party 15 (M) Interested party 16 (F) Respondent Councillor 4 Councillor 7
36	Male	Female	Theft	C	Traditional council	Complainant Respondent Councillor 1

37	Male	One male One female (community)	Right of way	C	Traditional council	Complainant Respondent 1 (M) Respondent 2 (F) Interested party 17 (F) Interested party 18 (M) Interested party 19 (M) Councillor 1 Councillor 3
38	Male	Three males One female	Family dispute – intestate estate	C	Traditional council	Councillor 3 Respondent 1 (F) Councillor 9 (F)
39	Three males	Four males	Dispute over tribal boundaries	C	Traditional council	Complainant 1 Complainant 2 Respondent 1 Councillor 1
40	Female	Three females One male	Family dipute – threat of violence and eviction; insults	C	Traditional council	Complainant Respondent 1 (M) Respondent 2 (F) Interested party 20 (M) Interested party 21 (M) Interested party 22 (M) Respondent 4 (F)

						Interested party 23 (M) Interested party 24 (F) Interested party 25 (F) Councillor 5 Councillor 10 (F) Councillor 6 Councillor 3 Councillor 8 Councillor 1 Respondent 3
41	Female	Male	Maintenance inquiry	C	Traditional council	Complainant Respondent Councillor 1 Councillor 10
42	Female	Female	Family dispute – care of siblings	C	Traditional council	Complainant Respondent Councillor 1 Councillor 4 Councillor 3 Interested party 26
43	Female	Two males	Insults	C	Traditional council	Complainant Respondent 1 Councillor 1 Interested party 27 (F) Councillor 11 (M)
44	Male	Two males	Harassment	C	Traditional council	Complainant Respondent 1

						Respondent 2 Interested party 28 (F) Interested party 29 (M) Councillor 3
45	Male	Male	Theft	C	Traditional council	Complainant Interested party 29 (F) Respondent Councillor 1 Councillor 6 Councillor 8 Councillor 3

Table 5.1. Register of cases

An important consideration from table 5.1 above relates to the identification of litigants and participants in general along the gender lines. This need is a direct response to the claims of innate patriarchy[4] in traditional dispute resolution. Essentially, this thesis provides proof of the reality of gender in traditional dispute resolution in the Limpopo Province. Another factor that was influential to the register is the prescriptive guidance of the Protection of Personal Information Act 4 of 2013 as amended. In effect, great care is taken not to expose the personal details of any of the participants. For that reason, litigants are referred to as either complainant or respondent whilst the participants' column identifies councillors, members of the executive councils of various *Kgoro* and interested parties. These interested parties attend cases with the litigants to offer their insights and or support a specific notion of events as known to them. Furthermore, three tribal authorities were sampled in the Limpopo Province. These jurisdictions are identied alphabetically for the ease of reference. Finally, in chapter 3 above, the structure of traditional courts is indicated in figure 3.1. Inevitably, this required that the respective *fora* where data is collected be indicated as well.

[4] Sanele Sibanda, 'When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation' (2010) 17(3) *Human Rights Brief* 1, 1.

3. Summary of the cases

3.1. Sequential summary of the cases

Case 1

This is an inquiry by a member of jurisdiction A appealing to *Kgoro* to intervene and assist him with getting his donkeys back. The complainant lost his donkeys through alleged theft. A case of theft was opened with the police but it is not making meaningful progress in his view. The complainant alleged that a period of more than three months has lapsed without arrest being effected and prosecution commencing. Significantly, it must be pointed out, the complainant did not know who stole his donkeys nor had any evidence to aid the police in the identification of the perpetrator. The complainant, on a previous occasion and on the advice of the *kgoro*, went to meet up with the station commander. He alleged, before the *kgoro* sitting, that the station commander informed him that according to the law if an investigation does not yield substantive progress for a period of three months then the case is closed. For that reason, the complainant returned to the *kgoro* asking it to intervene in his matter since the police are dragging their feet in this investigation. In its decision, *Kgoro* was careful not to accept the prosecution of the case in this fora without evidence that indeed the case was dismissed through the other forms of the justice apparatus.

Case 2

On 31 July 2022, the complainant laid a statement of complaint against the respondent family for taking 25 corrugated iron sheets and a door without permission. These properties were commandeered by the respondent family and a shack was erected using the material in a village under the headmanship of another *Ntona* (Headman). To properly prosecute this issue, this *Kgoro* had to write a letter to the *Kgoro* of the other *Ntona* to notify the latter that his children have a case to answer in the former *Kgoro*.

On 27 November 2022, the issue was again tabled for discussion at the former *kgoro* by way of an update. On that date, the respondents had not been secured as the other headman was unable to get them to honour summons issued against them. By 22 May 2023, this issue remained unresolved. By way of an update, *Kgoro* was notified of the respondent family's willingness to return the sheets of iron without a need for a trial. However, there was no indication of when this would be done or what specific measures would be taken to ensure this return.

Case 3

This is a single person inquiry. On 31 July 2022, the applicant made a request to be transferred to another jurisdiction under the headmanship of another *Ntona*. She cited, as her reasons for this transfer, her advanced age and ill-health. In her submission she contended that the distance she travels between her home and this *kgoro* is becoming increasingly unbearable in light of her age and failing health. To effect the transfer, she requested *kgoro* to give her a letter of transfer to officially leave the current jurisdiction and join another. After checking the records to ensure that she was in good standing with *Kgoro*, the order was granted to allow her to join a *kgoro* of her choosing closest to her.

Interestingly, despite the express decision of the *kgoro* on the date mentioned hitherto, the matter was revisited at a setting of 28 August 2022. On this occasion, a member of the *Kgoro* queried the lack of consistency by *Kgoro* in decision making. Citing his own previous rejection on the same facts as the applicant in the current case, this member bemoaned the granting of the order. However, it is not clear whether the *Kgoro* admitted that the decision was made in error and whether it self-corrected for future reference or reversed its previous decision. There was apparent lack of fluidity or clarity on this issue in both the discussion and the final decision of 28 August 2022.

Case 4

This was an ongoing dispute between the parties that commenced before the study. Despite this, its adherence to theme 2 discussed below underlies its importance to the current study. The complainant came in on 28 August 2022 to register her gratitude to the *kgoro* for the role it played in the resolution of the dispute with her neighbour in respect of her damaged fence. However, she further noted her dissatisfaction with how the respondent actioned the directions from the *kgoro* in repairing the fence. To avoid future conflict, the complainant wanted the boundary line between herself and the neighbour to be separated to create space. This request was not complied with by the respondent as per her submission before *Kgoro.* For that reason, she further requested that the respondent must be directed to create the space between the two fences to avoid any further damage in future. *Kgoro* summoned the respondent to appear before it to action this request.

On 27 November 2022, both parties appeared before *Kgoro* for further prosecution. Low and behold, the complainant expressed a desire to abandone her complaint against the respondent but instead be reconciled with him. This desire for reconciliation was endorsed by *Kgoro* as a show of a collective yearning for harmony in jurisdiction A.

Case 5

This is a single person inquiry. The applicant approached *kgoro* with her last born son with the intention of changing the names on the *yelwana* (permission to occupy) from that of the deceased father to those of the son. This request was declined. In its reason, *Kgoro* cited that the future is unpredictable in that despite the good intentions of the applicant, the son and or his wife in future may evict her (the applicant) from her own house. To justify this denial, a previous case of eviction was cited where a mother was chased out of the stand she previously owned

Case 6

The argument for traditional dispute resolution as a comprehensive system is enhanced in this case. This is so because of the following salient issues are apparent in this case. Firstly, this issue is a cross-jurisdiction dispute in that the litigants are from two different villages under the authority of different *Ntonas.* Secondly, the decision of *kgoro* underlies the importance of legal standing to litigate.

At issue in this case is the fact that the complainant, on behalf of his grandson, claimed that the respondent has not paid money due to the grandson for services he rendered to the respondent's child during the 2022 winter initiation. For completeness, it must be pointed out that proceedings started with a letter from the referring *Ntonagadi* requesting this *Kgoro* to assist her subject. After hearing contrasting evidence on the exact amount that was agreed, *kgoro* decided that a decision could not be reached without the evidence of the grandson. The matter was sent back to the referring *Kgoro* to secure the presence of the grandson for a hearing at a later date.

Case 7

The complainant put a series of impudent actions by the children of the respondents before *Kgoro ya sechaba* and invited it to assist him with finding a solution. From incidences of bullying experienced by his children, harm caused to his children by firecrackers to dumping dirt in his home. He alleged before this *fora* that previous attempts to speak to his neighbours at family level proved unsuccessful. However, his elaborative submission was countered by the respondents in their statement of response to point at an acrimonious sense of neighbourlessness. Notwithstanding this, after hearing the evidence of all of the litigants on behalf of their children, council decided the matter more on the issue of poor parenting than a need to intervene in the affairs of the children. At the end, council did not reconcile the

parties nor attempted to do so. Instead, the litigants were encouraged to go back home and sit as adults to try resolve the impudence of the children.

Case 8

A total of six similar cases were observed in jurisdiction A. What is important to note is that these claims are seasonal, commencing in and around October/November and ending with the reaping season in the autumn months the following year. Upon commencement of the sowing season, livestock farmers are cautioned to care for their stock to avoid it straying onto the agricultural land of the maize farmers. By and large, all these farmers do so for subsistent purposes.

Importantly, the jurisprudential position in this jurisdiction is that these type of cases are not prosecuted. What happens is that the complainant places the livestock of the respondent on the scene of the maize plot. Once the respondent accepts that indeed it is his or her livestock that ate the complainant's maize, the matter is settled. In the 2022/2023 season, a backyard infringement cost R400.00 whilst an infringement in the farms was R800.00. These amounts are based on the money paid to tractor owners or labours who sow the land. It is noteworthy to point out that in cases where there is more than one complainant and more than one respondent like like case 8(i), the parties are not jointly and severally liable. Thus, each complainant will be paid an amount of R800.00 by each of the respondents. In this example, there were two respondents which meant that each of them are expected to pay each of the five complainants an amount of R800.00.

Case 9

The dispute amongst the siblings painted a very grim picture of the family setup. A central issue here is that three of the siblings and a nephew accuse their sister and mother of witchcraft. They allege that as a result of the practice of witchcraft they have experienced strange anomalies over the course of time. This, as further alleged, has affected the pursuits of their other endeavours including but not limited to romantic relationships and spiritual operation as a healer and priest. For context, it must be acknowledged that the accusers were respondents in the case as the complainant approached *Kgoro ya sechaba* to seek a relief from her siblings. In her statement of complaint, she highlighted that the constant cacophony of noise and hurling of insults coupled with accusations of sorcery has affected her negative such that she no longer enjoys meaningful social relationships with anyone in the village. For that reason, she sought intervention from *Kgoro* to return to a state of normalcy.

The general practice in jurisdiction A is that cases of these nature are not prosecuted. This was justified by reference to, among others, the Witchcraft Suppression Act 3 of 1957. Despite this, and guided by the anomaly of this case, councillors endeavoured to reconcile the family. This endeavour was intentional from the beginning and sustained throughout. At the end, the decision of the *Kgoro* was to plead with the respondents to mend their ways and through changed behaviour attempt to repair their relationship amongst themselves and with the community at large. To a packed gallery of fellow community members, *Kgoro* called for calm and a sense of harmony so that they can live with the respondents in particular.

Case 10

If anything at all, this case best underlines the difference between this *fora* and the other forms of justice in the state's apparatus. As well, a properly classification of this case is a reference to an inquiry or demand for an apology than a complainant of theft. This is because at no stage did the complainant directly implicate the respondent nor does he allege that he actually stole his livestock. The central issue is that the complainant is finding it uneasy that his goats disappeared a couple of days after the respondent had come to his home with strangers who were looking to buy goats. The question before the *Kgoro* turned on this issue; how is it that the respondent's visit with strangers and protracted negotiation of the goats coincided with the disappearance of the livestock?

It is noteworthy that at no stage did the complainant allege that his three goats were stolen by the respondent. For that reason, when a previous attempt to speak to the respondent failed he approached *Kgoro ya sechaba* to aid his meeting with the respondent. Whilst councillors acknowledged the limitation of this *fora* to prove theft, the respondent was encouraged to apologise for bringing people into the complainant's home. At the end, the respondent apologised for the hurt suffered by the complainant and committed to assist them in tracing their lost stock. The apology was duly accepted and endorsed by *Kgoro*.

Case 11

In yet another case of accusation of sorcery in jurisdiction A, the person raising allegations of sorcery is basing it on a third party's account. In context, the complainant approached *Kgoro ye sechaba* claiming that a third party alleges that she (complainant) is bewitching the respondent with her (the respondent's) grandmother. What was apparent from the statement of complaint was that the complainant did not have real experience of being accused of the practice of sorcery by the respondent but basis this on what a third party told her. After calling this third party to support the claims she had told to the complainant, the respondent were

given an opportunity to respond. The respondent denied knowledge of everything that was alleged in the bearesst of denials. The grandmother equally denied the claims by disassociating herself with the complainant. At the end, *Kgoro* advised the complainant and the third party to take care of themselves by disassociating with the respondent and her grandmother.

Case 12

In terms of the indigenous cosmology in all three jurisdictions, people come together to form social clubs for one reason or another. This ranges from social clubs intended to assist with burials, weddings and all other different types of celebrations. Once established, the respective *Moshate* demands that the memorandum of understanding, or constitution as the members called it, be brought to it to be stamped. In these constitutions, it is expected that the members of the social club, the executive committee and the rules governing the club be written down for proper functioning of the club. To litigate in any of the respective *Moshate* as a duly recognised social club, this stamping was a prerequisite.

This case presents a dispute amongst members of such a club. However, unlike other cases in this register, this current dispute relates to the fact that the general meetings and operations of the society has been reduced to a spectre of profanities and general disrespect by certain elements. This behaviour threatens to collapse the club at the altar of this distasteful behaviour. The insulted members approached *Kgoro ya sechaba* to demand relief. It is worth pointing out that *Kgoro* did not allow for the repetition of the crass insults but merely allowed complainants to point out that they are being insulted. The decorum of this *fora* does not allow that repeat. The respondents, in their statement of response, averred that the complainants are also guilty of insulting them as well. In essence, they allege that insults were traded both ways. To intervene in the matter and restore calm to the club, *Kgoro* resolved that an elder member of the club was to be appointed to oversee the affairs of the club in order to restore calm. By likening this supervisory role to that of a party chief whip, it was decided that this elder appointee was to report to the *Kgoro* in the event of continued transgressions.

Case 13

The dispute by these neighbours is best understood for one significant point in the relation between the business of the *kgoro* and the indigenous cosmology in jurisdiction A. *To wit*, there are times when the practicality of a resolution depends on a fair and negotiated settlement amongst disputants. In effect, on the evidence of each party, *kgoro* found it difficult

to decide in favour of one. Instead, the final decision called for a supervised negotiation between the disputants.

To arrive at this conclusion, the complainant approached *Kgoro ya sechaba* alleging that by reason of the respondent's obstructing of the flow of water, her stand is now reduced to a reservoir of dirty rain water during downpour. This allegation rain water resting on the property of the complainant was experienced differently by the respondent as well. He too alleged that water was resting on his land with effect that he only allowed it to pass. The contest between the two disputants could not be resolved with the intervention of their *Ntona* acting alone. It was he who proposed that the matter come to the setting of *sechaba* for a determination. With both parties amenable to a negotiated resolution to settle the dispute, *Kgoro* appointed three people to meet with the disputants to negotiate and supervise a fair decision.

Case 14

The complainant, a non-local of this jurisdiction, brought a matter before *Kgoro* alleging that the respondent, who is his girlfriend, is attempting to deprive him of a stand on which they stayed together. In his submission, the permission to occupy document is in the name of the respondent only. This state of affairs, he submitted, was an incorrect reflection of the facts as they were joint owners of the stand. For that reason, he wanted *Kgoro* to issue a new PTO with both of their names on it. This was basis of the complainant's reason for approaching *kgoro ya sechaba*. However, after it became apparent that he was not a resident of jurisdiction A in good standing, the matter turned on his papers; *to wit*, whether he was properly transferred from his original jurisdiction under another tribal authority to jurisdiction A. Properly understood, this case made two things clear. Firstly, the tribal council in jurisdiction A exist for the benefit of its people. Secondly, it is expected of non-locals to have transfer papers to be accepted as residents of this jurisdiction.

Upon the discovery that the complainant did not have transfer documents, *Kgoro* decided that he could not be the rightful owner of a stand. His request was dismissed. He was further instructed to go back home to get proper transfer documentation.

Case 15

This case was brought to *Kgoro ya sechaba* by *Ntona* acting alone. In context, the complainant bought a stand from the respondent. Upon such purchase, he proceeded to take all the necessary steps and documents to effect a change of names on the permission to occupy

receipt. Despite this, the respondent is no refusing to vacate the stand but instead wants to repay the amount of the sale. In his defence, he alleges that he had two stands and sold the one he was not living. However, it emerged during the prosecusion of this inquiry that the respondent sold two stands to two people for R5000.00 and R10 000 respectively. To this new revelation, he claimed that he sold the same stand to the two different parties and was willing to repay the complainant his R5000.00. This view was dismissed by *Kgoro* as untruthful. Added to this, the PTO held by the complainant was in respect of the same stand on which the respondent lived.

In the decision of 28 March 2023, *Kgoro* resolved the respondent sold both stands and as such "evicted himself from the premises". As a consequence, he was given seven days to think about where he will go from the stand he sold to the complainant. Off the records of this study, on 4 April 2023 it was decided that the respondent would vacate the premises he sold to the complainant at the end of April 2023.

Case 16

This case shares some similarities with case 14 above. The significant point of similarity is that the stand is registered in the name of the female. As well, the respondent moved to jurisdiction A from another place under the control of a different tribal authority. Furthermore, the respondent was also not officially registered as a resident. However, the point of difference between the two cases is that in the current case, the respondent had formally introduced himself to the complainant's family by way of paying an amount of R3000.00 as an intention to marry the complainant. Furthermore, he alleged to have documents of transfer though this was never asked to be produced. In a two-part hearing that commenced on 18 April 2023, the case was prosecuted by way of a question and answer than allowing the parties to give a statement of complaint and or response.

The parties were separated and living apart. The stand on which they lived together was registered in the name of the complainant who wanted *Kgoro ya sechaba* to confirm her as the rightful owner of the stand and return her to its habitat. The respondent, on the other hand, claims that the registration was a sign of dishonesty by the complainant who withheld his (respondent) identity document in order to register the stand in her (complainant) name alone. Of interest, both parties acknowledge that it was the respondent who build the house from the ground up. On the date mentioned hitherto, no judgment was made. In fact *Kgoro* directed the parties to go back to reconcile on the condition that the complainant went back

home and the respondent tell his current live-in girlfriend to make way for his wife. The parties were ordered to return later to give feedback.

On 25 April 2023, the parties returned to the *Kgoro* to give feedback as directed. The reconciliation was not possible for a variety of reasons not least of which was the violence in their relationship. The complainant claimed that the respondent was violent and on several occasions she left home running without barely getting a chance to put on clothes. The respondent, on the other hand, expressed a view that if they were to live together, it could potentially have fatal consequences for either party. Notwithstanding the gravity of the claims, *Kgoro* again resolved that the parties must go back to be reconciled with the supervision of their parents. The return date was set for 06 June 2023.

Case 17

The issue started as a conversation and or complaint on a national broadcaster's radio station. Pursuant to that, a member of jurisdiction A's traditional council was called to give account of the practices of traditional healers in this jurisdiction. To be able to do this, *Moshate* summoned the respondent to appear before *Kgoro ya sechaba* to answer questions for bringing it into disrepute. As it were, questions on the respondent's standing as a reputable traditional healer were asked. Based on the scale of the allegations that were levelled against the respondent on the radio platform, other recognised traditional healers in jurisdiction A were summoned to appear as well. Equally, as the repute of *Moshate* was put into question, the *Ntona* under whose jurisdiction the respondent stayed had to account as well. The questions posed by this case were the following; firstly, whether the respondent is a resident of jurisdiction A in good standing? Secondly, what is the professional affiliation of the respondent? Thirdly, whether the respondent has the correct credentials to train students to go through their rite of passage to become traditional healers? Fourthly, whether the respondent followed due legal processes for the reburial of bones he is alleged to carry with him?

On the question of residency, the respondent was never officially transferred from another tribal authority to jurisdiction A. The failure to be properly transferred had the inevitable result that he was practicing as a traditional healer without the knowledge and official recognition of the tribal authority in this jurisdiction. Naturally, this put into question both of questions two and three. The representative of traditional healers in this jurisdiction, with the permission of *Kgoro,* indicated that the relevant organisations of traditional healers will address this outside of the dispute resolution *fora*. To the final issue of human remains, it is alleged that

these were exhumed from where the respondent is from and reburied in this jurisdiction. Initially, in the submission of an affected party, the bones were buried on a family cemetery and tombstones erected without the permission of the said family. Though the respondent denies that there was nothing but mere soil under the tombstones, the affected party submitted that they desecrated the tombstones and dumped them at the respondent's residency. Unable to verify if indeed there are bones in the position of the respondent, *kgoro* resolved that the issue must be referred to the police for investigation. The respondent was fined a total amount of R5000.00 for bringing *Moshate* into disrepute.

Case 18

The two disputants run different businesses. The complainant owns and runs a driving school whilst the respondent owns a food stall right in front of the driving school. To an outsider, it would seem like the two businesses complement each other. However, this was not so. According to the complainant, the respondent's stall is obstructing her one entry into the business premises. However, the respondent argued that the the driving school premises has two gates and could easily use the entrance on the other side. This, in addition to the fact that the respondent denies blocking the entrance at all. Additionally, this case raises a further dimension regarding the contest of the real owner of the land on which the businesses appear. The complainant acknowledges the tribal authority as custodians of the land and as such sought permission to occupy the land from *Moshate*. On the other hand, the respondent submitted before *Kgoro ya sechaba* that the land belongs to the municipality as such he will engage with them as a rates payer. In terms of this statement of defence, it would appear that the respondent challenges the authority of the tribal council. After a fiery contest of this challenge of *Moshate*'s right to title of the land, it was decided that a working solution would be to designate two councillors from the *Kgoro* to inspect the two businesses and find a working solution for both parties.

Case 19

This is a single person inquiry. The applicant, approached *kgoro* by way of a letter requesting to be moved from his current location to the land adjacent to him. He cited as his reason the fact that his stand was situated on a rock. Whilst *kgoro* was amenable to granting him his wish, a question on what would become of the stand he currently occupied changed everything. The respondent indicated that he was not relinquishing that stand but instead wanted to secure the adjacent one for his children should they wish to live there in future. This meant that the request must be declined because the view in this jurisdiction is that a

person can only get a double stand if he is married to more than one woman or he uses the other stand for business purposes. The applicant's reasons fell short of this with the inevitable result that his application was declined.

The applicant attempted to verbally amend his request so that the adjacent land could be given to him for business purposes. This request was also declined. He was instead advised to write a proper letter underlying his new intentions and approach *kgoro* again.

Case 20

This dispute between neighbours and a yearning for harmony in jurisdiction B sheds light on the unexamined dangers of fluidity of traditional dispute resolution. In this case, which commenced without anyone of the disputants or their representatives, it was alleged that the respondent had impeded the right of access of the complainant family into their yard by closing off the route to their entrance with his fence. Furthermore, it was highlighted before executive members of the *Kgoro* that the respondent was unwilling to engage with the complainant family. Eventually a representative of the family arrived to confirm that the access was still denied. *Kgoro* deliberated on this and found the conduct of the respondent lamentable. This is more so when one considers that the respondent and his family had been away from jurisdiction B for more than 20 years. This behaviour of lack of neighbourliness was foreign to the harmony yearned for in this jurisdiction and synonymous with what the called "township behaviour". The representative of the complainant family was directed to send people to the respondent to order him to remove the empediments and come to *Moshate.*

The case was heard on 14 August 2022. Off the record of the current study, it was confirme on 04 September 2022 that the respondent removed the impediments.

Case 21

As far as prosecution of matters in jurisdiction B is concerned, this issue is a curious one. For starters, the farmers argued that theirs was not a case in the technical sense of the word as used in this jurisdiction. They argued that it was merely a complaint against the failure of the *kgoro* to honour the resolutions that were previously taken and the second respondent, as the self-appointed designate of the *kgoro*, who allocates new stands. At the centre of determining whether this is a case proper or a mere complaint is the litigation fee of R200 that ought to have been paid by the complainants. *Kgoro* had, on numerous occasions, asked the various farmers to pay the money to open a case. This was met with a rejection on each occasion. Notwithstanding this, *kgoro* heard evidence of one the first complainant, who led

the various farmers, and proceeded to invite other farmers to corroborate his submissions. Pursuant to this, the second respondent was invited to respond to the allegations brought against him. At the end, after all deliberations were made by members of the *kgoro*, a decision was made by *Ntona*. Wherefore, despite all other appearances, this case actually followed the same pattern of prosecution of a case in this jurisdiction. It would appear, it is surmised, that the issue was the payment of the amount of opening a case than the description of this as a case.

To the issue at hand, the various farmers brought a complaint to *kgoro* regarding boundaries agreed previously. In their view, *kgoro* continues to allocate residential stands beyond the last line agreed. This allocation, which they allege is being done by the second respondent, is a violation of the resolutions of the *kgoro*. Furthermore, by allocating residential land beyond the set boundary, it is submitted, the land designated as the start of grazing space is unduly limited. This, it was submitted, leads to the deprivation of grazing land. In their submission, the deprivation of grazing land has a negative impact on their livestock. Put crisply, they allege that their livestock may die of starvation. After clarification of the dispute around the last boundary line and obsolving the second respondent of any liability, it was decided that the last line was settled as of 21 August 2022. No new stand would be allocated beyond the new line agreed. To enforce this decision, the farmers were given the mandate to police the new boundary and inform *Kgoro* of any attempts to create residential stands beyond it.

Case 22

This issue presents a dispute between two estranged partners who were previously cohabiting. The central issue was that the complainant wanted to claim money that she had lend to her former boyfriend over a period of time. This money, according to her narration before *Kgoro,* was lend to the respondent in multiple sums for a variety of reasons. This ranged from money to pay for laybye of shoes, to stock alcohol and cigarrates for resale and other miscellanous advances. In her view, the respondent owed her a total amount of R1500.00. The respondent, conceded before *kgoro* that indeed he owed the complainant but denied that it was as calculated by the complainant. In his estimate, the amount was plus/minus R1000.00. *Kgoro* found in favour of the complainant that the amount due and owing is R1500.

The case was heard of 04 September 2022 with the respondent committing before *Kgoro* to make a payment by the end of that month. By 21 May 2023, not a single payment had been made towards settling the judgment debt.

Case 23

This case blurs the margins between a prosecution and a disciplinary hearing. Be that as it may, at the centre of this inquiry *Mma-ntona* alleges that she is being ill-treated and or was insulted by the *Ntona* on several occasions in the *Kgoro*. The proceedings were held in two stages. Firstly, the respondent appeared alone before an all male panel of *Bakgomana* and pursuant to this the complainant appeared with the executive of the relevant *Kgoro* to state their case. Both of these hearings started with two letters being read out by one *Mokgomana.* In the covering letter and the letter itself, a series of abuse hurled at the complainant is read out.

In the first set up of *Bakgomana* seating with the respondent alone, he was expressly told that the events read out left a bitter taste in the mouth. And that it would be best that he apologises. He conceded to having heard the advice of his seniors and would heed it. In the second set up when the complainant appeared with the executive council of the *Kgoro* where she serves, it was pointed out that the respondent has apologised for the indiscretion. The complainant requested that this come from the respondent himself. Despite the first half hearted attempt being dismissed by *Bakgomana*, the respondent *Ntona* duly apologised. A ceremonial embrace was called for wherein before embracing the complainant, the respondent apologised directly to her and pleaded with her to put the past behind them.

Case 24

As pointed out in case 12 above, the conception of social clubs in the three jurisdictions are the same. For that reason, the reader is referred back to the introduction in that case for the functioning of the burial society.

The complainant burial club was such a club in good standing in jurisdiction B and as such it had the capacity to bring issues arising from their business before the *Kgoro*. On this occasion, it brought a claim against the respondent for a missing amount totalling R100.00 that the respondent was directed to bring to *Kgoro* as a token of appreciation for assistance with a previous issue. Secondly, the respondent was accused of attempting to swindle money from the club by lodging a fraudulent claim. On the question of money, the club, through its members, allege that the R100.00 was given to the respondent to deliver to *Kgoro*. This version is conceded by the respondent, however she adds that she did not find anyone at the home of the *Kgoro* and kept the money. She further alleges that the chairperson directed her to buy bread with that money at a seating of the next meeting. The claims and counterclaims in respect of the R100.00 proved one thing, and that is that the amount never made it to the

Kgoro. For that reason, it was decided that *Kgoro* cannot involve itself with issues of apparent missing funds of the club. The matter was reverted to the club to decide.

On the question of attempted fraud, the club alleges that the respondent added the deceased child of her brother to the list of beneficiaries after the child's death in an effort to swidle money out of the club. It was submitted further that the order of beneficiaries was abnormal on her brother's form in that the child was written above the mother and older sibling. This, it was contended, was an anomaly. As such, and based on the club's constitution, the respondent's brother was not entitled to a death benefit in respect of the child. *Kgoro* satisfied itself of the content and provision of the constitution before deciding that the version put by the club is correct.

Case 25

The remarks of one of the executive members of the *kgoro* underlies some of the difficulties highlighted in theme 7 below. What stands out as troubling is the fact that there exists no formal enforcement mechanism for decisions of traditional *fora*. For context, it suffices to point out that the member mentioned hitherto alluded to the fact that it is not uncommon for people to take up to two years without paying their debt to *kgoro*. Whatever his intentions, that member underlined a significant problem of traditional dispute resolution.

The importance of this issue aside, the actual dispute before *kgoro* was that the respondent families were summoned to appear before it to make arrangements regarding payment of money in respect of the unauthorised occupation of pieces of land. Whilst the one family attempted to deny unauthorised occupation, the steps they attempted to submit to *Kgoro* as having been taken were procedurally flawed as flagged to them. At the end, it was resolved that the occupation is unauthorised and the two families must pay an amount of R1000.00 due to *Kgoro* to make their occupation lawful. This amount, it was decided, can be paid in instalments for a period of six months. Failure to pay this amount, the respondents were cautioned, may result in eviction from the stand.

Case 26

In this case, "*mokgonyana"* (son in law) approached the traditional council claiming that his "*mmatswale*" (mother in law), removed his "wife" and children from the matrimonial home without consulting his family. The use of the invented commas is intentional because the family of the "wife" alleges, as a second point of contention, that the marriage bond between the complainant and their daughter has not been completed according to the customs of

jurisdiction C. The evidence pointed towards a lack of celebration of the customary marriage in line with the customary rite of passage of wifehood. Thirdly, another party was present in the proceeding as an interested party. Her interest was that the matrimonial stand on which the complainant housed his family actually belonged to her. In essence, the first two issues arise out of the "marriage" between the complainant and his "wife" whilst the third issue is incidental to the marriage.

On the first issue, the respondent admitted to removing the children but she claimed to have done so to secure their safety after their mother abandoned them to run to the police station. Notwithstanding the evasive nature of the mother's responses to the question of what she was doing at the police station, council found that the respondent erred in acting alone when removing the children. It was put to the respondent that she ought to have approached the family of the complainant to inquire about the wellbeing of the kids instead of removing them unilaterally.

So far as the matrimonial home was concerned, the complainant submitted to council that the house used to belong to his father before he relocated to another village living it in his care. This version was contested by an interested third party who submitted a narration of the history of the stand and her association with it. In her brief, the interested third party put it to council that she was married in a woman-to-woman customary to the complainant's aunt. In her version, which went uncontested, she left the matrimonial home as a result of a sense of acrimony with her deceased spouse. Based on this uncontested version, she was declared the rightful owner of the stand on which the complainant housed his family. Subsequent to this declaration, the complainant agreed to vacate the stand by December 2023.

On the question of "marriage", an interested third party put it to council that the bond between the complainant and his "wife" was not celebrated fully in line with the norms in jurisdiction C. On this narration, which council did not fully interrogate it expressed an opinion that if indeed it was true, the actions of the complainant was despicable. He was subsequently urged to do the right thing to properly introduce his "wife" amongst his peers as a married woman.

Case 27

Notably, this case raises interesting questions on the cross section between the law of the people in this jurisdiction and the state law in so far as intestate estates are concerned. The complainant approached council alleging that her aunt, the respondent, has taken assets belonging to her grandmother, the respondent's mother, for her own personal gain to the deprivation of the complainant and her siblings. At the centre is an undisclosed number of

corrugated iron and a shop. The complainant submitted before council that the shop in particular was entrusted to the respondent for temporary care until the complainant and her siblings came off age. In her submission, the death of the grandmother and the economic hardships in the family demands that the shop ought to be used to generate lease money for their upkeep. Instead of this use, the respondent is refusing to co-operate and unjustly keeps the shop to herself for personal gain.

In her statement of response, the respondent submitted that the assets under dispute were bequeathed to her under an official document signed by a state official at the local magistrates' court. In support of her submission, the respondent produced documentary proof as evidence that she is the rightful owner of the assets. In her narration, her mother gave her the shop but directed her to always care for her niece and nephews. Whilst council interrogated the customary position on this issue, the customs were found to be in an unfavourable or inferior status compared to state law as embodied in the document submitted by the respondent. In its decision, it was found that the legal document presented by the respondent has certain consequences that are stronger in law. Notwithstanding this, however, the disputants were urged to return home to try find a lasting solution to the hardship complained of by the complainant.

Case 28

This complaint and or request for intervention speaks to the erosion of humanness that was said to be an apex virtue of traditional life in chapter 1. It further heightens the argument of a growing sense of a state of anomie from amongst Natives. On the facts, the complainants came before council to request intervention and or protection against the threats to a funeral to be held on 21 January 2023. By the 19th January 2029 when the complainants approached council, the siblings were already waging a dispute about the estate of a deceased person before he could even be buried. The three siblings on one hand were threatening to deny a corpse entry into the deceased's home if his assets inventory was not presented before the burial. This three demanded the inventory from the one other sibling who was in another province finalising arrangements for the funeral. Should the threats come to pass, the complainants submitted, they could not guarantee the safety of the people who would be attending the funeral. At the end, council agreed to co-opt the local police to escort the hearse on Friday and be in attendance on Saturday during the funeral.

Off the record of this study, it is alleged that the funeral proceeded incident free under police watch.

Case 29

There is a Sepedi proverb that proclaims that *dikgomo go hlabana tsa shaka le tee*.[5] The discord between uncle and his nephew in this issue best epitomise this proverb. There is certainly no love lost between the two as evinced by the narration of their narration before council. The complainant alleges that his nephew is insolent and as such threatens the general harmony at home. This insolence extends to include threats of assault against him (complainant). The respondent flatly refutes threatening the complainant with assault nor that does he have a problem with him. Added to this, the respondent's mother denies any knowledge of the dispute between his brother and son. This notwithstanding the fact that the respondent alleged before council that the complainant had once before pleaded with his mother to place him under arrest for laziness.

Of its volation, council introduced a new inquiry relating the unauthorised extension of the stand. The respondent indicated that he was using the space as a carwash to maintain himself. At the end, the respondent's mother was advised to approach council to seek a stand of her own as she qualifies to acquire it. It must be emphasised that this was mere advice and not a decision of council. The advice was intended to avoid heightening the dispute between uncle and nephew. As such, separation was deemed the best possible course. On the question of the unauthorised extension, the respondent was ordered to approach council to properly request the land and pay the due amount of R250.00.

Off the records of the study, the advice of council was not confirmed by the tribal head of jurisdiction C.

Case 30

In the indigenous cosmology of jurisdiction C, a distinction is made between *moagelwa*– someone with whom you share boundaries and *moagishane* – someone with whom who share a sense of neighbourliness and enjoy a mutual sense of humanness. The two terms, though materially different, mean neighbour in English meaning. Although the final, and off record, decision turns on neighbourliness, that was not the premise on which the case was presented before council. In this matter, the complainant, as the rightful holder of the permission to occupy document, approached council alleging that the respondent is depriving him of the right to take up the land given to him. He asserted that the respondent started extending their yard as soon as they saw him marking the land with the intention of fencing. On the other

[5] The essence of this proverb denotes that family conflict is expected amongst those who live together.

hand, the respondent alleges that his father paid for the extension in 2019. Though he did not have the proof of payment receipt, he implored council to check their records from that year to confirm his claim. Without that proof and the corresponding memory that the complainant was recently given the piece of land under dispute, council found that the land belonged to the complainant.

Off the record of the study, the tribal head reversed the decision of council and directed it to find the complainant alternative land. In her view, the interaction between the two would be neighbours would not breed neighbourliness. To avert possible future infractions, the parties were betweer of separated now.

Case 31

The original complaint laid by the complainant was that the respondent and his family acted contemptuously towards him and his family in that they send an all women delegation to his home to request a traditional separation of his daughter and their son. To his mind, this was a demonstration of lack of respect by the respondent family towards him and his family. More so, the complaint asserted, when one considers that there are men in the respondent family. He came to council to demand an apology from the respondent and his family.

However, if this case demonstrates anything at all it is that a tendency to wander is not too uncommon in this *fora*. The case demonstrates that the free flow of evidence is not necessarily a good thing. That is because by and large, the submissions were largely concentrated on the ongoing conflict between the estranged couples. The history of the violence was detailed by the estranged wife, the husband refused to speak before council at the risk of incriminating himself whilst the family of the latter drew council's attention to previous unsuccessful attempts to summons the former to the headman's *fora*. Such was the over concentration of these points that the final decision taken by council was to dismiss both parties to allow ongoing criminal cases between the estranged couples to continue. Significantly, for current purposes, this case follows the same trend as case 27 above where the customary law of the locals is subverted by the process in the state's courts. All the while, the case ignored the fundamental premise of the complainant; *to wit*, a demand for an apology by the wife's father.

Case 32

The position of social clubs in jurisdiction C are, as summarised in case 12 above. For that reason, the coming into operation is not discussed here as well.

It suffices though to poit out that the complainant club was in good standing with *Moshate* in jurisdiction C and therefore as a duly recognised social club it had the right to bring a complaint against any member. In the present case, the club brought a case against its former member who had left it after being serviced in terms of its constitution. In submission to council, the club proved that she owes an amount of R5600.00. This debt was admitted by the respondent summarily. However, she indicated ongoing hardships that makes it difficult for her to service the debt properly. Council resolved the case by opening an account for the respondent in the debt register book used by *Moshate.* In essence, the respondent would pay her debt at *Moshate* pursuant to which *Moshate* will call representatives of the club to collect the money. The debt would be serviced in monthly instalments of R300.00 agreed between the club and the respondent.

Case 33

This case differs from case 32 above in that here the complainant brings a claim against a nameless family Club for the return of goods she had given to its members. Despite not having a name, this family Club was in good standing with *Moshate* in that its book of inception was so stamped as required. Therefore, this meant as well that the Club could bring issues to council or as was the case here it could be brought before council to answer a case. The premise of the complainant's claim was that members refused to service her when her family had a celebration in the recent past. As a result, she saw no reason to continue with the club.

Notwithstanding the clarity of her claim, the complainant could not account for the list of people, either current or former members, who owed her. Representatives of the family club present initially denied knowledge of a celebration at the complainant's home but subsequently conceded liability. The mandate given to the respondent club's representatives was to consolidate the list of all its members, former or present, who owe the complainant. Once the list was consolidated, it was directed, the members would all be summoned to council to pay the debt due to the complainant.

Case 34

The facts in this case show the rich tapestry of traditional life in jurisdiction C in particular. To further qualify this tapestry, the facts speak to the depth of the marriage practices in this jurisdiction. At the centre of the dispute here is a misplaced *kgomo ya lenyalo*.[6] The

[6] In a real sense, this refers to a cow that was given to the bride's family as payment for *magadi*. Whilst the term *lobolo* or *magadi* are popular in legal circles in particular, sight should not be lost of the fact that a less popular reference to the dowry is *dikgomo*.

complainant has brought the issue to council to demand that the respondent apportion the livestock under his care appropriately according to culture. It was laid bare before council that various meetings had been held by the families to try and resolve the issue but that the respondent had on all occasions defied them.

The central issue is that the complainant is bothered that his gift to the in-laws is now in the hands of the respondent who refuses to return it to the rightful owner. For context, the complainant gifted a cow to his in-laws at the home of his wife now under the custodianship of his brother in law. Due to advanced age, which made it difficult to look after the cow, and financial inability to secure someone to herd it, the brother in law passed the cow to his own brother to care for it. The second mentioned brother passed away, and as a result, his son continued to care for the cow and its calves. The respondent was a nephew to the brother in law. At the time of the dispute, there were 10 cattle in the care of the respondent. The complainant came to council to demand that the cows be, at the very least, shared amongst his in-laws' sibblings.

This proposal meant that five cattle ought to be apportioned to the other siblings whilst the respondent will be left with five. Thus, two would go back to the original kraal where they were intended to be; two would go to the other brother in law and one would go to the one sister in law. This one cow to the sister in law is what is referred to as *kgomo ya letswele*[7] in terms of the indigenous cosmology of these people. The complainant proposed this appoirtionment to cater for the fact that the respondent has been taking care of the cows without payment for many years. The five cows that remain in his care was intended to offset the lack of payment.

Council found favour with this proposal by making it its order. The case was heard on 16 February 2023 and the apportionment as per council's decision above was set for 21 February 2023.

Case 35

The variety and or the nuances of customary marriages and its complicacies is nowhere clearer than in this case. Here the complainant was married as what would appear as *ngwetsi ya lapa*[8] though the person to whom she was married to was an elderly male man who had

[7] It is a symbolic cow that a father gives to the family of his daughter's in-laws to further entrench the family bonds. It is intended to continue to feed the bride and his family in her new home. For all intends and purposes, this cow has traditionally always being a heifer which will reproduce first for the bride's in-laws.

[8] A wife who is married to a family for the purposes of siring an heir for that family.

neither a wife nor children of his own. This meant that the complainant was married with her children under what is called *oe gapa le namane*.[9] The claim brought by the complainant was that her sister in law has removed her husband from her care and without her consent. In removing him, she also indicated to council that the respondent took the SASSA card which is the only source of income for her (complainant) family. This meant that, so the claim continued, the complainant and her children were left to starve as their father and the family's source of maintenance has been taken from them.

As a duly recognised wife to the old husband, the complainant submitted to council that the family of her husband permitted her to find a partner outside of the matrimony with him he could share intimacy with. It was this permission that created a sense of discord between the complainant and her in laws. In the statement of response, the respondent and interested third parties pointed to a series of infidelities by the complainant that could not have been intended by the permission they gave to the sister in law. In fact, it was alleged, it was one of this infidelity that resulted in the respondent removing his brother from the care of the complainant. She claimed that her brother was neglected by the complainant in favour of a man the complainant was hosting in his parents' home. This act, she contended, was disrespectful to them and undermined the integrity of their home.

Granted that council found that the complainant erred in bring men to her matrimonial home, it found that this act was not a justifiable reason to deprive the complainant and her children of maintenance. At the end, council ruled that it is not unusual for husbands to be removed from the care of their wives. Notwithstanding this, the spouse ought to continue to be maintained. As such, the amount of the old age grant was appoirtioned equally between the disputants. The SASSA card is in the care of *Moshate* who draws the grant and calls the parties to collect their share. Notably, *Moshate* does not charge administration fees for this action.

Case 36

Two things are important in this case; first, the parties before council did not have first-hand experience of the theft complaint about. Second, the parties appeared on behalf of their minor

[9] This is described to mean that ''the child follows her mother into the marriage'' in Stephen Monye, 'Customary Law and Adoption: the '*o e gapa le namane*' Custom as a Reflection of Customary Law Development in South Africa' (2017) 4 *Journal of Law, Society and Development* 1; 3. See also Matshilane Mokotong, '*Oe gapa le namane* Customary Law Parenting (Step-parent Adoption from an African Perspective)' (2015) 78 *THRHR* 344 for an exposition of this marriage. For context, it is noteworthy to also see Lesetja Monyamane, 'Creating and Sustaining a 'Tunnel Vision' Argument for the Application of Customary Law — A Language Conundrum' (2023) *SAPL* 1 – 18 who contests the views of Monye and Mokotong from the perspective of the Bapedi people.

children. Technically, what these two important observations reveal is that it is possible to appear before council to narrate issues you have secondary knowledge of and that representation of minors is permitted in this legal order.

At issue here was that kids were playing soccer in the field unsupervised. The complainant alleges that his child gave his phone to one child in order to enter the field of play. The allegation is that the respondent's child took it from the first mentioned child but denied this when confronted after the game. At a family level, the two families, the complainant approached the respondent to inform them of this theft. The respondent son denied knowledge of the theft and ever touching the cellphone. Seeing that the issue had reached a dead end between the two families, the complainant approached *Moshate* for intervention. After receiving summons, it is alleged that the respondent approached the complainant with the phone, but in a damaged state. The complainant refused to take it on the understanding that council must rule on the matter. In his submission to council, he submitted that his teenage son uses the phone for school work but in its current state, it was defeating that purpose.

At the end, council was informed by the Sepedi idiom which proclaims that *ngwana ge a dira molato o direla batswadi ba gage*.[10] It found that the respondent must buy the same type of phone for the complainant. She conceded liability and committed to buying it at the end of June. This commitment was written into the judgment.

Case 37

Residents came together to oppose a single man from obstructing a passage the community claims to have used for years. A central issue though, at least so far as the complainant is concerned, is that he was given the space by council in 2010 and expended large sums fixing the place to make it habitable. The complainant alleges bbefore council that the community did not say anything as he was working the land but waited to pounce on him once he finished and fenced off the "stand". In their response, the respondents and general members of the community admitted to removing the fence as the contested space is a footpath that has been in use for a long time.

In the alternative, the complainant pleads with council to make arrangements with the community for a negotiated settlement that would see him keeping the disputed space and the right of passage decreased in size. This stemmed from the fact that the complainant

[10] The essence of this idiom is that parents are always responsible for the mistakes of their children.

alleges that he had registed his liquor licence against that space and not owes South African Revenue Services money as a result of the delay caused in operating the store as intended. To this alternative request, the complainant invited council for an inspection of the disputed place with a view to making a fair determination. On their return from the inspection, the two councillors submitted that indeed the complainant had worked the land but that in their knowledge that space has always been a passage.

The decision taken was to declare the disputed space a footpath for the community and direct the complainant to seek alternative land for his business.

Case 38

This decision is the only dispute that was resolved in the absence of a party in jurisdiction C. In context, the complainant is cousins with the respondents. He was staying in the respondents' home after the death of the parents whilst the respondents were away in another province. The complainant made improvements to the home as the only person living there. In 2022, the respondents claimed their parents' home. Whilst the complainant acknowledges that the place is not his, he wanted them to compensate him for the upgrades. It was he who reported the matter to council but on one other occasion previously, he failed to honour the date set down for hearing. On 4 April 2023, the dispute was set for hearing for the second occasion but the complainant was again absent.

On this occasion, council decided the home must be returned to the respondents. Upon inquiry by the respondents, council asserted that arrangements will be made with police to escort the respondents to their home to lock and secure it.

Case 39

The fluidity of the system in this jurisdiction does not extend to include council hearing all types of cases. The proof of this is in the dispute between one village and a headman who had clashed on the boundaries. On the face of it, this is not a complicated case. Yet when one considers that the village falls under the custodianship of another tribal authority, the issue takes on a life of its own. A Sepedi idiom proclaims that *mollwane wa tshemo o shekwa mashemong*.[11] The custodians of the village and representatives of the headman came before council assuming that it was the correct *fora* to hear the dispute. However, council declined

[11] The essence of this idiom is that all disputes relating to land ought to be settled on the land itself. In that way, the wisdom goes, each party is able to support his narrative by evidence of landmarks.

to make a ruling on the dispute opting instead to escalate the issue to a forum of *Bakgoma* that sits with the tribal leader.

Case 40

This was a family that is not at peace. At issue, at least as far as one respondent was concerned, is that the complainant abandoned her children when they were young and it is her return that has unsettled the family. From the perspective of the complainant though, she is being threatened with both death and eviction from her own home. Above this, there is also issues of crass language from one of her grandchildren and her sister in law. All these has contributed to a home of disharmony.

For context, the complainant left her matrimonial home in 1986 owing to alleged abuse. This fact is denied by the second respondent who avers that the complainant's orderly departure is in no way indicative of the alleged abused. At the time of the departure her oldest child was 16 whilst the youngest was 5 years old. This, according to the fourth respondent, meant that she and her siblings have had to care for the children until they came off age. The complainant returned home after the passing of the husband and father in 2019. From that moment, there has been unending in-fighting. She alleges that the first respondent is threatening her with both eviction and death. This claims are denied by the respondent. The third and fourth respondent equally deny insulting her. The only issue between the complainant and the second respondent seemed to be the issue of food. The second respondent submitted that if the complainant bought a bag of maize at home she would have no problem with her.

To put out the fires in this family, council resorted to scripture as a guide to the waring children of the complainant in particular. Bible verses were used in an attempt to reconcile the complainant and his children. Despite the denials, council found respondent three and four guilty of insulting the complainant and fined them R1000.00 each. At the end, dispute the ceremonial embraces amongst the disputants, the only true reconciliation was achieved between the complainant and the second respondent.

Case 41

At the centre of the inquiry here is that the complainant approached council alleging that the respondent is not taking care of her as a husband would. Granted that she complained about other ancillary issues like the fact that the respondent is refusing to wear his ring, the complainant asserts that but for the maintenance things are not that bad. The response to the failure to care and maintain the complainant took an interesting turn as the respondent

alleges that he is blinded by sorcery. He alleged that it is the work of witchcraft that intends to sow division in his home. In fact, he alleges that it through this belief that his unemployment grant of R350.00 has not been paid because of the works of witches. For that reason, he had been unwilling to apply for an old age grand as it would fall the same fate.

Based on the facts as they are here, council was unable to make any decision but instead urged the respondent to do something about his claims that he is being bewitched. Furthermore, because the respondent finally admitted that he applied for a SASSA grant in April 2023, it was hoped that once he gets his grant he would care for the complainant.

Case 42

An aspect of the negotiation and celebration of a customary marriage as demanded in section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 is critical to understanding both the context and the marriage custom in jurisdiction C.

Under discussion in this case is that the complainant approached council to seek relieve on behalf of her nephew and niece who, as she submits, are not supposed to be under her care. Whilst she puts it on record that she has no problem caring for the siblings, her goodwill is unsustainable. More so when these siblings should rightly be staying at their mother's maiden home. The respondent, on the other hand, rejects this notion on the evidence that their mother was married before her death as such they should go live at the matrimonial home. Additionally, she alleges that her brother (the siblings' uncle) specifically told her that the pair should be evicted from the house no later than 17 May 2023. As it were, the respondent raised a case for death wishes of the deceased person.

Upon inquiry by council, it was established that only *magadi* were paid for the siblings' mother. According to council this meant that no marriage took place because of the absence of a proper celebration as recognised in this jurisdiction. This, in its determination meant that the siblings and their mother were "stolen" by the family of their father. At the end, council resolved that the siblings must be returned to the maiden home of their mother and stay there until they could afford a place of their own.

Case 43

This case is best remembered for the consistency of the penalty for insults. On the merits, the complainant approached council to allege that the respondents insulted her during a year end function at a pre-school. For context, the allegations are that the respondents were drunk and rowdy which led to the inexcusable behaviour at an event intended to celebrate children.

Though the respondents denied being the instigator, council was persuaded that a case has been made out against them for the penalty to be issued. Council was persuaded by the admission of the first respondent that he does drink alcohol and had imbibed on the day in question. Seeing that the respondents were from the same family, a single penalty fee of R1000.00 was issued against them.

Case 44

This complaint is based on inordinate facts if anything and could be characterised as an abuse of process. The decision of council at the end affirmed this impression. Over and above stating an avalanche of speculative issues, the complainant accuses the two respondents of harassment and undermining *Moshate*. He alleges that the first respondent calls him a bastard in that the marriage of her mother was not properly celebrated. This fact is denied by the respondent who claims to not be aware of the complainant's mother. Secondly, the complainant accuses the second respondent of being a nuisance in the community and a gossip mongerer. Additionally, he claimed that the second respondent insults him at every sighting. This too is denied by the second respondent as unknown to him. Furthermore, the complainant alleges that he had been warning the respondents that he would bring them to *Moshate* and that they had both responded by undermining *Moshate.*

It must be noted that the facts of these abuses are known by the complainant alone. On that evidence, council dismissed his case and referred him back to the headman's *fora*.

Case 45

In this case, the complainant accuses the respondent of theft of numerous items from his yard. From timber to a trolley and other miscellaneous items. The respondent, on the other hand, flatly denies this by going as far as claiming that if anything the items are similar. The respondent claims to have bought his timber from a truck that sells timber in the village. This truck and the type of timber it sells are both known to the disputants and councillors. It is for that reason that the complainant argued that his timber is nothing like that sold in the truck. In fact, the complainant was so persuaded that his timber was stolen that he invited council to inspect the remaining ones in his yard. This request was accepted by councillors. On their return, the three councillors were unanimous in their view that the timber in the complainant's yard are the same ones used by the respondent to erect a shack.

On the evidence of the inspection, council resolved that the timeber used by the respondent belonged to the complainant and must be returned.

3.2. Summary based on themes

Despite the maintenance of the jurisprudential integrity of each jurisdiction in heading 3.1 above, there were certain common themes that developed through the data collection process. These are discussed here supported by the evidence of the proceedings. What this demands is that cases are grouped together under a specific theme and or sub-theme instead of the jurisdiction of origin. Similarities and distinctions between cases are duly noted as such.

For the ease of reference, the themes and sub-themees are shown in table 5.2 and discussed accordingly in terms of the descending order.

Theme 1	Sub-themes
Procedure (The hierarchy of dispute resolution AND the process of dispute resolution)	Correct forum
	Legal standing
	Cross-section with other forms of justice
	Default judgment
	Single person inquiries
	Hearsay (probative value)
	Inspection
Theme 2	Sub-themes
Reconciliation (Primary purpose of traditional dispute resolution)	
Theme 3	Sub-themes
Dispute over land	Right to title
	Unauthorised occupation
	Communal interest
Theme 4	Sub-themes
Customary marriages (Completion of marriage)	Negotiation and or celebration in terms of culture
	Forms of marriages recognised in terms of indigenous cosmology
	Marriage gifts
Theme 5	Sub-themes
Family disputes	Family setup – rights and responsibilities

	Witchcraft
Theme 6	Sub-themes
Dispute between neighbours	Neighbour law
	Neighbourliness
Theme 7	Sub-themes
Execution (enforcement of decisions)	
Theme 8	Sub-themes
Worldviews (an informer of the decision of the various *fora*)	Christianity
	Cultural lessons (idioms)
Theme 9	Sub-themes
Social clubs	

Table 5.2. Themes and sub-themes

3.2.1 Procedure

For clarity and a fair representation of traditional dispute resolution, this aspect refers to both the hierarchy of the court structure and the process towards reconciliation. **Case 44** in particular justifies the classification of this aspect as both process and hierarchical. In deciding to remit a case of harassment back to the headman's *Kgoro*, council held per councillor 3 that:

> *All these people are going to deny ever doing anything wrong. What is needed here is that there must be witnesses to support claims that are put forward. Go back and sit with your families to discuss this issue before running to council. When you come here you will have witnesses who know the case as well.*

Two things are underlined by this sentiment: One, council recognises other structures in dispute resolution. Two, it is difficult for council to make a decision based on a single version claim. Thus, if a case is discussed through the various structures up, different speakers would be able to present a clear version before council to aid it to come to a decision.

From a structural perspective, Figure 3.1 above closely resembles the order of dispute resolution in **jurisdiction A**. Whilst there was no general insistence on the family council structure in this jurisdiction, the negotiation of disputes by families cannot be thought away.

To underlie its relevance in this jurisdiction, in **case 7** the complainant expressed the view that he sent "*a person to go inquire*" from the first respondent about the series of issues the neighbours were having. Furthermore, in expressing his view on how best to resolve the issues amongst the neighbours, councillor 1 in the same case remarked as follows:

> Councillor 1: *If you are keen to resolve the dispute, you must sit down and discuss this issue as adults. If you do that, it will bring an end to the conflict and you will be able to visit each other as neighbours.*

Wherefore, the underlying fact is that the family council is recognised in jurisdiction A though not insisted upon. The need for this structure is also made necessary by the nature of the seasonal claims recorded in **case 8**. This is so because in order to make the livestock owner aware of his animals' encroachment, some form of a family conversation must take place. In **case 8(v)**, for example, it is the goats that trespassed. After that, the complainant approached the respondent to report the encroachment and to request that the latter take measures to safeguard his goats. Upon the continuous encroachment, the complainant send a representative to engage with the respondent as he felt undermined. This step being testament to the procedure taken to resolve the dispute from the base.

An interesting interplay develops between *Kgoro ya Ntona* (Court of the Headmen) and *Kgoro ya sechaba* (Chief's court). All the seasonal claims went from a conversation amongst litigants to *Kgoro ya sechaba* thereby bypassing *Kgoro ya Ntona*. On the other hand, **case 4,** for example, commenced with the base conversations between families to being prosecuted and finished in the court of the headmen.

> Complainant: *With the passage of time, when I think of the heartache that this matter has caused me, because they took a long time to fix my fence. I am at peace now. So since they fixed the fence, I withdraw my demand regarding the issue of reinstating their fence to the original boundaries.*

This naturally mean the case was settled by *Kgoro ya Ntona* as evinced by the final decision delivered.

> Member of *kgoro* 4: *We are thankful that cool heads prevailed at the end. We encourage this and we hope that neighbourliness will reign here. Everything has been restored and we are hopeful that things will be better than before the dispute. Let there be peace. In fact we have long said that if the residences of [this jurisdiction] live together in peace, Kgoro will be stronger.*

Cases 3 and **5** were single person inquiries that started and ended in the headman's court.

In **case 3**, *Kgoro* decided the request to be transferred to another kgoro in the following express terms:

> Member of kgoro 4: *I think this case is straightforward as we have dealt with similar cases previously. I propose that we take solace in the comfort of the [applicant's] last word which confirms that she is not fighting with us but merely wants to move to a kgoro closest to her... But, since it is indicated that the applicant has no outstanding debts in terms of our records, I agree that she must be given the testimonial.*

To settle **case 5**, the same decision maker as in 3 above expressed the sentiment of the *kgoro* in the following way:

> Member of kgoro 4: *It is clear that [the applicant] hardly comes to the kgoro because if she was a regular here this thought would not have come to her. A couple of years ago we had a similar case. A man was living with his mother then they had permission to change the names on the stand. After a period of about three months, the man chased his mother out of the yard because he was the rightful owner of the stand. The old woman was troubled, she did not know what to do but eventually she came to the offices* (main office of the tribal authority) *where she told them that his son chased him out of the yard. They asked her how was it possible that she was chased out of her own home. She indicated that she had changed ownership of the stand. That is when she was told that she made a fatal error. Since that case, even if we here* [kgoro] *endorsed your application, in the main office they were going to reject it. The change can only be effected in the years that we do not know when* [the applicant] *is no more. You are not allowed to change the ownership of your stand while you are still alive.*

Cases 13; 16 and **18** had the intervention of the headmen, though it is unclear if a proper hearing was held before a full *Kgoro*. In **cases 13** the respondent sought the attention of the *Ntona* to seek his counsel with his neighbours.

> Respondent: *On the morning of the 14th* [February 2023]*, when I got up I found water resting in my yard. I have erected a wall on the boundary so water cannot pass when it rains. So I created a hole at the corner so that the water would pass to their side. They too must create the same means so that water passes. Instead,*

> *they* (the complainant and her family) *put bags of sand right at the corner so that the water has nowhere to go but to remain on my land. I went to call Ntona* [] *to see what I was experiencing.*

This counsel that the respondent sought in the *Ntona* is a clear sign that the latter acted alone in referring the dispute to *Kgoro ya sechaba.*

Case 16 commenced with the following address by *Ntona*:

> Councillor 11: [The respondent] *wishes to keep the stand to be his and for* [the complainant] *to leave. That is not possible because the stand is registered in the name of the* [complainant]*. When we check, we find that* [the respondent] *is already living with another woman in that stand.*

It is uncertain if the councillor was acting alone, at his own accord or carrying out a decision of his *Kgoro.* Nothing supports a view of there having been a *Kgoro* seating to rule that the stand belogs to the complainant. On the other hand, **case 18** is clear evidence of a *Ntona* acting alone.

> Councillor 12: *If you are familiar with the village, you would know where the driving school is.* [The respondent] *established a food stall in front of the driving school. When I heard of the dispute and went to investigate, I was under the impression that the two businesses work together. Closer to the Morula tree,* [the respondent] *has set up tables there. Behind it is the driving school. I asked them to try to find each other but they refused. But what proved difficult for me to solve this issue was when* [the respondent] *told me that the space is municipal land so if there is anyone that he must talk to, it is the superintendent.*

His address in the first person is indicative of acting alone and not with the directions of his *Kgoro*. **Case 17**, is the exception to the norm in that it was heard for the first time in the Chief's court as it was *Moshate* that brought a complaint against the respondent for bringing it into disrepute. If anything at all, these experiences indicate that the general practice supports flexibility amongst the various *fora* dispute resolution as opposed to a dogmatic adherence to the hierarchical procedure in jurisdiction A. Thus, with the exception of **case 6**, which was remitted to the referring *Ntona,* all cases were properly prosecuted and decided on their merits.

Similarly, there is no general insistence on the use of the family council as a base of dispute resolution in **jurisdiction B**. In fact, **case 20** is the only indicator of conversations between

families. Notwithstanding that, the interation comes more as a form of an order than an attempt to have a meaningful conversation aimed at resolving a dispute. This view is supported by the expression of a member.

> Member of kgoro 5: [] *please send people to* [the respondent] *to tell him to remove that fence. They must also tell him to come to Moshate.*

This directive was given to a representative of the complainant who was informed not to take the message himself but send other people instead.

Case 23 introduces a new *fora* not observed in jurisdiction A. This is called *kgoro ya Bakgomana*. This *fora* hears all cases of transgressions by seating headmen as was the case in that dispute. With the exception of this one case, all others were settled in the court of the headmen without an express incidence on the base structure.

The position in **jurisdiction C** is materially different from the two jurisdictions in that it is a requirement that whenever there is a dispute, the disputants must sit down with other family members to attempt to resolve the dispute. This is echoed expressly by the views of a councillor in **case 27**.

> Councillor 1 (male): *When there are issues at home, it is necessary that you must sit as a family to attempt a resolution. Now it seems as though you are just here accompanying the litigants.*

The necessity of this forum is also underscored by the deliberations of council in **cases 40** and **44**. In **case 40**, in denying that he called his mother a fool, the first respondent submitted that he only said the following in response to her mother (the complainant) taking a family dispute to a foreman before any discussions could be had in the family.

> Respondent 1: *I have never said she was a fool, instead I said that by disregarding us as men to take a family dispute to the foreman was tantamount to treating us as fools.*

Furthermore, in **case 44**, interested party 2, remarked as follows:

> Interested party 29 (male): *I am aware of the issues of* [the complainant]*. He came to me more than five times to report* [the first respondent]*. In my reply I advised him to send a delegation of his family to the* [first respondent] *to try resolve the issue.*

In effect, the family council is more than a ceremonial forum in jurisdiction C. It is important to the process and procedure of dispute resolution as underlined by the three examples above. On the hierarchy, the headman's court and the court of the foreman enjoy an equal standing. In **case 31**, for example, seeing that the family council could not meet because interested party 9 refused to honour their invitation, interested party 10 narrates this chronology of events:

> Interested party 10 (M): *We indicated to her (interested party 9) that since she refuses to set foot at home she must at least come to our kgoro so that we can speak.*

The submission is evidence that in the step-by-step procedure of dispute resolution, the headman's court is an important *fora* alongside the family council. Above, **case 40**, introduces a dynamic of the foreman which is unknown in jurisdictions A and B. In their explanation, this jurisdiction has foremen appointed by each village where there is no headman. The foreman, as a link between the village and *Moshate*, performs the same judicial functions as the headman. This *fora*'s participation in the procedure and process of dispute resolution is already quoted above.

Despite the recognition of these two forums, disputants can approach council directly from the family council. It would seem that whilst council enjoys a superior status than the headmen's court and the foremen's courts, there is flexibility in the process of litigation. Council is made up of the representatives of each headmen popularly referred to as *Magoshana* in the cosmic language of this jurisdiction. That is, *Magoshana* do not make up council themselves but instead appoint representatives to make up this structure. There is a total of thirteen council members in this jurisdiction. Notwithstanding the importance of this structure, it does not have capacity to hear all cases as testament in **case 39**.

> Councillor 1: *We hear what has been said but I must indicate that we* (council) *do not have capacity to adjudicate on this issue. We can set up a meeting between yourselves and a senior forum above us who are more familiar with boundary lines of the respective authorities.*

What this mean is that the fluidity of traditional dispute resolution is not without rules or limitations. The epic forum is the chief's court where the Chief sits with *Bakgomana* and *Bakgoma*. In sum, the court structure or procedure for resolution commences with family council. It can proceed to either of the headman's court or the foreman's court or even council. The process does not seem to support a hierarchy but instead is intended at dispute resolution

that must start at home. In effect, figure 3.1 does not fully capture the fluid system of dispute resolution in jurisdiction C.

So far as the resolution of cases is concerned, there is a difference in procedure between a single person inquiry and a dispute between two or more people. In the case of the former, as evident from **cases 3 and 5**, the procedure is easy. Attendees are invited to register any issues that they wish to have discussed in the session before the business of the *Kgoro* starts. In **case 5**, for example, the applicant came forward to register her intention to speak. Before presenting an issue to *Kgoro*, records are checked to confirm if the person is in good standing with their levies and other commitments to *Moshate*. Once confirmed as a member in good standing, permission to proceed is requested from the *Ntona*.

> Member of kgoro 2: [The applicant] *is here and has been checked in the books. She is up to date so they belong to this Kgoro.*

It is noteworthy that if a person is not up to date with their records, *Kgoro* does not hear their case until all outstanding monies are paid. In essence, in order to litigate in jurisdiction A, it is a requirement that the applicant/complainant be up to date with all monies and responsibility to *Moshate*. See also clause 2 of the constitution of Jurisdiction A *Kgoro ya Moshate* (attached as appendix 7). All residents in the specific jurisdictions of each headman are expected to be complaint with the rules of *Moshate* relating to levies in order to litigate. Once acknowledged that the applicant is in good standing with that jurisdiction, and permission to proceed granted, the matter proceeds with this question:

> Member of kgoro 2: *How can we help you?*

At this point, the applicant presents his or her request to *kgoro*.

> Applicant: *I am here to ask for a letter to change the yard. The old man* (the husband) *has died. I am asking for a letter so I could change.*
>
> *Member of kgoro 5: Should it change to Salome and not Phineas?*
>
> *Applicant: It should be David.*
>
> *Member of kgoro 2: Who is David?*
>
> *Applicant: My child.*
>
> *Member of kgoro 2: Is he your last born, the one remaining at home?*
>
> *Applicant: Yes.*

Once refined, members of *Kgoro* are invited to speak on the issues tabled. Everyone in attendance has an equal opportunity to engage with the applicant. This was done orderly through a controlled process of people speaking one after the other pointed out by the session chairperson. A few example of the engagements are notable and gouted below.

> Member of kgoro 10: *You cannot take over the stand while your mother is still alive. Your mother is no different from your late father. We cannot guarantee the future. You can take over the stand, maybe even marry a wife but trouble may follow. Sometimes you may find that it is not you causing the trouble, you may find that it is your wife whilst you are at work. So you people will come back here (*to the kgoro) *with a different dispute.*

This line of advice struck a chord with another member of the *kgoro*. He echoed its soundness and expanded on it in equally well articulated terms.

> Member of the kgoro 1: *Say you David marry my sister or my daughter. After that my daughter fights with your mother, I am not saying it is going to be like that. After fighting, my daughter says to your mother this place is registered in my husband's name. Therefore, this is my stand. Please leave my home. Even if this matter goes to the courts it is going to be decided in favour of David and his wife. The poor woman may be left stranded with the result that she may have to return to maiden home or go to live with David's siblings. I want to plead with the family to reconsider this in the light of potential dangers in the future.*

From the discussions off the floor, some light was directed towards a solution by someone who had brought a similar application before.

> Member of the kgoro 6: *The issue is very simple, at least for me. I want to use my case as an example like I did in the previous case. I approached this kgoro before when my mother asked to change the stand into my name. The law did not permit for this change. I was told that the yelwana* [PTO] *cannot be changed into my name whilst my mother was still alive. Similarly, this family cannot be allowed to change the names. They must wait for the time unknown to us for when the mother passes then they will come and change the names. If you decide otherwise, it means my case as well must be changed.*

It is apparent from this last submission that member 6 was calling for consistency in the decision making process. The final decision, as already quoted above, confirmed the

consistency of practice and the decision making processes in jurisdiction A. In summary, the prosecution of the inquiry is summed up as follows:

i) Registration of the issue;
ii) Checking of the records;
iii) Statement of complaint or inquiry;
iv) Engagement by *kgoro* AND
v) Decision by *Ntona*.

With respect to disputes involving two or more persons, an important new step in these disputes is with respect to the introduction of summons (see Appendix 4). In the summons, the respondent is identified, the issue they will answer to highlighted and the specific date on which they are expected to appear indicated as well. On the date set down for hearing, the matter is prosecuted in the form evidenced by **case 6**.

> Member of kgoro 2: (Complainant) *please tell us what your dispute is with* [the respondent].

After the statement of complaint, support of this statement or any questions to clarify the statement is called for.

> Member of Kgoro 2: *There is the issue as per* [the complainant]*. Is there anything you wish to add or you are just here as a witness?*

This question signifies the importance of supporting a statement of complaint. After this step, the respondent is given an opportunity to reply to the complaint against him or her. At the end of the reply, the issue is summed up for the interrogation by *kgoro* before referral for a decision. A single important remark in this cross-jurisdiction dispute is noted in this contribution that was unanimously supported by the attendees.

> Member of kgoro 1: *Without wasting any time, let me point out that* [the complainant] *should not take an issue that is not his and prosecute it in his name. The way I see it, the child must be called here so that we can speak to him. As it is, it appears as though* [the complainant] *is representing the child. If we invite the child here, he will stand before us and tell us how much* [the respondent] *owes him.*

The final decision supported this view as noted here:

Member of kgoro 4: *This is not the first time we prosecute issues relating to children. What is clear is that children have the potential to create feuds amongst adults. We are not finding any child guilty nor are we pronouncing on their innocence. However, it was incumbent upon the jurisdiction of* [the other Ntona] *to ensure that they sent the right people here. They should have thoroughly dealt with the issues there so that when they came here the issues are well refined for us. So that we know how much is being owed, what is the child's surname and so forth. In my conclusion, I think this issue must be referred back to [*the other Ntona] *for them to properly refine the issues before we can finalise it here.*

In sum, a dispute between two or more people is prosecuted through the following step-by-step procedure.

i) Registration of the issue;
ii) Checking of the records;
iii) Statement of complaint;
iv) Summons;

On the date of the hearing, the case commences with the statement of complaint for the benefit of the respondent and *kgoro*.

v) Statement of complaint;
vi) Statement(s) of support;
vii) Statement of response;
viii) Statement(s) of support;
ix) Engagement by *Kgoro* AND
x) Decision by *Ntona*.

The process is a fluid one. There are material differences in *Kgoro ya sechaba* however. Primarily, this *Kgoro* does not deal with checking of records but sits merely for purposes of prosecuting cases. It is, as opposed to *Kgoro ya Ntona*, not a public interest forum but a forum of litigation. The process commences with the statement of complaint in iii) and ends with a decision by *Mokgoma* or the Chief when he is in attendance. Significantly, the procedure for addressing *kgoro* is expressed before every issue is prosecuted in the following terms.

Councillor 3: *When you will be addressing* [kgoro] *women speak sitting down whilst men must stand. Each of you must introduce yourself before the address.*

The explanation for this difference is that the men stand for the women. This is in reference to the literal meaning of standing and not to suggest that women cannot bring cases in their own names.

There is no record checking of litigants in jurisdiction B. As well, the executives of each of the headmen's courts sit on Wednesdays to discuss issues relating to the affairs of the *Kgoro*. Disputes are registered at this executive meetings then tabled for prosecution at the seating of the *Kgoro*. In **case 19** above, it is clear that the proceedings start with a letter of inquiry being read out to the *kgoro*. In this letter, read out to the *kgoro* the applicant stated the following:

> Applicant: *I* [the applicant]*, stand number ###B, my stand is situated on a rock, as a result I am asking for a plot of land next to my stand. I would appreciate if my request is granted.*

This is the same in **case 23** in the forum of *Bakgomana.* Firstly, the letter read as follows:

> Mokgomana 1: *Mma-ntona's complaint is in respect of the following. One, being ill-treated by the Ntona in respect of the business of the kgoro; two, inappropriate language used by the Ntona. For example, one "you are mad"; two, "you are speaking nonsense"; three, "who do you think you are?"; four, "what are you in here (kgorong)"; five, "you raise your hand too many times and speak endlessly"; six, threatening demeanour directed at me (harassment); seven, poking me with a finger. Full details are in the letter of complaint. We would be happy if you can help us reconcile these parties.*

The covering letter by the executive read as follows:

> Mokgomana 1: *As members of kgoro we have witnessed the occurrences as alleged in the letter. We met in an attempt to correct the lack of collegial relations between the Ntona and Mma-ntona. We arrived at the following conclusions; that Ntona must choose between either a six months suspension where he does not sit in the executive meetings but carries on with his duties to serve Moshate or secondly, that Ntona must ask for forgiveness from Mma-ntona. Ntona's response was the following: one, he agreed to the six months suspension; two, he refused to apologise to Mma-ntona. Furthermore, Ntona stated that he no longer wishes to work with [the complainant] as an executive member of kgoro. As a result, Ntona requested that a new Mma-ntona must be appointed for him. Seeing that*

the matter has reached an impasse, we approached you to seek your assistance with burying the hatchet between the two and or achieving reconciliation between them. This decision to approach Moshate is informed by the fact that we do not have the jurisdiction to prosecute the Ntona.

Evidently, this means these letters are critical to clarifying the dispute that is to be ventilated before *kgoro* on the day. Once the letters are read out, attendees are invited to engage with the contents of the letter. In **case 19**, for example, the engagement took on the following line.

> Member of kgoro 2: *Yes, I agree that the request be granted. After all, he just wants to shift a little to the side in order to avoid the rock, please grant his request.*
>
> Member of kgoro 3: *I want us to please clarify this issue so that we are certain what is actually being requested here. There is a stand on which [the applicant] is currently staying on at the moment. So my question is, does he want to abandon this current stand and move to the new one? Now I want this to be clear so that we know if he is demolishing the old and relocating to the one he is requesting.*

The engagements are fluid and controlled by the session chair. For completion, because member 2 asked a question, the complainant ought to be given a chance to respond to same to enable the continuation of a constructive conversation amongst members.

> Applicant: *I am requesting for this extension because my children have grown. My first born will soon be eligible to pay for yelwana* [traditional levy]*. At the moment he is job hunting, and so too is my second born. My children have grown, so if indeed you* (tribal authority) *can grant my request for extension, because I have already commenced building on the place which has a rock, I was thinking that if they* [my children] *get better employment we can build a home on the place I am requesting.*

It is apparent that the request in the letter is different from the reasons the applicant orally advanced in the *Kgoro* as motivation for extension. This difference essentially led the kgoro into making a number of suggestions in an attempt to reconcile the two. What that achieved, was no more than drag what was essentially a direct request. At the end, the issue is referred to the *Ntona* for a decision. To draw on the example of **case 19**, here with is the decision.

> Member of Kgoro 5: *I think what is* [in principle] *a simple issue is now becoming leshita phiri.*[12] *We know that here in* [jurisdiction B] *we do not allow a man to have two stands unless he is strong, meaning that he has more than one wife. On the other hand, this man says he wants the stand on behalf of his children. We are aware that when you want a stand for children, an application must be addressed to the kgoro about this… We must strive to be consistent in these issues to avoid treating similar issues differently… Our children are educated and have money, when the time comes for them to have their own home, they leave to go wherever they like and leave us here with open spaces. We have indicated previously that we ought to not take stands for children to avoid this problem of open spaces that have been secured… Make an application and say that you want a stand for the children.*

In jurisdiction B, as per the decision herewith, there is an attempt to be consistent in the application of customs or rules and decision making process. At the end, it means dispute resolution in this jurisdiction follows this procedure:

i) Letter of inquiry/complaint;
ii) Engagement by *Kgoro* AND
iii) Decision by *Ntona*.

The introduction of the Wednesday meetings assists *Kgoro* in refining issues that will be discussed on the day of the seating. As well, the letter is a new factor that aids the fluidity of the system in jurisdiction B.

On the other hand, disputes involving two or more people commences with the complainant approaching the executive during the Wednesday sessions or on Sundays when *Kgoro* sits. After laying a complaint and identifying the respondent, summons (see Appendix 5) are issued against the person so named. On the day set down for hearing in the summons, proceedings start with the complainant's statement of complaint. To support this, reference is had to **case 22** as an example.

> Complainant: *I have been staying with* [the respondent] *at* [] *for a period of seven months. One day he came to me and said that his family wants me gone from the premises. I asked him, how could they now tell me to leave when they watched us working together to build this place? So I told him that I would not be leaving*

[12] Loosely translated, this phrase means insurmountable difficulties.

unless he paid me an amount of R1500.00 that he owed me. In response he said that he would pay me the money but I must leave. Fact of a matter was that I was no longer wanted at that place. They changed locks while I was out. On my return I found that locks were changed and I could not gain access. I had nowhere else to go so I went to the police station but I was not assisted. I had no one else to assist me. Now when I ask him to pay me back, he tells me that he is not going to do that because his mother told him that as a Zimbabwean I would bewitch him if he paid me back. That is the reason I came here (to the kgoro) *because I had no other choice. I was evicted from the stand and have nowhere else to go.*

Because this case did not have any supporters on either side, the members of the *Kgoro* asked direct questions to refine the issue for a response.

Membr of kgoro 6: *How was the amount made up? Did you give him that money in a single advance?*

Once clarified by the complainant, the respondent was given an opportunity to respond.

Respondent: *Some of the amounts that are mentioned here are correct but others are not. I have also given her money as well. The amount for the shoes was R300.00. It is surprising to me that today that figure is R500.00. The issue of the transport is equally surprising as she only came to live with me when the shack was completed. When I asked her to move in with me, there was already a shack in place. So you can understand my surprise when she talks about nails. Perhaps when she talks about transport she is referring to the costs to take her things from where she stayed to the stand. It is possible that she forgot, I do not know.*

The respondent was also asked to a question regarding his own estimates regarding the total amount due to the complainant. Whilst he accepted liability for some debts, he denied that the amount was R1500.00, arguing instead that he owed R1000.00. The engagements continued in this fashion:

Member of kgoro 12: *As far as I am concerned, the money would eventually reach the amount that the lady has indicated as owing. This is because of the discretion we men tend to have towards women. So to avoid wasting time, I propose that the respondent must simply accept all liability and we bring this matter to a close. If you concede to liability of R1000.00, then R500.00 is not a lot. Please pay this lady what is due to her so the both of you can continue with your separate lives.*

This proposal was echoed by another member before the issue was referred to the *Ntona* for a final decision.

> Member of kgoro 11: *[respondent], you heard what was said. Please give [the complainant] her R1500.00 then close this case. This is the end of the dispute.*

In sum, a dispute between two or more people in jurisdiction B is prosecuted along the following lines.

i) Statement of complaint to the executive or *Kgoro*;
ii) Summons;
iii) Statement of complaint;
iv) Statement(s) of support;
v) Statement of response;
vi) Statement(s) of support;
vii) Engagement by *Kgoro*; AND
viii) Decision by *Ntona*.

As per **case 22** summary above, this is flexible and dependent on each case.

In jurisdiction C, the procedure before council closely resembles that of jurisdiction A's *kgoro ya sechaba* (chief's court), with a few tweaks. The process commences with a statement of complaint before council. Summons (see Appendix 6) are issued with the indication of who the complainant is, the issue to respondent to and the date of the hearing. On the date of the hearing, the following express statement is made in all hearing.

> Councillor 3: *We thank you for honouring the summons. If you are summoned to appear but fail to do so on the date indicated, you must know that you have already committed a transgression against Moshate. The penalty for that transgression is R100.00.*

After this welcome message, the procedure for hearing is explained.

Councillor 1 makes the following express directions in all cases before council.

> Councillor 1: *When you address council, men will speak while standing and women remain seated but must speak aloud so that we can hear them. We will start with the complainant and then when they are finished we will go to the respondent. Once the discussions are finalised amongst you and council is given the issue to deliberate, you well not get another opportunity to speak again. So please make*

sure that you tell us everything you know regarding the issue. As well, if someone is speaking and you find what they are saying incorrect in anyway, you do not interrupt them. Instead you raise up your hand, we will see you then give you a chance to speak when that person is done. Do we understand each other?

This express pronouncement in jurisdiction C is consistent and recited in all cases in the exact terms. As noted, proceedings commence with the statement of complaint followed by support of this, if any. **Case 35** supports this general flow of a prosecution perfectly.

> Complainant: *I was married into the family in 2015 with my three kids. I am married to this old man* (pointing at her husband)*. I lived with my husband from that time onward. My sister in law pointed it out to me that since my husband was old and possibly no longer sexually active, I was permitted to find someone with whom I can have a relationship. I did not have a problem with being married to my husband, but since I was permitted to find someone it was also fine with me. This was the start of conflict in the family. In 2018, I found someone to have a relationship with. My husband is someone that likes to visit his siblings. But the issue arises here. In the morning I wake up to prepare the children for school. After that I clean around the yard and house. My husband would leave as I am busy with these chores to go visit my sister in law. When he gets there they ask him if he had eaten to which he responds in the negative. This created the impression that I was not taking care of him…*

From here, the husband was removed from the care of the complainant with the result that his SASSA card was taken as well. This meant that the complainant and his children were left without a means of sustenance. The statement of response appears in this brief submission.

> Interested party 14: *It is true what this woman* (pointing at the complainant) *is saying. I will not repeat all that she has already said suffice it to highlight that she has approached me and other members of the family about these issues. We tried to resolve the issues but were unable to succeed because of her sister in law* (respondent)*. I put it to the respondent that she ought not to make unilateral decisions whilst her other siblings were still alive. I urged her* (respondent) *to invite other members of the family to the discussions so we could reach an appropriate decision.*

Another person supported the version of the complainant pursuant to which the respondent was given an opportunity to speak as well.

Respondent: *We agreed as a family to allow* [the complainant] *to find someone she could date. But she brings these men home with her and claims that my brother is her father. One of these men had been sleeping at home with the complainant whilst my brother is moved to the other room to share with the children. On one occasion when this man visited we heard from the neighbours that the man was in the house drinking in the morning. I called my niece to inform her of this and asked her to go investigate. When they got there they found that man there and assaulted him. We agreed to let her have a partner but we did not give her permission to undermine our home like that.*

The version of the respondent clearly put a third party at the scene of her claims. It was appropriate that she support the claims herself.

Interested party 16: *I received a call from my aunt in the morning. She told me that she was with my uncle and the he was chased out by another man who was drinking at home. I called* [] *to go see what was happening. It is true that when we arrived there we founf another man in the bedroom. We asked him who he was and what he was doing there. He told us he was* [the complainant's] *boyfriend and actually intended to marry her during the Easter holidays* (2022)*. We asked him if he knew that* [the complainant] *was married and he said he did not know and that my uncle was introduced as her father. A confrontation started and we assaulted him then he ran away…*

After support of the submission that the complainant has had many indiscretions, council was given an opportunity to respond.

Councillor 4: *We hear what was said here. But we also acknowledge that there has been an error by the complainant. You permitted her to seek pleasure outside of the marriage bond but she was wrong to bring her partners to the matrimonial home. Having said that, I must say that it is human to err and we must forgive her for that. But as well, you the respondent, have no right to meddle in the affairs of your brother's marriage as you do. This is your sister in law, and her children are also your children. How do you expect them to survive without maintenance?*

Councillor 7: It is not unusual for a husband to leave his home to go live with his siblings. We have handled such cases in this council before. However, the wife and children must continue to be maintained. Those children will grow old to continue the lineage of their father.

Evidently, councillor 7 relies on past experiences to invite council to be consistent. This, already underscored in both jurisdiction A and B above, points towards the view that traditional dispute resolution is dependent on consistency of practice. At the end, the final decision supportted the unanimous view that the complainant and her children must continue to be maintained. This, notwithstanding their mother's indiscretions.

It is noteworthy that in this jurisdiction, the process proceeds largely uninterrupted by councillors until all affected and interested parties have spoken. Once council is given an opportunity to reflect on the evidence before it, the parties are not allowed to add any new statements. The only thing they may do is answer questions as and when asked by councillors.

An interesting procedure in this jurisdiction is that after interrogating the issues, the parties are excused by council. In this time when the disputants are outside, the councillors come together to deliberate on the case alone and reach a decision that will be communicated to the parties on their return to the hall. This is a unique feature not observed in either of the two other jurisdictions. Additionally, once the decision is communicated, the parties are expressly told that the decision is taken to the Chief for confirmation and that they must sent representatives to receive that final order. This is another unique step not followed in the other jurisdiction. The decisions of the Chief are reflected as off records as she makes them alone on the evidence of the case summary written by councillors.

In sum, the step-by-step procedure is as follows:

i) Statement of complaint;
ii) Summons;
iii) Statement of complaint;
iv) Statement(s) of support;
v) Statement of response;
vi) Statement(s) of support;
vii) Engagement by councillors in the presence of the disputants;
viii) Engagement by councillors in the absence of the disputants;
ix) A unanimous decision by council;
x) Referral to the Chief for confirmation AND
xi) Communication of the decision of Mmago Kgoshi to the disputants.

The differences demonstrated here underlies the need for details and support the argument against the notion of a homogenous Native systems.[13]

To underlie the importance of theme 1, the sub-themes are discussed below.

Correct forum

The procedure and process of dispute resolution assert the flexibility of traditional dispute. In general, in **jurisdiction A**, it is clear that there is no insistence on the family council whilst the choice between the court of the headman and the chief's court appears to be discretionary. **Case 8** is a clear demonstration of this choice. The hierarchy exists in principle than in reality. **Jurisdiction B** supports this notion as well. None of the cases was dismissed on technical aspect such as the *Kgoro* being non-suited to hear a case. However, this position changes in **jurisdiction C**. In the discussion above, cases 39 and 44 attest to the need for a using a correct forum.

In **case 39** the complainant's approached council on the following claim:

> Complainant 1: *Ours is not a long story. We received a letter from the Headman indicating that we have encroached into their territory. While we were still digesting this issue, they sent us a second letter inviting us to speak to them at their place. We know that* [the headman] *falls under you as Moshate hence we approached you requesting that you summon* [him] *for us to meet here in an attempt to resolve the boundary dispute once and for all.*

A Sepedi idiom proclaims that *mollwane wa tshemo o shekwa mashimong*.[14] The second complainant echoed this idiom in his support of the statement of complaint.

> Complainant 2 (male): *We decided to come here with the express aim to engage and not be aggressors. If we have encroached into the territory of others, it would be best if we can point it out to each other. We are merely the custodians of the place where we live, so when we were confronted by the dispute over the boundary lines, we wanted to seek the clarity instead of trying to assert ourselves.*

In his response, the respondent stated the following:

[13] Moeketsi Letseka, 'In Defence of Ubuntu' (2008) 27(6) *Studies in Philosophy and Education* 47, 49.
[14] The essence of this idiom is that all disputes relating to land ought to be settled on the land itself. In that way, the wisdom goes, each party is able to support his narrative by evidence of landmarks.

> Respondent 1: *It is true that in our observation we noticed that they had encroached into our territory. As a result, we wrote them a letter inviting them to come speak to us. They did not honour it. We wrote them another letter which they did not honour as well. We were surprised to be summoned here (Moshate).*

As already indicated elsewhere on this chapter, council did not decide the issue on the merits, but decided instead that it (council) was non-suited to hear the matter about tribal borders.

Elsewhere, in **case 44**, council remitted this case back to the headman's court for resolution on the strength that all the parties appeared alone and presented contrasting versions.

> Complainant: [First Respondent] *is harassing me. Whenever we meet, he always makes it a point of telling me that I am not Matsimela but Kekana. That there was no celebration of mohlobolo for my mother. He was told to apologise but this is still ongoing.*

In respect of the second respondent, the complainant said the following:

> Complainant: [Second respondent] *says that I am not a human but a thing and that I was picked out of a dustbin. As well, this man does not get along with his neighbours. He has been away for many years now he has returned and causing people trouble. When [a third party] threatened to bring him to Moshate, he said Moshate was nothing.*

In response to this allegations levelled against them, the respondents replied by denying knowledge of the claims.

> Respondent 1: *I do not remember ever uttering such abuse to [the complainant]. I am not his friend nor do I spend time in the same circle as him. How can I use mohlobolo to insult someone? As it is, my mother is unmarried so I know nothing about mohlobolo. If you could help me ask this question of him, which mother is he referring to as I do not know his mother.*
>
> *Respondent 2:* [The complainant] *insults me day and night. I am surprised today when he claims that I am the one guilty of all this.*

Each party presented their own versions which, whether correct or not, supported them. Because council does not interrogate people in respect of their disputes, this presented a challenge. It is for that reason that interested party 29 had suggested to the complainant that he should approach the first respondent's family yo talk about these issues. In that way,

council would have had enough witnesses to decide the issue on the strength of the narrations. This was eventually remitted back to the headman's court so the families could meet and decide it.

Outside of **case 39**, it would seem like the issue of the correct court is more of an exception than a principle of traditional dispute resolution. This is supported by the general flexibility of the system.

Legal standing

Case 6 raises the question of legal standing to prosecute a case in a way quite different from **cases 20** and **42**. This, notwithstanding the fact that in all of these cases, the person appearing as complainant acts on behalf of another. **Case 6** share similarities with **case 20** in that in both cases, the representated persons were not before *Kgoro*. Materially, case 6 is remitted whilst case 20 is decided as discussed under default judgment below. However, in case 42, the represented people appeared before council.

For current purposes, only case 6 is discussed as the only case whose decision depended on the standing of a litigant.

> Complainant: *I have a problem. My problem is with* [the respondent]*. During the initiation season he approached us at home looking for a guardian for his initiate. As I understand the issue,* [the respondent's] *intention was to have his son leave with mine for the initiation school. Unfortunately at the time mine had already left. So I said to him I understand your request but I cannot assist you because my children have already left. He indicated that his son wanted to go to the initiation school as his peers had left him behind. I advised him that if he had the relevant documentations for the child, he ought to make copies and accompany the child to the mountains. I further directed him that when he gets there* (initiation school) *he will make contact with the people he is looking for to make arrangements. He did as advised. In the evening when he returned he confirmed this to me… From time to time I would go to the school to check on my children. Indeed I always found them with [the respondent's] child under the care of my grandson. I did not make follow up on the arrangements between* [the respondent] *and my grandson until I discovered around September (2022) that he* (the grandson) *was not paid for his services. At the time he* (the grandson) *was staying in Gauteng so he called home to inquire if* [the respondent] *had not brought his money. He called his mother who was not pleased about the non-payment. I cautioned her to not get*

involved in the affairs of the initiation school because I was the one who was going there during that season… To this very day (18 December 2022) *my grandson has not been paid for his services…*

From the elaborate submission before *Kgoro*, it was clear that the complainant was there primarily to claim the unpaid money due to his grandson. In his further submission, he said the amount was R1200.00. In his response, the respondent put the issue of non-payment under the spotlight.

> Respondent: … *I did not approach* [the complainant] *asking for his permission for his grandson to be the guardian for my son. He does not have a son who is illegible to be a guardian. I only went to speak to him as my neighbour and my brother. In his response, he said his kids were also at the initiation school then I said it means we will meet each other there. I went to the initiation school. On arrival, I bumped into* [the complainant's] *grandson. I said to him that my son has just arrived but I will speak to him in time. When I arrived home, I spoke to his* (the grandson) *mother to request that seeing as though he was already a guardian to other kids, he can also assist with mine as well. We never discussed the actual amount to be paid to him. I managed to visit the initiation school daily, which is more than* [the complainant] *himself. I gave them my car to run errands at the school. The initiates came back, I have not spoken to* [the complainant] *and he has not said anything to me in return. When I spoke to the grandson he said he wanted R800.00 because my car was used to run errands and was actually useful to them.*

The difference in amount could not be proven without the submission of the grandson, who was not present in the session. In his absence, *Kgoro* was unable to pronounce on the correct amount that was owed. As indicated elsewhere, he general feeling was that the complainant was non-suited to litigate the case as his own. At the end, the decision taken was to refer the case back to the *Ntona* that referred the issue to secure the attendance of the grandson so the issue could be resolved.

Cross-section with other forms of justice

These cases presents the intersection between traditional dispute resolution and other forms of justice in its entirety. **Cases 1**; **17**; **28** and **38** involve all issues were some form of interaction with the South African Police Service (Hereundere referred to as SAPS) was required. **Case 27** is the single case where customary law interacted with the testate

succession through a testamentary document. In **case 31**, some of the issues raised were the subject of ongoing criminal prosecusion in the Magistrate's Court. **Case 37** raises the aspect of the South African Revenue services (hereunder referred to as SARS). The cases are discussed in the order as noted herewith.

In case one, the complainant stated the following in respect of his stolen donkeys and the investigation by the SAPS.

> Complainant: *… the police have closed the case hence I have brought the matter to the kgoro. To* [the police] *it is no longer an issue because of lack of evidence.*
>
> Member of kgoro 2: *We have a lot of power as the tribal authority. If the matter goes to the police and they fail to resolve it, we send someone to tell them that we are not satisfied. As a result we write a letter to the police to ask that we take* [the case] *over and prosecute it in the kgoro. We have solved many cases that came back to us before.*

Based on the contestation of whether or not the case is closed, the case proceeded as per the narration of the following two members.

> Member of kgoro 3: *The way I understand* [the complainant]*, the case is closed with the police which means there is no longer a need for us to write them a letter to request permission to prosecute it. It is true we are complaining about theft* (in the communities) *but we never get satisfaction from the police. Now that* [the complainant] *is saying it has been closed that side, let him bring it here so we can look at it, so that we can solve it because he has evidence and he knows who stole the donkeys.*
>
> Member of kgoro 1: *I request that we do not ruin this case. We might take it then ruin it. So, we do not know for sure if they still have a case number for this issue or if it was referred to the stock theft division. Let us do a follow up with* [the police] *to be certain that the case has been closed… I do not want us to take it only to find out that it was not terminated but suspended. The way they put it they are saying if there could be new evidence then they can continue with it. My understanding then is that they have suspended the case and not closed it altogether.*

The engagements by members of *Kgoro* underlie an ongoing relationship between jurisdiction A and the SAPS. To further this relationship, the decision of the *Kgoro* respects the simingly collegial terms they have.

> Member of kgoro 4: *We are here to help people, we do not want a person to complain because we did not assist them. However, we are also saying in helping our child we do not create problems for ourselves in future. So, in this matter, it is necessary that we must first ask if this case has been closed or suspended, then when we know for sure where it is, we can proceed accordingly.*

In **case 17** on the other hand, *Kgoro ya sechaba* takes a decision to refer a matter of alleged human remains in the position of the respondent to the police for further investigation and possible action.

> Interested party 7: *About two years ago I got a notice that there was a new grave in our family cemetery. I was shocked by this rumour so I went to investigate. Upon inquiry, I discovered that the grave belonged to* [the respondent]*. I called my uncle here to inform him of the new found discovery and to find out from him if he had knowledge of this. My uncle and I looked and found* [the respondent] *who informed us that he was attracted to our family cemetery. He said that some of his family members had been buried elsewhere but he decided to get them in order to rebury them in our cemetery. We asked him who gave him permission to use our cemeteries. His answer was that it was the Ntona but the person he identified as Ntona was actually not one. We demanded that he remove the grave from our family cemetery.*

> Interested party 8: *… Now to the question of the burial remains. In my knowledge when it comes to reburial of the remains of our loved ones, we do not take bones. Instead we go to the site of the grave to take a small portion of the soil because exhuming the bones requires one to follow due legal process that includes getting a letter from the Magistrates' Court…*

> Interested party 9: *To the issue of bones. A person is not supposed to walk around carrying bones. Where are those bones now? If those are the bones of your grandmother, for example, was she your grandmother alone? In our culture, the whole family is entitled to access a grave. This thing of violating a grave is perhaps the reason why your wife is abusing you. We have a police sergeant here, she must follow this issue up with a proper investigation of the trail of these bones.*

After a succession of speakers on the transgression relating to the reburial of the human remains, the respondent had a chance to respond to the questions put to him.

> Respondent: *I know nothing about the bones. I went to the place where the graves were situated being led by spirit. How can I dig a grave alone? What I did is go to the Ntona asking to put my parents' graves here. He gave me an authorisation letter. We went to erect a tombstone there but underneath it was just soil, not bones… One day when I was at home a truck came with a load of the tombstones. They said I had erected the tombstones in their family cemeteries. I am not an Ntona, I was shown where to erect the tombstones. But I must reiterate that it was soil and not bones underneath the tombstones.*

Upon further deliberations on this issue, a councillor made a telling submission to avoid further speculations on the matter.

> Councillor 6: *There are two versions here; the one is that there were bones in the grave whilst the responsible person denies this. I align myself with the view that we must hand this matter to the police to handle the investigation. This process is called exhumation in English. As we speak, the bones may be in the kitchen. But talking about this here will not yield any result. Let us refer this to the police.*

At the end, and in appreciation of the limitation and scope of traditional dispute resolution, the following decision was made:

> Councillor 8: *So who is going to assist us with an investigation into the bones?*
>
> Interested party 9: *[…] Police Station. I will pass by there to inform them to take action.*
>
> Councillor 8. *We would appreciate a report as well.*

In essence, this meant that *Kgoro ya sechaba* deferred the metter to the police to get to the buttom of the inquiry into the reburial.

In **case 28**, upon a request by the family for protection in respect of a funeral that was threatening to degenerate into anarchy, council made a ruling to rope in the SAPS to ensure the safety of all parties. The security granted falls off the record of the study. However, the assurance given to the family and the incident free funeral of 21 January 2023 under police scrutiny speaks to the co-operation between SAPS and council in jurisdiction C.

Case 38 further entrenches that sense of co-operation between the two stakeholders. To effect a decision that was made in the absence of the complainant, council clarified that it would be enlisting the services of the SAPS to carry out its judgment.

> Respondent 1: *Is there a way in which Moshate can intervene to assist us with the eviction process? If we go do it ourselves, there may be bloodshed which we would want to avoid.*
>
> Councillor 3: *You can go buy locks and return to council, we will accompany you to go lock the place so he will not have access to your home.*
>
> Councillor 9: *I propose that we ask* [the Chief] *to call the police to escort us there so that there would be no claims of theft against us afterwards. We need to do this with the police in attendance.*

A sense of deep seated trust and co-operation is entrenched between these two institutions.

Case 27 raises a question on the relationship between traditional dispute resolution and the last wishes of a testator. In this case, the disputants were fighting over a shop that the complainant alleged was in the care of the respondent but ought to be transferred back to them. On the other hand, the respondent alleged that the shop was transferred to her subject to the proviso to care of her niece and nephews.

> Complainant: *I have come here because I have a problem with my aunt. My aunt took a shop and some iron roofing sheets from us. These things belonged to her parents, our grandparents. The assets were entrusted to her as the eldest child on the understanding that when her brother grew up, the assets will be given to him.*

The respondent refuted this view.

> Respondent: *During her life, my mother gave me the shop on the specific direction that I should never abandon my nieces and nephews. She said I am giving you this shop but take care of your brother's kids. This was back in 1991. Since then, I have never forsaken my brother's kids, I have always endeavoured to honour the wishes of my mother. All revenue generated from the shop has always been shared with them* (niece and her sibling)*. The problems might have started around 2019 when the lessee was experiencing difficulties keeping the shop afloat. The lessee came to me to tell me that he or she was closing down the shop. Since that*

time, I have been looking for a person that can lease the shop. However, these efforts are negatively affected by the fact that the store has no electricity and is in a dilapidated state. I reiterate that based on the directions of my mother that I should take care of these kids, I will continue to do so. I will never abandon these kids...

To support her view that the shop actually belongs to her, the respondent produced a document and handed it to council to inspect it. After inspecting it, councillor 2 made the following telling submission on the relationship between the powers of council and documents purporting to bear the signature of a court official:

Councillor 2: *The complainant claims that the shop was given to the respondent on the understanding that she will pass it on to the kids when they come off age. That is her submission. However, there is nothing on this document that supports that claim. This document is saying nothing about kids. It could be that the deceased was blinded by what is written here if indeed she intended that the shop must go to the respondent temporarily with the subsequent result that it would be passed to children in later years. I do not know what was agreed between the respondent and her mother. The document is written in English so there is no knowing if the lack of understanding played a role. What is clear here is that the shop is bequeathed to the respondent with no mention of children.*

The way it is, this document has consequences. If we sit here and compel the respondent to hand over the shop to these children, we can get into trouble. This is because these document has been signed even by the magistrate. Nowhere on this document does it say the shop must go to the children. The only way this matter can be resolved is if the respondent voluntarily gives the shop to the complainant from the goodness of her heart. As it stands, this matter is between these two parties to decide on how to go about it. Whether the respondent is willing to give the shop that was bequeathed to her is a decision that we cannot impose on her. So if you decide the issue based on your customs and the respondent takes it to a court of law you will lose the case.

Evidently, the customs of the locals was reduced to futility. The written document from the magistrate's court triumphed over any possible wisdom that council would propose in this case. The mating point between the state law and the customary law resulted in a defeat for

the latter. Put bluntly, it was a no contest from the moment the respondent produced documentary proof.

In **case 31**, what was a simple case of a complaint regarding the customary procedure of laying a matrimonial query turned into an argument about on-going disputes between estranges partners. The estranged wives detailed abuse starting as far back as 2010 whilst the husband altogether refused to speak. Without taking a decision of the original claim, council dismissed the case in whole by insisting that the parties must let the courts and police settle their dispute. This happened in the following manner.

> Complainant: *The* [respondent's] *family came to my home to bring a complaint regarding a separation between my daughter and their son. They demanded everything that was given to us as part of magadi. It must be pointed out that they have assaulted my daughter but we never took a complaint to them.*
>
> Councillor 1: *What did you do to them that led to their bringing a complaint against you here at Moshate?*
>
> Complainant: *No. They did not come here (Moshate). They came to my home to demand a return of all things given to us as part of magadi. When they assaulted my daughter, I never sent a complaint to them… But they only sent women. So the old man declined to speak with them indicating his unwillingness to engage with women.*

The real issue is then properly set out in the thoughts and submission of a family associate of the complainant in this way:

> Interested party 8: *The real issue here is that the old man is hurt by what was done by the* [respondent's] *family. How do they send a complaint through an all-female delegation? So he refused to speak to them but instead redirected them to bring the complaint here* (Moshate). *They did not do that. The old man then send this man* (complainant in the current issue) *here* (Moshate) *to come report the issue so he can meet the* [respondent's] *family here. The old man says when the negotiation of the marriage started, they send a delegation composing of men as well. Why are they now only sending women to speak with him? We were hoping to meet them here today so that we can ask them this question.*

It is apparent that the complainant had a bone to pick with the respondent's family regarding how they have conducted themselves in visiting his home. However, the issue took a different

turn when council called for more evidence to corroborate the issue before it. The estranged wife used the platform to detail the manner of abuse she had endured at the hands of her estranged husband. The allegation of assault and the frequency of it had her demanding from council to inquire from her estranged husband where she must walk if she is assaulted at every sighting with the respondent. Fittingly, she arrives at the following question.

> Interested party 9: *Does he want to kill me? If there is an issue that he has with me, why does he not send men to my home so that there could be discussions aimed at resolving the issues? So my father feels disrespected by their conduct as there are three separate issues that are pending at the moment, this is the fourth one.*

When the opportunity to respond to the complainant was presented to the respondent and his family, the eldest brother commenced his submission in this way.

> Interested party 10: *We married this woman a while back. But she does not set foot at my parents' home. She goes from family to family except ours. It is surprising to us that when we summon her she does not honour our invitation. We indicated to her that since she refuses to set foot at home she must at least come to our kgoro so that we can speak. Instead of heeding that invitation, she went to the police station. She was again summoned to appear before the kgoro but she declined citing that the issues she was summoned for were already with the police. Now, today we are surprised that we received a letter to come to Moshate to discuss the same issues she has declined to honour our kgoro summon. How are you* (council) *going to prosecute this issue when we have not had a family discussion nor a kgoro deliberated on this issue before it was brought here* (Moshate)*? Our bride undermines us.*

Understood in context, this response raises two fundamental issues for council; firstly, some of the contested issues before council were already with the police. Secondly, the proper hierarchy for the resolution of a dispute is raised. Despite this, the estranged wife attempted to refocus the attention of the council to the issue before it.

> Interested party 9: *The issue here* (Moshate) *was not brought by me. My father is the one who brought a case here. They must respect him because he is old. They* (the respondent's family) *should avoid sending a delegation of girls to my father. The delegation included his* (estranged husband) *wife* (another wife in

what is assumed to be a polygamous marriage) *and their daughter. My father is old, he is 95. You should not disrespect him by bringing girls to his doorstep.*

Despite the seriousness of the allegations of violence against the estranged wife, that is not what was properly before council for discussion. At the end, it was unclear what the specific decision taken was in respect of the complaint of disrespect. The decision taken was to allow the criminal justice system to take its cause. Council refused to interfere in criminal cases.

In **case 37**, the complainant alleged that the conduct of the community has legal implications for him. In the case, the complainant and the villagers in general were fighting over a right of way which the complainant claimed was he lawfully gained stand. Thus, by denying him the right to use the space, he contended that he was incurring financial losses for money due to SARS.

Complainant: *I came here with a complaint arising from the damage caused by these people. In 2010, I came to Moshate to request a place with the intention of establishing a liquor restaurant. Moshate escorted me to the said place to view it and demarcate it accordingly as mine. On our return, they gave me this piece of paper as proof that I have been allocated that space. I demarcated the space allocated to me with bushes. A couple of days later, I was summoned to appear at the local gathering arising out of a claim that I had obstructed the community road. I indicated to them that I was allocated the place by Moshate.* [Three people] *were assigned to come with me to Moshate to confirm that my submission was true. Indeed it was confirmed to them that I was rightly allocated that space. We went back to the community… Last year (2022) SARS send me a letter indicating that I owe them. I went to* [one of the men that accompanied me to Moshate]*, as he is the only one still around from the three, to inform him that I now owe money in respect of that space. He said he was not interested in the issue anymore. As it were, I decided to commence with the work on that space by fencing it. After three to four days, I saw people running away as I approached by car. I went to investigate only to find that the fence had been removed.*

The feud for the space started in 2010 as indicated here. Despite that, the complainant registered a liquor restaurant with the intention of using that space, now he alleges that he owes SARS and that his assets may be attached as a consequence. Despite this, council decided in favour of the community and ordered the complainant to seek alternative land for his business.

Councillor 3 (male): *We have resolved many disputes similar to this in this council. So, in our conversation as councillors, and in order to resolve the issue, we decided that this matter must be resolved like all other disputes where it is alleged that someone has blocked a road. In these disputes, we tell the person to seek an alternative space. So therefore, [complainant] look for another place my brother. If you do that, you will be able to live in harmony with this community as opposed to the ongoing conflict.*

In deciding the issue, council opted for consistency of practice over yielding to alleged transgressions against a state institution.

Default judgment

During the whole process of data collection, only two cases were decided in the absence of the other parties to the dispute. These are **case 20** and **38** respectively.

So far as **case 20** is concerned, it in fact started in the absence of both disputants before the representative of the complainant family appeared later. Knowledge of the village and the dispute enabled the conversation to proceed.

Member of kgoro 4: *Alright, when coming to the issue of the* [complainant] *family,* [the respondent] *has returned home to the ruins that belonged to his family previously. He was gone for many years and for whatever reason he has returned to his family home. The home is now in a state of dilapidation because they left a long time ago. Now this man is back and he wants to live in his family home. Now what is worrying is that the* [complainant's] *gate was facing down previously but they changed it to the other side. We are not talking about these yards of today, we are talking about the old yards of yesteryears. The* [complainant] *family were troubled by water, as you can see that their family home is located on a downward slope. As a result of this trouble, they opened the gate that side. When* [the respondent] *came back he closed the gate by putting woods on either side of the gate and fenced the woods together. The other portions of* [the respondent's] *yard is supported by the wall that was erected by the* [complainant] *family. The problem the* [complainant] *family now have is that they cannot gain access to their home as they are impeded by the fence erected by* [the respondent]*. Looking at the situation there, do you think there is going to be a sense of neighbourliness?*

To respond to this question, another councillor remarked as follows:

> Councillor 5: *Sometimes we address stubbornness with stubbornness. We leave those kids, and I start to inquire if they are young girls. On this realisation that they are young girls, I assume that they are taken for a ride. No, man, as a man and a father, should I just harass a family headed by women? I feel very bad. After all, it might lead me to GBV - Gender based violence… We have a right, a duty, to remove those impediments.*

To properly address the removal in a legal manner, another councillor proposed that perhaps it would be prudent to use the current measurements as opposed to those of yesteryears.

> *Member of the kgoro (male): I want to say that since there is a PTO that is issued. I do not know if the tribal authority has written the measurements of the standard stand on the PTO. I propose that we use the PTO to open the way. We can use the new order measurements to limit the old order measurements on the PTO. In that way, we would know that we have adhered to the tribal law. As things stand, that stand is big, it should be allocated the standard size to look like the current stands. But we must operate as guided by the law.*

At the end, the supposed yearning for peace guided the decision of *Kgoro.* It resolved that the respondent must remove the empediment and appear before the executive in their Wednesday meetings.

In case 38, the complainant reported a case of dispute over property with council but failed to appear twice. At issues as summed above is that the stand belongs to the respondents but the complainant effected some improvements on the stand. On the occasion of the second setting, council decided the case in the absence of the complainant.

> Councillor 3: *He is aware that the case is set down for today. You come from far for this case yet he stays here but fails to honour the hearing. He undermines Moshate. Now when they called him, he says that he will take up the issue with the police. We are not afraid of the police. So you can evict him from your home.*

Single person inquiries

Cases 1, 3, 5 and **19** are single persons' inquiries in that the applicant approaches *Kgoro* for assistance with an issue pertinent to them. To avoid unnecessary duplications, the discussion under the process and procedure of dispute resolution above suffices to cover this sub-theme.

Interestingly though, case 3 was reinterrogated on another setting after a decision was made.

> Member of kgoro 6: *I hear the minutes relating to the issue of people asking to relocate to another kgoro. I must warn this kgoro and request that things must be done correctly and consistently. I remember that I previously made the same application a couple of years ago when I felt that I was struggling with the distance between my home and this kgoro. I felt like I was living far away and I asked to be transferred to another jurisdiction closer to me. My request was declined. The reason offered was that this kgoro will lose more and more people and be left with no one. It must be recalled that this kgoro is not made up of people from Dikgopheng only, however, we have many from ga-Mokgopo, ga-Moloisi and Titibe. All these places are far from here and if we allow people to leave on account of the distance, we will be left with very few people. The resolution was that all pensioners must continue with their financial obligations to the kgoro but can be excused from the attendance without incurring a penalty…*

It is unclear still whether this was an appeal or a call for future practice on issues of transfer by members. After engagement with attendees, it was decided that the matter deserves a reconsideration for consistency and preservation of *Kgoro*.

> Member of kgoro 4: *To err is human, and it is apparent from the discussion that we have made a mistake in the decision of the last kgoro… Going forward, we should not commit the same error as this will help with the preservation of this kgoro. I propose that all those who, for one reason or another, are unable to attend the kgoro, they must send a suitable person to stand in their place.*

What is clear is that though case 3 started as a single person inquiry, *Kgoro* was able to self correct in the absence of the applicant and wihout the decision being binding on her. This creates either of an anomaly or supports the argument of *Kgoro* being a public interest *fora* intended to exist for the benefit of the people.

Hearsay (probative value)

The general idea from the data collection seem to point towards traditional courts being intentional about reconciliation to the complete disregard of all other rules of prosecution. Evidently, while the pursuit is for the truth and mending the relations between parties, the narration of disputants and interested parties may not always be based on first hand accounts. The question is whether the accounts of others can be accepted into the records of courts to assist it in making a decision. **Cases 8(v); 11; 21** and **36** have an impact on this aspect as demonstrated here.

In **case 8(v)**, the complainant laid a statement in person but was unavailable on the date set down for hearing. Someone else appeared on his behalf to submit as follows to *Kgoro ya sechaba*:

> Representative of complainant: [The complainant] *said that* [the respondent's] *goats are released into his yard. As a result he* (the complainant) *spoke to [the respondent] warning him* (the respondent) *to take care of his goats so that they do not cause more damage to his* (the complainant's) *crops. In his response, [the respondent] said he would take care of his goat but they continued to damage the crops. One day when he* (the complainant) *came back he found the goats in his backyard. He then proceeded to chase them out then opened the gate to* [the respondent's] *yard. A confrontation between the two ensued.* [The complainant] *came to me to report that [the respondent's] goats finished his crops.*

The accounts of this representative are based on the correspondence between the disputants to which, with the exception of her approach by the complainant, she had no personal knowledge. Despite the fact that this was based on the experiences of a party that was not present in the session, *Kgoro* decided the matter consistently with all seasonal claims.

In **case 11**, on the other hand, the complainant related issues emananting from the hearsay from someone. What was different about this case was the fact that the second mentioned person was present in the session.

> Complainant: *On the 19th of January (2023) Dineo came to me claiming that* [the respondent] *is accusing me of witchcraft. She told me that [the respondent] claimed to have met a traditional healer from ga Sekgopo who revealed to her* (the respondent) *through a mirror that I was the person holding her life back. Apparently, I was doing this with her grandmother. According to Dineo,* [the respondent] *alleges that she once came to my house where I offered her a plate of food but before she* (the respondent) *could take it, my child cried for the food. Instead of giving the food to my child, it is alleged that I took the plate and spilled it.*
>
> Interested party 2: *This issue started this way.* [The respondent] *was insulting her grandmother on the street. I asked her how she felt about what she was doing, calling her grandmother a witch. How does she expect people to react to this accusation? She said that she is hurting. That ever since she was born her*

grandmother has been out to get her working in tendon with some other woman. That even her mother had confirmed that much to her.

Interested party 2 restated the version of the complainant as it appears here. In this case, the hearsay is supported by the primary source of the allegations. The final decision for this case is dicussed in theme 5 below. What is apparent is that the complaint was accepted, notwithstanding the fact that it was based on third party's allegations.

While it would appear that jurisdiction A had no problem with accepting hearsay as part of the narration, its value was reduced to mere gossip in **case 21**. In this case, farmers had an issue against kgoro and the second respondent about grazing land versus residential boundaries. On the question of rumours used to confront the second respondent, a member addressed as thus:

> Member of kgoro 7: *I find it worrisome that the farmers confronted* [the second respondent] *in his home. That in my view is the second mistake that the farmers committed. Officials of the kgoro, Mokgoma and Mokgomana, should not be confronted in their homes in respect of the business of the kgoro. As a result, the farmers must be fined for that conduct. As well, they relied on hearsay in order to confront* [the second respondent]*. Kgoro does not concern itself with hearsay. Hearsay? We do not work with that in here…*

Significantly, the entirety of **case 36** was premised on hearsay. Parents appeared on behalf of their minor children who were playing unsupervised in the field.

> Complainant: *On my return from work, I found my son crying because they took his phone. On inquiry, he informed me that he was playing football with other kids. So* [because football is a contact sport] *he alleges that he gave it to one child as he could not play with it. When he got out of the field to get his phone, that child told him that the respondent's child took it. As I hear it, my son asked the respondent's son to return his phone but he denied having took it.*

In her response, the respondent underlined the lack of primary knowledge of the issues.

> Respondent: *It was a bit late when the complainant approached my household. He told me that my son took his son's phone at the playgrounds. I called out my son to inquire from him about this allegation. He denied having taken. After a few days, I went to the complainant's home to inform him that we have not found the*

phone as yet but we will continue to engage with the children to assist in finding it.

At the end, the phone was found but in a damaged state. What is important to note here is that despite the lack of primary experience of the playground issues by the litigants, council finally ruled I favour of the complainant.

> Councillor 1: *Council has decided that the respondent must buy a new phone. That is how things are, ngwana ge a dira molato o direla motswadi. We all know that we do not play with our children, but the lesson here is that kids must respect people's assets.*

Under the circumstances, the truth was not far off from the hearsay accounts of the parties. But whatever the impression, in this case it was accepted and ruled on despite none of the parties having primary knowledge of the fact. It would appear, hearsay matters only so far as it can support the truth.

Inspection

For a variety of reasons that becomes apparent in the discusiion below, **cases 13; 18; 37** and **45** all had an element of an inspection by members of the traditional courts. In case 13, the inspection was for a supervised negotiation between the disputants. In case 18, it was intended to aid *Kgoro ya sechaba* with making its final determination. In case 37, it was an alternative argument by the complainant to try negotiate with the community regarding a dispute over a right of a way. Finally in case 45, it was the basis upon which council made its decision.

In **case 13** the disputants were feuding over the flow of rain water. The *Ntona*, acting alone, was unable to resolve the impasse and as such referred to *Kgoro ya sechaba* for a fair determination.

> Councillor 8: *Ntona* […] *and Ntona* […]*, with an assigned member from Moshate, we will give you a designate, tomorrow you must go meet there with these families to see to it that the issue is settled once and for all…*

At the end, kgoro saw it fit that the issue could be resolved best if all parties met at the scene of the dispute.

In **case 18**, two businesses that coupld potentially complement each other were instead fighting over the space that was rightly designated to the complainant. The respondent merely

erected his food stall just outside the driving school. To encourage a sense of working together by its subject, *Kgoro* called for an inspection with a view to attempting cooperation.

> Kgoshi Dikgale: … *Despite all this, Mr* […] *and Mr […], please set up a date* with [the disputants] *to go view the place. On Tuesday* (02 May 2023)*, come back and give us feedback. We will give a ruling by then.*

In **case 37** it was actually the complainant who invited council to the inspection. He invited councillors to come view the place, insisting that it is not a road and that he is the rightful owner of the space. But if by any chance it is a road, he invites council to come make a determination on a path that can be left for the community to continue to pass. At the end, the councillors acceded to the request by the complainant to go inspect the space in question. On their return, the same decision was confirmed that the complainant seek alternative land to commence with his business adventure.

Similarly to the above, in **case 45**, a party invited council to view the goods that were alleged to have been stolen on his land. In this case, it was the complainant's wife.

> Councillor 1: *So you say you have seen the timber and found it to be yours?*
>
> Interested party 29: *Yes. In fact, we can leave here to go home with us to see the remaining ones.*

This invitation for inspection found favour with council. In his justification for this visit, councillor 3 was clear that no one knows his things better than an owner.This councillor asked that the request to go see the complainant's timber be heeded in order to compare them with those of the respondent. The case was adjourned for the inspection. On their return, councillor stated as follows:

> Councillor 8: *You have send us to go inspect the claims made here. We found that the timber complained of belongs to the complainant as we found matching ones in his yard.*

As it turns out, three timbers have been stolen from the complainant. At the end, the following decision was made by council.

> Councillor 3: *On the evidence of the fact that the timber has been inspected and found to be that of* [the complainant]*, as council we resolve that* [the respondent] *must return the timber to* [the complainant]*.*

3.2.2. Reconciliation

By and large, the store of traditional dispute resolution draws on its desire to reconcile parties. In **case 20**, despite the hard language used *Kgoro* spoke of a "yearning for peace" and harmony in the village. It is unsurprising, therefore, that a large proportion of cases in this study touches on the need to reconcile the disputants. Such is the desire for this function that ceremonial reconciliation was called for in both jurisdiction B and C in particular. The following cases deal with reconciliation on different facts as summed up in this discussion. **Cases 4; 9; 10; 12; 13; 18; 23** and **40** addresses this aspect.

While sight should not be lost of the primacy of reconciliation in traditional dispute resolution, it is critical to point out that it is not possible in all cases. **Cases 11 and 29** are the exception to the norm. The discussion commences with the former cases where either of the *Kgoro*/council or the disputants themselves, set out to be reconciled with the other.

In **case 4**, as already set out above, the complainant abondaned her claim against the respondent demanding that their fences be separated. Her primary reason was that the dispute and the slow rate of the redress had caused her a lot of heartache. The expressed wish to drop the case was noted as a sign that "*cool heads prevailed*" by *Kgoro*. The case was not settled until the respondent asked to express himself.

> Respondent: *I also want to say that I am grateful to my neighbour. We should not, as neighbours and relatives, be fighting amongst ourselves. That is saddening. To my neighbour, I want to apologise for the wrong I have committed against you.*

This unsolicited apology was welcomed as a sign that indeed there will be a sense of neighbourliness between the two former disputants.

If anything at all, **case 9** is notable for advancing the intentional action towards reconciling the parties. In this case, the siblings were fighting amongst themselves with accusations of witchcraft the main divider of the family.

> Complainant: *My siblings call me a witch. This* (accusations of witchcraft) *started in 2012. I did not pay attention to it then as I desired peace with them. They allege that I practice this witchcraft with my mother and elder sister. According to the accusation, I learned the practice from my sister then I in turn taught my mother… These ones* (pointing at a pair of her siblings) *allege that I have negatively affected their spirituality and these ones* (pointing at another pair of

siblings) *allege that they are unable to attract men as a result of being bewitched by me. At the beginning they were only targeting me and my sister but in time they turned against my mother.*

Upon hearing this, a councillor intervened to address *Kgoro* so as to give context to the case they are about to adjudicate over. Materially, for current purposes, this councillor set out in express terms to invite *Kgoro* to listen to the case with the sole purpose of reconciling the parties.

Councillor 3: *I am still going to give you* (councillors) *an opportunity to speak on the issues. But I must point it out to you that these people* (the litigants) *come from the same family. I want you to help mend them because this is a single family… As you can see, today it is full in this kgoro. Most of the people you see there* (pointing towards the back) *live on the same streets as* [the respondents]*. I am familiar with most of these people and they all have a range of complaints against* [the respondents]*.*

With the context clarified, the case proceeded as normal.

Complainant 2: *These kids (the respondents) have caused me heartache. They accuse me of witchcraft. They allege that whenever they arrange to have events at home, I use witchcraft to ensure that their events are not successful. As a result of this belief that I am bewitching them, they have all left home to go find their own stands. These accusations have negatively affected my health and caused me stress as well. As we speak, I am taking medication as a result of the stress they have caused me.*

Respondent 1 (female): *When I was still staying at home, I approached my sister to inform her that I was suspecting that something was having sex with me during the night. In her response, she said that the things that were having sex with me belonged to our mother… One evening, around 20:00, my mother approached me in distress complaining that she was tired from carrying cats on her back. She said that* [the complainant 1] *and* [my other sister] *had ruined her life by teaching her witchcraft. She said first thing in the morning she would find an exe and chop them. She further advised me to leave home because nothing will ever workout for me in life. I left home on the advice of my mother, so I am surprised that this is changed today to imply that I am insolent.*

Respondent 2 (female): *My sister told me that since our mother will die soon and she trusts me, I must return home to care and feed her things. My sister and her neighbour are constantly insulting us but they in turn opened a case against us accusing us of witchcraft.*

Respondent 3 (male): *I am a qualified traditional healer. I left home upon realisation that my practice was not going well. I had no patients, my church was operating but was not attracting congregants. I told my mother about this struggle then proceeded to suggest that perhaps I could have a change of fortunes if I had a place of my own. My mother did not have a problem with that. In fact even on the evening I went home to collect my stuff, including my cultural shrines, I said goodbye to her… One day* [the complainant 1] *approached me at my new home at the new stands. She said I was right to leave home because indeed they practice sorcery. She said to me that she was a witch and that our mother killed our father through witchcraft. She further said that the witches in* [this jurisdiction] *want to give her the role of lead sorcerer on the condition that she kills me.*

Respondent 4 (male): *I left home because I had evidenced strange things. One day when I came back from the shop I found* [complainant 2] *in distress. I inquired as to what was the issue. In her response, she said she was tired of the cats she was carrying on her back. When I looked at her, I could not see anything. On a separate occasion, one evening when I got up I found my legs bleeding from* [suspected] *razor cuts. I decided that I was not going to stay around for more. I told* [complainant 2] *that if* [respondent 3] *is leaving then I will leave with him.*

This dispute paints a picture of acrimonious family relations which, to *Kgoro ya sechaba*, required intervention. The general norm in this jurisdiction was that cases of sorcery were not prosecuted. But as this family issue was quite an anomaly, the intention was to mend them.

Councillor 4: *I grew up in this kgoro. From my knowledge, this kgoro does not prosecute allegations of witchcraft. Furthermore, according to South African law, if you accuse anyone of sorcery you may be jailed for a period of up to 20 years. This is because these type of claims can lead to vigilantism. I think today we allowed the issues to run because these ones* (pointing at respondents) *are still young.*

This view was further aptly supported by another submission in the same vein.

Councillor 5: *These people are here to witness how we* (council) *deal with this issue. I visited the villages where they* (the respondents) *stay and because they do not know me, I did my own investigations. All these people packed in here have issues with them* (the respondents)*. I understand that you intended to mend this family, however these people* (the respondents) *should not be a law unto themselves. As well, there is something called Witchcraft Suppression Act*[15] *which, if we issue a letter that we could not resolve this matter, these people* (villagers in the gallery) *may resort to vigilantism.*

It is worth pointing out that neither this Act nor the Witchcraft Suppression Amendment Act 50 of 1970 supports the claims made by this councillor. However, it is telling that this councillor is aware of statutory regulation of the matter before council, notwithstanding his incorrect interpretation. To confront the issue and work towards changing the behaviour of the respondents in particular, councillors charted the path as follows.

Councillor 6: *I am observing here that it seems to me like you are a family of traditional healers. You (*respondent 3) *say you are a healer. It is mentioned that another sibling is undergoing a rite of passage to becoming a healer. You* (respondent 1) *are wearing some shrines indicative of traditional healing. You* (respondent 2) *as well. Despite all of this, you sit here and accuse people of witchcraft. Does it not shame you what is happening here?*

Respondent 3: *I am ashamed.*

Councillor 7: *We live with traditional healers, we interact with them regularly. They do not behave as you do nor do they go around fighting with people. You will never find them standing in the middle of the street insulting people… You are behaving like cat and mice in the family. You are causing untold stress on this poor old woman. If she is a witch as you allege, why did she not bewitch you when you were still young? Why would she wait for you to be old then start bewitching you?*

It is apparent that the councillors were not impressed by the sordid details laid bare before them. Councillors expressed the sentiment that the family must sit and mend their relations instead of airing dirty laundry in public as they do. To highlight the gravity of the issue before them, one councillor singled this case out for its uniqueness.

[15] Act 3 of 1957.

> Councillor 3: *I have been working with these old people* (councillors) *for 15 years now. In that time, we have never had a case similar to this. It is the very first time we experience this type of a case. I am even ashamed of all this.*

Councillor 5 came in to encourage the family to mend its relations with the community by asking for forgiveness. To emphasis this need for a reconciled relationship between community and this family, he asked those present to forgive the respondents in particular and give them another chance to redeem themselves. This was supported by councillor 4 who advised the respondents that the best form of an apology in this instance was changed behaviour. Symbolic attempts towards the need for mended relations was shown by the first complainant who paid the *vula-vala*[16] amount for both herself and the respondents.

In **case 10**, the complainant seeked the respondent out to account for the disappreance of his three goats. It must be noted that the complainant did not accuse the respondent of theft, but that he found it to be too much of a coincidence that his goats disappeared after the respondent brought strangers into his home.

> Complainant: [The respondent] *came to my house with people who were looking to buy goats. They indicated that they wanted nannies, which I was not selling at the time. After about two days, the goats disappeared. It bothers me that* [the respondent] *came to my home with people looking for goats then thereafter they disappeared. I raised this issue with* [the respondent's] *brother pleading with him to inquire from him* (the respondent) *as to what might have happened. All I wanted was some answers, for me and him to meet and talk in an effort to find each other. He* (the respondent) *did not ever make an effort to meet up with me. That is when I decided to approach this kgoro to seek these answers.*

Understood in context, the complainant was looking for answers only from the respondent.

> Respondent: *Do you know the dates on which your goats disappeared? If it is so, and if kgoro is willing, a letter can be written to the* [third party] *to ask for their permission to use their records. Their street cameras can reach up to* [the complainant's home]*.*

Evidently, the respondent was implicitly denying any wrongdoing in respect of the disappearance of the goats.

[16] This is the litigation fee in this jurisdiction. The complainant pays an amount of R100.00 to prosecute a case whilst whoever is found to have erred pays the closing R100.00.

Councillor 6: *The complainant came here suspecting that you had something to do with the disappearance of their goats. But you have indicated here that it is not you. As kgoro, we are unable to declare that you are guilty of anything. It is undeniable that* [the complainants] *are hurt by what happened. Do you see that they are hurt?*

Respondent: *Yes.*

Councillor 6's remark tells of the capacity of traditional dispute in relation to theft. It is a concession of lack of capacity, if anything. However, for current purposes, the case was concluded as follows:

Respondent: *I apologise to the* [complainant]*. I did not know that things will turn out this way.* [Complainant] *I am sorry. I would react the same way if I was in your position.*

Complainant: *I hear you and I accept your apology.*

Reconciliation between the parties was unsolicited by *Kgoro* but was the desire and to the satisfaction of the complainant.

Case 12 is discussed under theme 9 specifically. What is important for current purposes is that *Kgoro* enforced a supervised reconciliation between the parties who ran a social club together but had reduced it to a spectre of insults.

Councillor 1: *You* (respondents) *are even said to have called others uninitiated. So I propose that we give you a last warning so that should we hear about the same exchange of insults, we are going to close down this society. You are all going to sit here and deny any wrongdoing. We are going to appoint one other member to assist us* (kgoro) *with monitoring you to ensure that proceedings are conducted peacefully.*

Councillor 5: *Complainants, you have heard what* [councillor 1] *has proposed. Here* (in the kgoro) *our primary objective is to reconcile people and ensure that they live in harmony. So are you satisfied with the proposal made by* [councillor 1]*? Do you all still wish to continue with your association with the society?*

Complainant 1 and 4: *No.*

The primacy of reconciliation and seeing to it that it is achieved is expressed by this councillor. However, it clear that the first and fourth respondent did not wish to be reconciled.

> Councillor 4: *My siblings, I would encourage you to value the importance of a burial society. You see this woman* (pointing at Mrs Malatji)*? I am sure that she had tolerated you all and your distasteful behaviours. My aunt* (respondent 1)*, just check yourself properly. The reason you insult people as you did is a sign that you do not respect yourself. You are an old lady but you exchange profane words with this young lady* (pointing at complainant 1)*. You are setting a bad precedence amongst these children. Please those of you who want to leave the society, please rethink your decision.*

Despite that intention, councillor pleaded with them to reconsider and be reconciled. In that light, the second respondent found it prudent to echoe the need to be reconciled with an apology.

> Respondent 2 (female): *We are all neighbours here, we live together. Whatever happened, we apologise for it.*

At the end, the decision taken was to enforce the supervised reconciliation as per the proposal of councillor 1 earlier.

> Councillor 8: *Mrs Malatji is given the role similar to that of a chief whip. She will monitor the affairs of the society on our* (kgoro) *behalf… I am satisfied with the discussion and guidance on the issue of insults. We totally abhor that type of behaviour here in* [this jurisdiction]*… You* (respondent 1)*, I have heard your dealings with these women. Your behaviour leaves a bitter taste I must be honest with you. Please go back and correct your ways for the benefit of this society as a representation of all of us.*

The apology and appointment of a senior member of the club will go someway towards effecting actual reconciliation. It must be noted here that *Kgoro* insisted on the reconciliation and as a matter of fact appointed someone to oversee the process of changed behaviour.

Case 13 presents yet another opportunity of a supervised reconciliation between disputants in jurisdiction A. A portion of this case is discussed under inspection above, including the decision and some responses. That will not be repeated here but for an explanatory note where necessary.

> Complainant: *From time to time when it rains, my neighbour creates an opening from his yard so that the water would pass into mine. What alerts me of this problem each time is when the water create a seating stream in my home because*

he makes an opening from his side. When we put bags of sand on the boundary line to prevent water from coming to our side, he removes the bags. Secondly, I have a complaint against him regarding the size of my stand. For some time I have suspected that the size of my stand is smaller. I have tried to reason with him without success.

This narration was complemented by an interested party.

Interested party 4: *On the morning of 14 February I got up to prepare and take my daughter to crèche. When I got out of the house, there was water everywhere in the yard. I alerted my mother of this seating water then we proceeded to create means to rid ourselves of it. Again we filled bags with sand to put on the boundary to prevent water from coming into the yard. Later that day, around 16:00, the bags were removed.*

In his response to the allegations, respondent indicated that he experienced the downpour and water situation differently. In his view, it was the complainants who disturbed the flow of water. For that reason, he approached the *Ntona* to intervene in the dispute.

Councillor 9: *I was unable to assist these parties. Therefore, I advised them to bring it here* (Moshate) *seeing that I was unable to reach a decision that would be fair alone. Looking at the water situation, it is in such a manner that if I find for* [the respondent]*,* [the complainant] *would be aggrieved. And vice versa.*

Granted that the *Ntona* acted alone, he referred the issue to *Kgoro ya sechaba* so that the combined minds of councillors could reach a fair determination.

Councillor 6: *… My question to them is, how long do you intend to keep this fight going? If* [the respondent]*, in keeping with his name, desires this woman* (the complainant)*, he must speak to her properly and not use aggression. So, do you think there is no other way in which this water issue can be resolved in consultation with them?*

Respondent: If we can find each other in consultation, I think it is possible that we can resolve the issue.

At the end, the decision of *Kgoro* as recorded under the inspection sub-theme above, was to appoint three people to supervise the consultation between the two families to ensure that a decision was reached and they could co-exist as neighbours. Though it was at the suggestion

of *Kgoro,* the respondent was amenable to be reconciled with his neighbours under supervision.

Case 18 continues the pattern of supervised reconciliation in jurisdiction A. A portion of the decision here is discussed under sub-theme inspection in 3.2.1. Likewise, certain portions appear there and would not be repeated here as well.

In a highly contested dispute, *Ntona* acting alone referred a dispute over land to *Moshate* on the evidence highlighted by this exchange in particular. Above, in 3.2.1. the respondent is cited as having said the land belongs to the municipality and that he would engage the superintendent instaed of *Moshate*.

> Councillor 1: *Who says that land belongs to the municipality?*
>
> Respondent: *I did.*
>
> Councillor 1: *Do not try to rob Moshate of its land.*
>
> Respondent: *I am not robbing Moshate of the land, I pay rates to the municipality. Please tell me, for a person to erect a stall to sell something, do they need permission from Moshate?*

The respondent did not seem to fully appreciate the powers of *Moshate* on communal land.

> Councillor 14: *Who gave you that spot?*
>
> Respondent: *I erected the stall and started selling food.*
>
> Councillor 14: *Because the land belongs to the municipality?*
>
> Respondent: *I saw people erecting stalls alongside the road. I am unemployed so I am trying a means to fend for my family. What wrong did I do?*
>
> Councillor 14: *Did you not find the driving school there?*
>
> Respondent: *It is behind me. You know the place well. My business starts on the edges of the driving school, I have never been in there actually.*

He insisted on that line of thought that the land belongs to the municipality. Eventually, when the respondent composed himself and was able to make submissions of her own, she proceeded as follows:

> Complainant: *I received a call from my neighbour informing me that someone was erecting a stall in front of my gate. I asked who it was and was told that it is* [the

respondent]. *One day they called me to say he was on the site so I asked to speak to him telephonically. I told him that I heard that he was erecting a shack in front of the gate so I asked him who gave him permission to do so. In his response, he said that Moshate gave him permission. So I proceeded to call* [the Ntona] *to inform him of this development. On the day he* (the Ntona) *came,* [the respondent] *changed his version to say it was the municipality that gave him the space.*

The response the respondent acknowledged the telephonic call but differed in material respects.

Respondent: [The complainant] *called her driver to ask that he give me the phone. The way she spoke to me, she was aggressive. We did not speak for long because I hung up as she was harsh on me. On that space I made a concrete slap before erecting the shack. But I am not at all in her yard. As well her gate is on the other side.*

Complainant: *I have two gates and you do not get to choose for me which one I can use.*

A confrontation between parties would not likely lead to reconciliation hence this was stopped for councillors to continue with their engagement of the issue.

Councillor 15: *You indicated that you think the land there belongs to the municipality, did you get permission from them to erect a stall there?*

Respondent: *They came to speak to me about that space and directed me to continue since I do not require a yard.*

Councillor 15: *Did they give you any form of documentation?*

Respondent: *They did not because I do not require a stand.*

After several hostile engagements regarding the space and municipal regulations regarding stalls and whether the respondent was even a resident of jurisdiction A in good standing, the final decision for the session was one that sought to bring calm and co-operation between litigants and the *Kgoro* at large. Two officials were oppointed to inspect the place in order to give an informed report to allow for a decision.

In **case 23**, ceremonial reconciliation was actually recommended in the decision of *Kgoro ya Bakgomana*. In the deliberation, it was clear that this act is a feature of jurisdiction B. The

heading under 3.2.1. dealing with the process and structure of procedure in traditional dispute has already shown that this case started by was of a letter to *Kgoro ya Bakgomana*. As indicated again, this case was held in two stages.

In the first stage, the letters were read out before a panel of all men and the respondent. Pursuant to that reading, *Bakgomana* engaged with its contents.

> Mokgomana 2: … *Some of the things that are said in that letter are in bad taste. But I want to register my apology for them because we did not workshop you before you ascended to your role. We did not workshop you on how to lead people. You were appointed as an heir to your father. But if we had formally appointed you, we would have conducted a workshop for you on how to lead your people. If I were you, I would admit to everything that is in that letter. I do not suspect that your children could make such damning allegations against you if it was not true. I would accept the charges to avoid prolonging this issue and turning it into he said, she said. Be a man about this matter, admit liability and do not ever (x3) claim that things belonging to kgoro are yours. The business of the kgoro does not affect you only, it affects the people you lead as a whole.*
>
> Mokgomana 3: *You have said a mouthful.* [Respondent] *is an adult, I think he understood the message you relied to him. If he did not understand properly then it would mean that he is being difficult. Please heed that advice. You heard the letter. Things like harassment, poking a finger at a person and others are not acceptable. These are your children so you must lead them well in order for them to respect you. But if you are in constant confrontations with them you will lose their respect. If, during a session, you see that things are getting out of hand, you must ask the chairperson to close proceedings to restore order.*

Seemingly, *Bakgomana* apportioned the blame to themselves for failing to workshop the respondent before takeng office. Furthermore, they encouraged him to admit to liability and apologise for the preservation of his *Kgoro.* Granted that the respondent heard the plea, he had some conditions for apologising.

> *Respondent: I hear you all. I heard you clearly and I understand you. I will not repeat the same errors again. But there is a problem. The problem here is with respect to the complainant who is in the executive. She is not Mma-ntona. Mma-ntona is here, there she is* (pointing to another female)*. This one* (complainant) *came out of nowhere to suddenly be referred to as Mma-ntona. The real Mma-*

ntona is there… I want to understand where she came from and how she was designated as Mma-ntona.

The condition of the respondent had to be established first in the second part of the heading. Notably, it must be mentioned that *Mma-Ntona* mean wife to *Ntona*. In the present issue, the *Ntona* was married so the two appointees were actually appointed by the executive of the *Kgoro* to assist in all matters relating to women in the *Kgoro.* Once this was clarified, the issue had to proceed to the complaint itself.

> Member of kgoro 4*: What is written in the letter is true of the events that all of us here* (the executive of Kgoro) *witnessed. It is as a result that we deemed it fit to appoint some amongst us to go speak with the Ntona before coming here. We appointed three members of the executive in this regard. We called an emergency meeting to discuss the issue pursuant to that. We advised Ntona to apologise to the complainant but he initially refused. Eventually we managed to get through to him with the result that he apologised. But his apology was qualified. Ntona remarked that he does not wish to work with Mma-ntona going forward. It was clear to us that he does not want to work with her. At the end, we decided that we must bring this issue here for resolution. You all know that the primary aim of the Kgoro is to reconcile parties. Therefore, upon realisation that we could not achieve this we decided that we must approach you.*

The sentiment relating to the complaint was supported by the complainant in her own words.

> *Complainant: What is in the letter is true of what transpired. The events happened one after another until I decided enough was enough after being told that I was mad and speaking nonsense. I was flagging something that I thought was a mistake. For example, we received instructions from Moshate that we must give* [another village's] *residents stand numbers. I said, "where is the letter to support these instructions?" That is when I was told these words. We have previously gotten into trouble for actioning instructions that we did not receive by letter. Secondly, we went to the opening of* [yet another village] *kgoro. I notified* [the respondent] *that the main purpose of the occasion was to ensure that people affiliate to our Moshate. When we arrived there, someone was appointed as Ntona. I queried this because we should not be appointing a person who came here* (jurisdiction B) *to do business as Ntona. I told him what would happen and I was proven right. This did not sit well with the respondent. I do not know how to put*

this, but that is when the hatred grew to the level of inducing these bad words from the Ntona.

To avoid heightening the dispute, Mokgomana 1 redirected the conversation towards achieving the ultimate aim, reconciliation.

Mokgomana 1: Ntona has admitted that he is aware of the contents of the letter. On top of that, he expressed his remorse for what happened. This was after the old men reprimanded him for the type of language that was used and described in the letter. He has apologised and indicated that this would not happen again. In truth, a leader of the people must be an exemplary individual. In our discussion with Ntona we made him aware that he is the representative of Kgoshi. That the executive of the kgoro acts on behalf of the people. All decisions that are taken in the kgoro must be those of the people. As well, the executive is appointed by the people with the consequence that Ntona has no right to say he no longer wishes to work with any member of that executive. That is what we discussed with Ntona as we attempted to find common ground.

Mokgomana 2: When we spoke to Kolobe, he accepted all the allegations brought against him. He did so voluntarily. We did not coerce him into asking for forgiveness.

This second sentiments in particular, do not seem to be supported by the proceedings in the first segment of this dispute.

Complainant: You say that the respondent has apologised, but this is not the first time. He has previously remarked that he will never work with me under this sun ever again.

Complainant was within reason to express her dissatisfaction with this process. To try address her, Bakgomana pointed out that this seating was aimed at correcting the wrongs of the past and ensuring that the parties move forward as one. Respondent was given an opportunity to register the apology in his own words.

Respondent: I have nothing else to say. As you have already said, I have apologised and the matter is finished.

This was not acceptable to *Kgoro ya Bakgomana*. The respondent was given another opportunity to apologise properly.

Respondent: I have apologised and I will not repeat this.

At the end, a decision was made underlying the apology. Furthermore, in his capacity as a senior official of *Moshate, Mokgoma* asked for a ceremonial act of reconciliation.

> *Mokgoma: You have said a mouthful, as a result I do not have much to say seeing that it is getting late as well. As indicated, this is a big kgoro that is appropriate to hear matters relating to Ntonas in this jurisdiction. I am convinced that we would not be called again to reprimand you on similar charges. Before us are men and women who witnessed this prosecution. As well we would be happy to see Kgoya in your jurisdiction prospering like other jurisdictions. In my capacity as Mokgoma, I would like to respectfully request you to come before us and shake hands to affirm reconciliation between you two.*

Mokgoma directed the parties to the position where they must stand to achieve this ultimate signal of reconciliation. At that point of contact, the respondent said the following directly to the complainant.

Respondent: Please forgive me. Let this be the end of the issue.

The end result demonstrated a willingness of the respondent to be reconciled with the complainant and perhaps continue to work together in the furtherance of the course of *Kgoro*.

The gist of the dispute in **case 40** falls under theme 5 discussed below. Despite that, there are elements of reconciliation in the case that are noted here and not repeated to avoid duplication. The family dispute is in relation to the complainant who alleges that she is being deprived of peace at home. Her one son is allegedly threatening to kill and or evict her, whilst her granddaughter and sister in law insult her. For current purporses, however, the following segments of the prosecution are important. This begins with a yearning for peace.

> Interested party 21: *All I want is peace at home. To achieve this, I think one of two things could be done; [the complainant] can leave home with his last born son or these ones (pointing at respondent 2 and 3) should leave.*

This peace must be accepted against the fact as they are and not by thinking them away and pretending that the complainant was without faults. This is according to one of the family members present in the dispute.

> Interested party 24: [The complainant] *has erred, we cannot ignore that. But let us not use that to condone insults against her. These children must accept* [the

complainant] *as their mother. They should desist from threatening her with death. If they welcomed her as their mother, accept that she is home, things would improve. As sisters in law, we must do the same but we are unable. Let us sit these kids down as aunts to help them mend the family. What type of a family is this where one day one is threatening to shoot the mother, another is insulting her? We are ashamed to walk around in the village because of what is happening in this family.*

This speaker encourages intentionality of action towards reconciliation by all involved. This intention is actioned immediately below by interested party 22.

Interested party 22: *You will forgive me if I am speaking out of turn, but I want to direct a question to my niece and nephew. Do you wish for this matter to be settled?* [Respondent 2] *do you want your issue to be settled because this is your issue?*

Respondent 1: *I want it to be settled.*

Respondent 2: *I also want it to be settled.*

Interested party 22: *As I said council, you will forgive me if I am wrong but my proposal is that from here, these kids must go straight home. Perhaps their aunts can accompany them with one uncle as a witness, to go home and talk it out.*

This attendee set out to ensure that the parties have a conversation about some of the things that they could not say before council but found it necessary to ventilate in the comfort of the family council. At the end, on the issue of reconciliation, council reached the following determination.

Councillor 1: *We also agreed that* [respondent 2] *qualifies for a stand. It is advisable that she approaches council to ask for a stand. This will help mend the relations at home. Now, do you forgive your mother?*

Respondent 1: *Only if she apologises to me for lying about me. I never threatened to kill her.*

Councillor 1: [Complainant] *do you forgive your son?*

Complainant: *No.*

Councillor 1: [Respondent 2] *do you forgive your mother?*

Respondent 2: *I have no problem with my mother. As long as she buys maize at home we will be fine.*

Complainant: *That is our agreement.*

Council asked the parties to come forward and hug each other as a form of ceremonial reconciliation.

Councillor 1: [Respondent 3] *do you forgive your grandmother?*

Respondent 3: *I have no problem with her.*

Councillor 1: [Complainant] *do you forgive your grandchild?*

Complainant: *Only if she will not repeat it. But I know that she will start as soon as we leave here.*

The reconciliation between this pair seemed enforced, despite at the end council persuading them to reconcile and hug it out. This extended to the complainant and respondent 1 as well who were eventually persuaded to reconcile. Considered as a whole, the actions of the complainant and her son (respondent 1) and granddaughter (respondent 3) do not seem to support the practicality of reconciliation. If anything, this is no more than a superficial agreement before council in order to discharge the dispute.

The slippery slope of insisting on reconciliation is nowhere more clearer than in **case 16**. This case covers three themes; *to wit* one, elements of enforced reconciliation; two, dispute over land under the sub-theme of right to title and three, customary marriages under the sub-theme on the negotiation and or celebration in terms of culture. At the heart of the dispute is the ownership of the stand. For that reason, the facts are deferred to 3.2.3 below. For current purposes, the aspect of reconciliation are captured.

Councillor 8: *This matter was being prosecuted well but* [the complainant] *threw us off by stating that she stays everywhere. Now you want us to declare you as the rightful occupant of that stand so you can live with your boyfriend? You were given that stand to live with* [the respondent]*. Another problem relates to the issue of magadi money seeing that* [the complainant's] *mother is denying receipt. Who did you send to the complainant's place?*

Respondent: *My sister and her friend. They gave an amount of R3000.00 to* [the respondent's] *mother.*

> Councillor 8: *Even if it was only R500.00 it still would have been sufficient. This woman here* (pointing at the complainant) *is your wife. This other one that* [the respondent] *is staying with is not needed here. You must go back to tell her to leave then report to us next week* (25 April 2023) *about this.*

On this passport, *kgoro* reached a decision of a 'forced' reconciliation and asked the parties to return. A week later, on 25 April 2023, the parties came as ordered. They were invited to give a report to the *kgoro* on what happened in the seven days of imposed reconciliation.

> Respondent: [The complainant] *came on Sunday to inform me that she has moved on with her life.*

> Complainant: *I went there on Sunday. On arrival I told* [the respondent] *that I am back as per the instructions of the Kgoro. He acknowledged my return but also informed me that I would need my own bed and any other thing I will use because he would not allow me to use anything that belonged to him. He told me that he had moved on with his life.*

The reconciliation, diagnosed as forced on the first hearing, proved to be so. In the words of the complainant, she alleges as well that the respondent denied her access to the house keys. Again, it was insisted by *kgoro* that this couple is lawfully wedded as such must reunite to continue their life together. That the complainant cannot take the house built by the respondent to live with her boyfriend. On the other hand, that the respondent cannot stay with another woman in a stand registered under the complainant. This situation proved difficult for *Kgoro* to negotiate. On this turn, the respondent's mother intervened to address *kgoro*.

> Interested party 6: *You see this one* (pointing at the respondent)*, he is my son. The other day when he came here* (to Moshate) *I was not around but he came to give me an update that they are claiming that they own the corrugated iron. Did you see the house he built? He must leave them so they can live in peace in that stand. Even my co-parent in law, we do not see eye to eye.* [The complainant] *is wild, when she goes drinking she does not return.*

According to her version, the respondent is a beneficiary of a Road Accident Fund payment arising out of his motor vehicle accident. So he used some of the money to build the house that is now being disputed. In reality, the inquiry establishes a seemingly broken down

relationship between the parties as per the response below. When councillor 8 put it to the respondent that the complainant must return home, he gave this answer:

> Respondent: [The complainant] *and I separated a while back. I suspect that if she comes back home one of us will be endangered.*

This open threat of violence was ignored in favour of an inquiry into assets that the complainant is said to be requested to bring home. When this failed, the inquiry was more direct on the holdership status of the stand.

> Councillor 8: *In whose name is that stand registered?*
>
> Respondent: [The complainant].
>
> Councillor 8: *So you are living in her stand?*
>
> Respondent: *Yes.*
>
> Councillor 8: *You are going to go back to fix this issue properly.*

At this turn, the responsibility towards attempted reconciliation was given to the co-parents in law who were both present. Interestingly, the respondent's mother expressed herself as follows.

> Interested party 6: *We do not see eye to eye, in fact I am afraid of her* (complainant's mother)*. She once attempted to hit me with a bottle.*

As it appears, the troubles between the couples extend to the parents as well. Despite this councillor 8 asked the respondent's mother that they should go back as a family to attempt to resolve this issue.

> Interested party 8: *I cannot do that.*

At the end, the issue was again deferred to the 6th June 2023 for the family to sit and attempt to resolve the issue. In the light of everything, this appears to be a forced attempt to reconcile the parties.

Case 40 raises aspects of superficial or ceremonial reconciliation that may not serve the practical needs of the disputants. It is generally accepted that traditional dispute resolution is aimed at achieving reconciliation. Be that as it may, it is noteworthy that there are exceptions to this. In some instances, separation may be a practical solution to a dispute. This is clear from **cases 11 and 29** on the register.

Case 11 is discussed in theme 1 in 3.2.1 above under sub-theme hearsay. The information is not duplicated here. Instead only a few explanatory comments are made where necessary. In this case, the complainant relied on the allegations made by a third party that she was practising witchcraft. Once she narrated the third party's account and that third party supported the allegations, the respondent was given a chance to reply.

> Respondent: *I have no knowledge of everything that was said.*
>
> Councillor 3: *You have no knowledge of everything?*
>
> Respondent: *Yes.*

The allegations placed the respondent's grandmother as someone who was also accused of witchcraft in cohort with the complainant.

> Interested party 3: [The complainant] *came to my home. She said she was not there on a good visit then proceeded to point out that rumour has it that* [the respondent] *was accusing her of witchcraft in cohort with me. I was surprised by this discovery because I am a loner who spends most of the time on my own. As an old woman, I do not form relations with young girls.* [The respondent] *is my grandchild, she has never insulted me.*

This submission was refuted by the complaimant based on primary experience of the matter.

> Complainant: *When I went to her* (the grandmother) *to complain about the accusations of witchcraft, she told me that* [the respondent] *should not drag me into this issue as she had been accusing her* (the grandmother) *of witchcraft for years. As well, these two people do not see eye to eye.*

On these facts and the denial by the respondent and her grandmother, councillor engaged with this issue from the perspective of the need for caution.

> *Councillor 6: There is an English adage that says that "where there is smoke, there is fire". There is something amiss here. Perhaps you* (pointing at the respondent) *might have said something that was misunderstood by others, but to outright deny everything is suspicious.*
>
> *Councillor 7: You know what my children, do not be disheartened by the public denials. If there is an issue, it will eventually reveal itself. What I ask from you is that you disassociate with these people* (respondent and her grandmother) *from*

today onwards. Hlogo e meetse e lotwa ke mong wa yona.[17] *Something is amiss here so you must withdraw from this relation.*

At the end, the ruling was made on the need to be cautious instead of insisting on reconciliation.

> Councillor 2: *These sorcery claims are becoming problematic. What is clear is that here in* [jurisdiction A] *we do not prosecute claims of sorcery. There is nothing we can do when someone pleads ignorance while another gives a different version…*

This ruling enforces a sence of avoidance as opposed to a general insistence on reconciliation. The complainant and interested party 2 are advised to avoid the respondent and his grandmother in order to enjoy their lives.

Case 29 is discussed more appropriately under theme 5 on family disputes. Notwithstanding that, certain segments of that discussion addresses reconciliation. Put more correctly, it suggests separation as a form of aiding family relations amongst disputants. In the case, an uncle and his nephew were not seeing eye-to-eye. When council invited the sister or mother to shed light on the dispute, she pleaded ignorance. This prompted the following response from council in the engagement.

> Councillor 5: *Moshate endeavours to reconcile people. However, this can only happen if people are willing to not only talk but tell us the truth. When you leave your home with intentions of being stubborn, telling yourself that you will not tell us the truth, God exists, God is alive… please let us tell the truth to enable Moshate to reconcile you.*

To carry the conversation forward, councillors remarked as follows:

> Councillor 6: *You say you are 56* (the respondent's mother) (a correction of the actual age being 54 was provided), *you qualify to get a stand. To avoid many issues, I advise you that you must approach council with a view to applying for a stand. This will enable you to leave home whilst you are still on good terms. That way, you will still be able to live in harmony with the* [complainant]*. We do not*

[17] In Madipoane Masenya, '"For Better or for Worse?" – the (Christian) Bible and Africana Women' (2009) 22 (1) *OTE* 126; 144 this is loosely described as "[o]ne who has a "soft" head, has the responsibility to make sure that it is protected". However, this loose translation betrays the essence of this idiom. The underlying lesson of this idiom is that it is the responsibility of each to protect themselves. *Hlogo e meetse* though is an attempt to qualify this sentiment by making this responsibility the preserve of people of sound mind.

want conflict and so we try to avoid it this way; for one to live here and another elsewhere.

Councillor 7: As Moshate, our aim is to reconcile parties. Sometimes, this reconciliation can be achieved through separation of the parties.

The above deliberations were not the decision of council but the clear intention by councillors not to insist on superficial reconciliation. Instead, it was deemed more practical for the parties to be separated so that in time they could mend their relations and be able to visit each other.

3.2.3. Dispute over land

The following disputes over land are discussed under the sub-themes of right to title and public interet. **Cases 14; 16; 17** and **18** are based on the individual right to title whilst **cases 25; 26** and **30** are based on unauthorised occupation. On the other hand, **cases 21** and **37** are public interest cases.

For context, right to title speaks to an individual's right to have a permission to occupy receipt issued against them. That is, in some respects, the individual's capacity to hold title is questioned. This is apparent in cases 14 and 17 in particular as shall be apparent from the discussion below.

Right to title

In **case 14**, the complainant approached *Kgoro ya sechaba* alleging that the respondent is conspiring with her mother to deprive him of the right to hold title in respect of the stand he allegedly co-owned with the respondent. He formulated his claim in the fashion summed up here.

> Complainant: *I came here in 2012, staying with my woman here (*pointing at the respondent)*. In 2019, I made plans to find a stand of our own. I approached* [Ntona] *for assistance. He assisted me in collaboration with* [the respondent]*. I erected a shack in that stand. Soon thereafter, I asked that my name should appear on the permission to occupy receipt alongside that of* [the respondent]*. She refused. I was surprised by this turn of events and so I asked* [Ntona] *to intervene in the matter.*

This narration was refuted by the respondent who alleged instead that she was the sole owner of the stand and that the complainant actually sold the one he previously acquired.

Respondent: [The complainant] *looked for and found a stand. However, he sold it soon thereafter citing relocation to another place. I indicated to him that my kids and I cannot continue to stay at home with my siblings. We needed a place of our own.* [The complainant] *said he will look for a stand* [elsewhere]*. I looked for a stand of my own with the help of* [Ntona]*. He did not pay for this paper (the permission to occupy document) here. I paid for it myself. After paying R250.00 to* [Ntona] *I asked him to accompany me to Moshate to pay the R500.00 for the permission to occupy receipt.*

Clearly, two contrasting versions are presented in respect of the same stand. This then necessitated engagement from councillors.

Councillor 4: *When did you start living with* [the respondent]*?*

Complainant: *In 2010.*

Councillor 4: *What brought you to* [this jurisdiction]*?*

Complainant: *I work as a hairdresser.*

Councillor 4: *Now seeing that you allege that you own the stand, did you come here with letters of transfer?*

Complainant: *No.*

Councillor 4: *You are not a resident of* [this jurisdiction] *then because you do not have the right papers. You may have looked for a stand, but you did so for the benefit of* [the respondent].

According to this question and answer, the councillor established that the complainant lacked the capacity to acquire title in jurisdiction A. This disqualification arises from the fact that the complainant did not transfer from his proper jurisdiction under another tribal leader to the current jurisdiction.

Councillor 1: *… You must go back to* [your tribal authority] *to get a letter of transfer then come back here in good standing. You cannot just simply come live here without the correct documentations. You are ruining our communities. There is no other way of looking at it.*

Councillor 10: *We really should not be spending this much time on this issue.* [The complainant] *must go back home to get letters of transfer. If the* [complainant] *does something to* [the respondent] *now, what are we going to do? He must get*

the correct documentations so that he has the standing here and in the community.

The decision of councillor 2 supported the view that people need the correct documentation in jurisdiction A to qualify for title. This case enhances traditional dispute resolution as based on principles and not a free for all under all circumstances. This same line of the need to qualify for legal title is raised again in case 17.

Case 17, which is discussed above in 3.2.1 under the sub-theme on the intersection with other forms of justice has elements of right to title. Only the elements necessary for the current sub-theme ae discussed, unless otherwise necessitated by the context. This case brings into focus the assertion by *Moshate* that the respondent brought it into disrepute through his conduct as a traditional healer.

> Interested party 9: *I am not sure how things are done in* [this jurisdiction]*. However, where I come from when a new traditional healer arrives, he/she must go introduce himself/herself to the Ntona then from there he/she must be introduced to other traditional healers in the community. From there, the person must be brought to Moshate. Where I come from we pay levies annually. This is to ensure that if I am found in the field digging up the land for my medicine, they already know that I am a healer. Now it sounds to me here that* [the respondent] *did not follow this due process hence Moshate is unaware of him.*

When asked, the respondent indicated that it was his first time in Moshate. However, he claims to have transfer documents from where he originates from.

> Respondent: *The papers are with that woman* (the respondent's estranged wife) *but there is a protection order against me that disallows me from entry to that house.*

This submission alone appears to have been adequate to accept that the respondent had the right to tittle. However, this did not mean that the right to title enabled him to more rights than the other residents of jurisdiction A.

> Councillor 8: … *How many stands did you give to* [the respondent]*?*
>
> Councillor 12: *Four.*
>
> Councillor 8: *You are going to reduce that to one. Every child of this land has a single stand, how come [the respondent] has four? We do not accept that. The*

stand must be reduced to one. We do not understand how you came here yet you own four stands. The Ntonas you see here each have a single stand, but you have four.

Unlike in 14, the respondent was not denied title. This notwithstanding that his transfer to jurisdiction A cannot be ascertained clearly. Whether *Kgoro* was persuaded by his claim of transfer documents cannot be ascertained. However, what is different between the two cases is that in this case, the PTO document was already issued against the names of the respondent. Inevitably, this would have required that the document be revoked as opposed to a refusal to register the complainant in case 14.

Case 16 is an unexplained exception so far as prosecution of cases is concerned in jurisdiction A. The case as a whole, continued from start to finish as a question and answer inquiry as opposed to disputants making their respective statements in proving their cases.

Councillor 1: *To whom does the stand belong to?*

Complainant: *It is mine.*

Councillor 1: *Is* [the respondent] *your husband?*

Complainant: *He started as my boyfriend but he paid a sum of money towards marrying me.*

Councillor 1: *Who built the house in that stand?*

Complainant: *He did.*

The exchange between councillor and the complainant makes two things very clear. *To wit*, one, the legal title to land is in the name of the complainant. Two, the respondent built the house. The question now would be whether the respondent qualifies for title since it came to light that he came from another place under the authority of a different traditional leader.

Councillor 1: Did you come here with the right documentations from [where you come from]*?*

Respondent: Yes.

Councillor 1: Where is it?

Respondent: It is at home.

Councillor 1: Did you ever bring [those papers] *here at Moshate to be officially recorded?*

Respondent: No.

The trust aspect raised in case 17 above is again evident here. Councillor changed his line of inquiry upon a positive affirmation by the respondent that he has documents.

Councillor 1: What is the size of the house?

Respondent: Six rooms.

Councillor 1: Six rooms? You have built quite a house.

Respondent: Plus a garage.

When urged to go back home to the respondent, the complainant gave the following direct response.

Complainant: I cannot do that, this man beats me up. There were times I would hurriedly leave the house with my pants worn inside-out.

Councillor 6: *Are you unwilling to go back to him? Here at Moshate we reconcile people. If* [the respondent] *apologises for assaulting you and commits to not doing it again, will you be unwilling to forgive him still?*

Complainant: He has already moved on with his life. He lives with another woman and a child. I have done likewise and moved on with my life.

The respondent denied living with another woman instead choosing to extend an invitation to the complainant to return home.

Councillor 3: You say you have moved on, can you explain what you mean by that?

Complainant: I have found a boyfriend.

Councillor 3: Do you stay with him currently? Where do you stay?

Complainant: I stay everywhere.

It is unclear what the complainant meant by that last statement. Be that as it may, what is apparent is that both parties have moved on as such their union has reached a state of disintegration.

Councillor 12: These people are my neighbours so I am familiar with all the issues discussed here. [The complainant] *complains that* [the respondent] *beats her, but whenever she goes out to drink alcohol she comes back the next day.*

Whatever the intention of the councillor, it would appear that it is some sort of a justification for the violence perpetrated against the complainant. All things considered, Kgoro did not make a decision on the issue on two separate hearings.

The gist of **case 18** is discussed in 3.2.2 above particularly under the sub-theme of intentionality. The facts are not repeated here to avoid duplication. What is of importance for current purposes was that the respondent was deemed not a resident of jurisdiction A in good standing by a councillor.

Councillor 4: *The person you are speaking about here, is he a resident of* [this jurisdiction]*? It is not possible that you stay on municipal land on the tribal land of* [jurisdiction A]*.*

This question establishes the right to acquire title in this jurisdiction. Councillor then directed his question to the respondent.

Councillor 4: *Are you a resident of* [this jurisdiction]*?*

Respondent: *Do not act like you do not know me.*

Councillor 4: *Do you have the papers that prove that you are a resident? Do you pay a levy?*

Respondent: *I do not pay levy.*

Councillor 4: *Thank you. You are not a resident in good standing here so you have no right to fight for the things that belong to* [this jurisdiction]*.*

Notwithstanding this, the final determination on the issue depended on the inspection and report by appointed councillors. *Kgoro* opted to insist on a negotiated settlement or reconciliation as opposed to a doctrinal application of rules as established by councillor 4 in this line of inquiry.

Unauthorised occupation

Case 25 is intended to prevent self help from amongst residents of jurisdiction B. For that reason, Kgoro invited two families to appear before it to answer questions of unauthorised occupation.

Member of kgoro 6: *We have called you here to account. You are aware that the occupation of that stand is unauthorised. It is not permitted for anyone to extend their own stand simply because there is a vacant portion adjacent to their home. When we check our records they show us that the stands you occupy do not have numbers. This mean that you allocated the stands to yourselves without permission to do so. It is for that reason that we called you here today so that you can pay your dues to kgoro and be in good standing with Moshate.*

The first respondent denied that her family's occupation was unauthorised. In an attempt to prove that, she narrated the steps taken previously to secure the land.

Respondent 1: *Upon learning that the stands there* (pointing in the direction of the stand in question) *were being assigned for business purposes, we went to Moshate. On arrival we expressed our desire to acquire a stand for business. They inquired into the type of businesses we wished to establish and we answered. Then we were furnished with letters that I gave to my sister as I was working far at the time. Regrettably, she has passed on now but we did go to Moshate to get the right papers for that stand.*

The second respondent, brother to the first, supported this claim.

Respondent 2: *As far as I am aware, there was a visit to Moshate. I was not there at the time as I stay* [elsewhere]*. To the best of my knowledge, the issue was closed a long time ago. Now I am surprised that it is being raised at the present moment. Could it be that you are taking advantage of us now that our parents are deceased?*

The second respondent is implying something sinister on the part of *Kgoro*. For that reason, this merited a direct response.

Member of kgoro 8: *We actually invited your parents on a previous occasion to come to Kgoro. Only your mother came at the time. She took issue with us inviting her here instead of her husband. However, the person who delivered the letter (summon) found her alone at home and handed it to her. So we spoke to her because we could not say she lacked standing in the case. What you should know is that we agreed with her at the end that she must pay the amount that is due* [to Moshate] *as per the discussion today. After her passing, it would have been insensitive of us to come claim monies from you whilst you were still grieving.*

From the explanantion above, the respondents had nothing else to say nor did they attempt to deny the narration. On the other hand, the third respondent, on behalf of the second family, conceded liability and wanted to know how much money needed to be paid for her occupation to be legal.

> Respondent 3: *How much time are you giving us to pay the money?*
>
> Member of kgoro 8: *R1000.00…*
>
> Respondent 3: *Do we have to pay that now?*
>
> Member of kgoro 10: *If you have the total amount now you can pay it. But, if you do not have it you can make arrangements to pay in instalments. For example, you can come to the kgoro on another occasion to pay R300.00. We will make a note of this in our records, but on the time I am not sure. Please you can assist me on that, six months?*
>
> Member of kgoro 6: *My proposal is to align the payment to the same time frame for stands. As you are all aware, we give people three to six months to erect something on a new stand. Perhaps we can use the period for them to make their occupation legal.*

At the beginning, the intention was to ensure that the families make their occupation legal and avoid the risk of losing the land. In this case, settlement was reached that the amount to make occupation legal would be paid over a period of six months. Notably, none of the two respondent families made a down payment towards making their occupation legal.

In **case 26**, the primary dispute was between the complainant "son-in-law" and the respondent "mother-in-law" over the removal of children from their residency without due process or consent. However, during the prosecution of the case, it came to light that the house on which the complainant stayed was not his but belonged to a third party instead.

> *Complainant: … As far as I am aware, my kids were attending school at* […]*, but I was surprised to be told that they are now attending another school. I asked myself, how did that happen? When I inquired from my wife she informed me that her family was insisting that the kids stay with them because the stand we occupy does not belong to me but instead belonged to the* [interested party 4]*.*
>
> Councillor 2: To whom does the stand belong?

Complainant: *That stand used to belong to my father. But he moved from here to go live there* (pointing out in the direction of the villages involved) *leaving the stand in my care. He said to me that he would like for me to one day live on this stand as mine. I fetched my aunt from Marblehall then laid bricks to build a three room house for her to take temporary shelter in it…*

Councillor 2: Is your aunt not married?

Complainant: She was married… Unfortunately, she passed on. Her burial was conducted from that stand.

The early exchanges between councillor 2 and the complainant strikes at the heart of a stand on which he lived with his wife and formerly with their children before their removal by the respondent. As it stands, there is nothing untoward about the complainant's claim to suggest unauthorised occupation. He continued to speak about the funeral of her aunt from what he had tried to establish as his stand.

Complainant: … [The interested party 4 and her family] *came before the funeral to take control of all issues relating to the arrangement of the burial as they claimed that as their sole responsibility. When they* (the family mentioned hitherto) *returned for the cleansing ceremony they claimed ownership of the stand.*

Councillor 2: *Is that your aunt stand?*

Complainant: *That is not my aunt's stand, it belonged to my father.*

Another attendee attempted to support the version put forward by the complainant claiming ownership of the stand.

Interested party 3: *He is right. That place was his father's home. But his father moved out, and built his own house elsewhere.*

Councillor 2: *So you are aware of these information? You were there when his father told him (about giving him the stand)?*

Interested party 3: *I was not there. I just know the issues to be as narrated here.*

This attempt was based on an account this speaker could not support as such, it did not appear as though it was given any weight at all by council. In contrast with this speaker, the interested party 4 had intimate knowledge of the history and ownership of the stand.

Interested party 4: *That stand which is being fought for by* [the complainant]*, that is the home where I was married into. The old woman,* [the complainant's] *aunt, did not have kids. She came to me to ask if I would be amenable to sire children for her. I was open to the idea after which we agreed. I was then married to her in 1977 as mosadi wa lapa.*[18]

Councillor 2: *Which stand exactly are you referring to?*

Interested party 4: *The very same one that* [the complainant and his family] *reside in.*

Councillor 2: *You are a bride in that family?*

Interested party 4: *Yes. I am a bride in that family home. I want you to pay careful attention as I narrate the details of this issue before you. I was married by that household, I am a bride in there. My marriage was negotiated, concluded and celebrated in 1977. This man's aunt, the woman I was married to, stayed in that stand. In 1984, due to running differences between me and her, I approached Moshate at the time when Mmaswi* (his standing in this jurisdiction is unclear) *was still alive. He advised me that to quell the raging fire and conflict between me and my mother in law, I had to be given a new place where I could stay. During that same 1984, that old woman, my mother in law, passed on. I returned to the home to undertake my responsibilities as the bride of that household.*

Councillor 2: *So you say Mmaswi gave you a stand in order to soften the tensions at home?*

Interested party 4: *Indeed Mmaswi gave me a stand to help avoid heightening the feud between myself and my mother in law. Despite our differences, I had always invited her to the celebration of my children's wedding celebrations. We had our differences, but these was not so bad that we could not stand each other in every respect.*

Councillor 2: *So in other words you are saying this stand at the centre of the dispute belongs to you. That the house is yours? So do you still need that house?*

[18] A traditional and sacred marriage between a woman and a woman entered into with the sole purpose of siring children for the woman and family that is marrying another woman.

Interested party 4: *Yes that stand is mine and I want it. I took a vow in respect of that stand and I want it.*

This version by interested party 4 went uncontested, as such, her right to the stand was stronger. This coupled with the express declaration that she wants the stand as owner meant that the complainant and his family were in unauthorised occupation of the stand.

Councillor 3: [Complainant]*, you hear that there is a claim against the stand you occupy with your family. What is clear and pleasing about that old woman's narration is that the stand is hers and she has given a comprehensive history before us. I therefore urge you to not contest this issue anymore. Come to Moshate* [read council] *to make an application for your own stand. This will help you to avoid a lot of difficult situations similar to those we have experienced in this council before. We had a case here that I will not disclose where someone took the ruins of another family. After he build a big house he did not find peace in it. The ancestral spirits of the original owners of that land troubled him. He came to us to report that he was not having peace on that land. We reallocated a stand for him elsewhere but he lost money there. Now you* [complainant] *I am cautioning you that such things can happen and that it is best if you avoid this at this earliest stage…*

To navigate to the position of the complainant leaving the house, councillor one asked direct questions off the complainant.

Councillor 1: *Are you employed?*

Complainant: *Yes.*

Councillor 1: *I am making this inquiry in an attempt to establish if you would be able to vacate that stand and find your own if council finds against you. As well, if you recall, that day we came over to the stand you indicated that you build a structure there. What is going to happen going forward?*

Councillor 2: *We must be considerate here. If we find against him and he accepts that he must leave, we cannot just say leave immediately. We must give him some time to save up in preparation for a new stand. Conversely, he should also not be too relaxed because we are not chasing him out of the stand. Can you give us an indication as to when you would be able to vacate that stand?*

Complainant: *In December.*

Councillor 2: *December of this year* (2023)*?*

Complainant: *Yes.*

This issue was settled. His occupation was unauthorised but he was given a period of 11 months to find alternative accommodation. This is in line with councillor 2's need to be considerate and not chase the complainant out.

Case 30 deals with the issue of self help in jurisdiction C. Thus, the respondent extended his stand upon seeing the complainant surveying the land adjacent to him. Critically, it puts into focus acceptance of evidence based on memory and knowledge of the community as a factor that can be relied upon in deciding a case

> Complainant: *I previously approached Moshate requesting permission for land. We left here* (with councillors – the standard practice observed in the jurisdiction) *to go to the place that I desired to acquire the stand. On return here* (Moshate)*, I paid the money as confirmation that we have reached an agreement. When I was supposed to start with my arrangements to secure the stand, I was surprised to see the yard fenced off. When I inquire* (into who the fence belonged to)*, I was told that it belonged to my neighbours.*
>
> Councillor 1: *Do you have the papers* (permission to occupy)*?*
>
> Complainant: *No, I did not come with them.*

It is apparent that if council insisted on documentary proof, this case would have been stood down at this stage. However, council accepted that the complainant's application for a stand was recent and as such still in their collective memory.

> Councillor 3: *I passed there myself and found him* (a third party) *busy erecting a fence. I stopped to inquire if they had the documentation for the extension. I also asked them if they knew that the stand belonged to* [the complainant]*. They said that they must have the papers somewhere but did not have them at that specific time. I told them that we* (council) *need papers on all matters relating to stands…*

This councillor was narrating things from his out of council errands. For unknown reasons, this was accepted as shedding light to the dispute.

Respondent: *As far as I know, that stand belongs to us. But I cannot confirm if the old man paid the money for the extension. So to be sure, I called my younger sibling who confirmed that the stand belongs to us. However, he or she could not confirm the issue of payment.*

The respondent had nothing to show for his claim. In fact, he put it to council that it must check its records from 2019 to trace a payment made by his now deceased father. On the evidence of this, there was a unanimous agreement that the respondent resorted to self-help in extending the stand. This self-help was the result of one or two things; one, either the respondent has no documentation for the extension or two, in the event that he had the correct papers, he waited too long to erect a fence for extension. As a consequence of either position, he extended the stand with the sole purpose of depriving the complainant of his right of occupation. At the end, the complainant was declared as the lawful owner of the stand. Council resolved that the respondent must remove his fence to enable the complainant to erect his.

As indicated in 3.2.1 above, this decision was not endorsed by the Chief.

Communal interest

Case 21 presents a contest between residential land and grazing land. Farmers approached *Kgoro* to demand that previous resolution regarding boundaries be respected. This respect, as they argue below, would result in more grazing space for livestock.

Complainant 1: *… If kgoro could permit me, I want to remind it that we previously came to see Ntona on a Thursday to tell him that we have noted with concern that people are being allocated stands there next to the* [church] *stand. Where is our livestock going to graze? We tried to reason with Ntona. It came to our attention that* [the second respondent] *was the one allocating these new stands… We asked Ntona to call* [the second respondent] *and tell him to stop allocating any new stands in that area. After that, we left as farmers to go see [the second respondent] to reason with him and not to fight with him. To say, please do not continue with allocating stands until the seating of kgoro on 21 August* [2022]*…*

When called upon to suppor the statement of complaint, another farmer gave a blunt submission that did not move the prosecution forward in anyway.

Complainant 2: *The submissions of* [the first complainant] *are accurate in all material respects.*

The first respondent continued to make out a case on behalf of the farmers.

> Complainant 1: *I am reminded of another issue ... One of the things* [the second respondent] *said to us was that a new site was allocated to someone else because Kgoro will continue to allocate new sites for so long as people give them money. I realised that, the men in the Kgoro are only interested in money but do not take our needs into account. We have agreed that* [the second respondent] *is no longer the person responsible for allocation of new stands. That responsibility falls on* [member of kgoro 10]*. So in my understanding, it is clear that the Ntona is aware of the activities of* [the second respondent]*...*

Added to the contest between residential space and grazing space is the influence of money. At least that is according to the submission of the first complainant.

> Complainant 3: *We did not think that this was going to be such a big issue. We did not approach* [the second respondent] *with the intention of fighting with him, it was merely to speak to him, to reason with him...*

All of the talk seemed to place the second respondent at the centre of the dispute. It was only fitting that he be given an opportunity to respond.

> Respondent 2 (male): *I feel defeated. My spirit is also affected. I do not know what to say. I am very much defeated. Firstly, the farmers came to the kgoro, to speak to the Ntona and I was called. It was alleged that I am allocating new residential sites on the place designated for grazing. I asked, who did I allocate a stand to? I said to the Ntona,* [the first complainant] *and the farmers know. In fact before the allocation of stands, we invited all farmers to come to the kgoro. We said to them there is space that side, please come and show us where you would like to graze your livestock. They did not honour that invitation. What infuriated me, and I want to be honest, but for the intervention of* [a third party] *I promise you that I would probably have hurt one of you. You cannot come to my home. I do not have a Kgoro. In fact I am not even an Ntona. As well, the law of the tribal authority does not permit anyone to be confronted in his home… I concede that I am no longer the designate to allocate new residential site. That responsibility falls on* [member of kgoro 10]*. I came to the kgoro on the 24th* (the month was not indicated) *and I was expressly told to withdraw from allocating new residential sites, I agreed. Now I am surprised that they say I am allocating new stands. Where did the problem arise, a man came to my house asking for an*

extension of his stand. I said to him "look I am no longer working with these issues of stands. Go to [member of kgoro 10]*. He refused. Okay, let us call the Ntona. Ntona, I have a person here who wants to extent their yard". Maybe the fact that I brought a person to the Ntona offended people. [Member of kgoro 10] and others confronted that person to inquire as to why he came to me. Maybe I was wrong for bringing a person to the Ntona and for Ntona to allow the person to extent his stand. Another person came and asked for two new site. I informed him that I do not allocate new stands anymore. I advised him to contact the Ntona, which he did. He came to the kgoro, when he arrived they contacted me back to ascertain that indeed it was I who referred that person to the kgoro. I confirmed this. Ntona and [member of kgoro 8] asked me where they should allocate a stand for this person. I declined indicating that I am no longer the designate of the Kgoro and so they should see how they assist that person. I withdrew, so today I am surprised that I am accused of allocating stands. Or perhaps I should not refer people to the kgoro? It is downing on me that the real issue here is that I am no longer welcome in this kgoro. If that is so, we should be express about it and not make accusations against me.*

The elaborate statement of response covered all issues that were before *Kgoro* for prosecution in respect of this case. This necessarily mean that the farmers had to refine their issue appropriately for better engagement. That duty fell on the first compolainant.

Complainant 1: *The place we are speaking about, honourable kgoro, there is a roundavel that side, if people ever take a walk. That other side, there is a roundavel, for those who walk around. We agreed that the roundavel is the boundary. That no one should be allocated new residential site beyond it. But we found a person cleaning there beyond that agreed boundary. On the other side, next to the farmland of* [a third party]*, there are three other new sites there. There was also a shack that was erected there. We ensured that it was removed. The owner left and has not returned. And yet the activities there continue. As I speak to you now, just yesterday, there were people there erecting shacks. It is the duty of kgoro to go investigate what is happening there. To inquire into where those people come from and if they have the correct documentation to occupy that space... Importantly, is it difficult for our Kgoro to tell people that it no longer has available space for residential purposes? We must learn to be able to tell people that we no longer have space…*

The underlying idea, it would appear, is that the complainant farmer was submitting before *Kgoro* that it should honour its resolution as a sign of showing some care towards the farmers and their livestock.

> Member of kgoro 9: *I do not want us to confuse the issues. Let us stick to the one issue here so that we can finalise this case. If I understand the farmers correctly, they are referring to the boundaries on this side where they say they found a person cleaning the yard. Let us not bring in the issue of the new shacks on the side of Masilo. Please let us stick to what is the issue here. Farmers say the person they spoke to said* [the second respondent] *allocated that stand. It is that issue that he* (the second respondent) *must answer to, not the issue of shacks on the side of Masilo.*

After this the second respondent returned to provide further clarity on this issue that was refined immediately above.

> Respondent 2: *I want to advise you, I hear* [the first complainant] *saying the roundavel is the boundary, it is not so. If you recall, kgoro, there is a person that you allocated a stand next to the school for that person to make bricks. I cannot recall where that person is from. He was removed there to be reallocated another stand and he was again removed from this place as well. After that you allocated three or four stands for this person beyond the boundary of the roundavel. I did not allocate those stands. You allocated those stands to that brick maker as a kgoro, today you accuse me of having done that.*

Evidently, the case could not be completed without the input of the person designated to allocate new. If this was intended to clarify issues further, it achieved the opposite of that desire.

> Member of kgoro 10: *I found a man there cleaning the yard. I asked him what he was doing. He said he was hired by another man who knows* [the second respondent]*. I relayed that conversation to the Ntona and requested that he provide me with guidance regarding this issue. As you know that the Ntona cannot travel long distances* (for health reasons)*, his sibling was delegated to go do an inspection with me. Luckily when we arrived there, the same man was working the land. Member of kgoro 9 spoke to the man to establish his reasons for being there. The man asked if he should cease with cleaning the land. However, he was told to continue working because he was employed. Because he (member of kgoro*

9) is here and it was he who spoke to the man, I think he is better placed to speak to this than I am.

Tasked with providing clarity, this member passed that responsibility to another.

> Member of kgoro 9: *These issues are not the same. If I listen carefully, what* [member of kgoro 10] *is talking about is completely different. Where I went with him is not next to the roundavel hence I am getting a bit lost. It appears to me that we are talking about two unrelated issues. The place he is talking about is next to Mma Maropeng. If I understand the farmers' complaint correctly, that is not the place in contention. Correct me if I am wrong. But the issue here is that space next to the roundavel that* [the second respondent] *is talking about. I went there myself to inquire because we have agreed that there should be no new stands beyond that roundavel. But the answer I got was that the brick maker was allocated that stand there because he was chased away a couple of times from prior allocations. I asked further to say is there a re-allocation going on in that space? The answer I got was no. So I assume that that would be the new boundary line up to the mountain. It starts there beyond the roundavel and extends to the side of the mountain. There might be space for two more stands next to that mountain. I said this must be the last line. There should be no new allocation without prior consultation with Kgoro. I said this because there were already new stands along that line, meaning that the owners paid the money to Kgoro. Let them be the last stands…*

Member of kgoro 9 brought the much needed clarity to close the case as a dispute. For that reason, one of the complainants expressed his gratitude.

> Complainant 2: *I would like to express my gratitude to kgoro for hearing us and heeding our complaint. It shows that kgoro cares about us.*

At this point, the *Ntona* was invited to rule on the issue.

> Ntona: *The issue of the stands beyond the boundary has been clarified. However, I want to caution the issue of the attack on* [the second respondent]*. Everything related to stands around here, everyone blames* [the second respondent]*. Let us desist from accusing him of allocating new stands. We have clarified the issue of the allocation of those stands here today. There must be no new stand beyond that boundary. The space beyond there is for grazing. You formers, if you see that*

there is a new site beyond that line you must notify us immediately. Do not wait for the person to start building. Notify us immediately so that we can reallocate stands elsewhere…

The contest was resolved amicably in a balanced determination of the space. It would appear that this was to the satisfaction of the complainant as expressed by one of them.

Case 37 has already been discussed under 3.2.1 under the sub-theme of the cross-section with other forms of justice. The information will not be repeated here to avoid unnecessary duplication. In sum, the case brings into contest the interest of one person over land against those of the community over a right of way.

Respondent 1: *The space this man is talking about, we removed a fence from there because as far as we are aware it is a road. Now we are surprised that he is claiming the road as his stand. As well, we did not damage his fences, we just removed it from obstructing the road.*

Respondent 2: *I was surprised by the summons calling me here. I was not there when the community removed the fence.*

Interested party 17: *We went there to remove the fence. We were told that that passage there is a road. I am young so I do not have the full details but I was told that the space is actually an old road.*

Interested party 18: *When I grew up that was a road. I am surprised that today the road is obstructed by someone claiming to be the owner of that space.*

Interested party 19: *That is an old road used by people on foot. We cannot just accept its closure.*

Community members spoke in one voice that the space is a footpath for common use and that they are unwilling to accept an alteration that aims to benefit one person at the expense of the community. Councillor 1 put it to all in attendance if they knew where the disputed place was. This was met with a resounding affirmation.

Councillor 2: *Is that a road?*

This too was met with a resounding affirmation. On the back of this evidence in favour of the community and for peace's sake, council resolved that the complainant must seek alternative land to establish his business. On the evidence of this ruling, the public interest or the common good as it were triumphed over the individual interest.

3.2.4. Customary marriages

Customary marriages have a variety of nuanced issues that are addressed in these cases. From the negotiation and completion in **case 16**, to the celebration in **cases 26** and **42**. In **cases 26** and **35** mention is had to an issue relating to different types of marriages recognised in terms of indigenous cosmology. **Case 34** addresses the aspect of marriage gifts. These aspects are summed up in the discussion that follows.

Negotiation and or celebration in terms of culture

Case 16, which is discussed in 3.2.2 and 3.2.3. respectively, also has elements of a negotiation of a customary marriage. Granted that the dispute was over the ownership of stand, the complainant earlier highlighted that there was a negotiation for her marriage to the respondent.

> Councillor 7: *Your daughter indicated here earlier that* [the respondent] *has formally met the family. Who did he meet?*
>
> Interested party 5: *They came and found me with my sister. I asked who they were and what they intended to do. Upon realising that they were representative of* [the respondent] *I lost interest. But I also asked how much they had. They said R3000.00. In reply I said that could not be money intended to start a marriage negotiation with me. I did not receive it.*

The improbability of this state is reflected in the opinion of councillor 8. Out of necessity, the engagement of that party is repeated here for reasons that appear thereafter.

> Councillor 8: … *Another problem relates to the issue of magadi money seeing that* [the complainant's] *mother is denying receipt. Who did you send to the complainant's place?*
>
> Respondent: *My sister and her friend. They gave an amount of R3000.00 to* [the respondent's] *mother.*
>
> Councillor 8: *Even if it was only R500.00 it still would have been sufficient. This woman here* (pointing at the complainant) *is your wife.*

It is clear from the thought of councillor 8, who makes binding decisions on behalf of *Kgoro ya sechaba* that the simple act of commencing a marriage negotiation is sufficient for conclusion of the marriage. This view is uncontested nor is there any similar case in jurisdiction

A for *Kgoro* to express itself differently. As it were, this appears to be the official position in jurisdiction A. this position is materially different from the view held in jurisdiction C as per **case 42** discussed immediately below.

> Complainant: *[The respondent] raised these children well but I do not know what changed along the way. These children's mother was staying* [elsewhere] *but she was not married. The marriage celebration was incomplete but she left her home to go stay there…*

The claim that her sister was not married was refuted by the respondent who, in her understanding, insisted that the payment of magadi was sufficient for a completion of a customary marriage. This view is aligned to the thoughts in jurisdiction A but not so in jurisdiction C.

> Respondent: *As well, my sister was married. She had her own home.*
>
> Councillor 1: *Where is this home?*
>
> Respondent: *At* […].
>
> Councillor 1: *So that is [these children's] home?*
>
> Respondent: *Yes.*
>
> Councillor 4: *Was the marriage celebrations completed or it was just magadi?*
>
> Respondent: *Magadi. We did not have a celebration, but they changed surnames* [into the father's].
>
> Councillor 4: *According to the customs of* [jurisdiction C]*, when we say a person is married there must be a celebration including accompanying the new bride with mohlobolo.*
>
> Respondent: *This was in the 1970s and they had a house together.*
>
> Councillor 4: *That is still not marriage. According to our customs, they* (the deceased mother and her children) *were "stolen".*[19]

Seemingly, *mohlobolo* is critical to the conclusion of the marriage according to the customs jurisdiction C. Without it, as expressly opined by councillor 4, there is no marriage. In fact,

[19] In this context, stolen denotes that they moved to the "husband's" family without following due processes of marriage according to the customs of this jurisdiction.

she equates the action of the other family to theft of the would-be bride. The celebration of this ritual include the delivery of a specific portion of meat from a goat that is delivered from the bride's home to the groom's. More crudely put, as the name suggests, *mohlobolo* mean to take off the clothes. Marriage, therefore, signifies the privilege of consortium on the part of the man. In its decision, council rectified the respondent that the siblings' mother was never married because there was no *mohlobolo*.

Case 26 advances the notion of a proper celebration of a marriage in jurisdiction C and the esteem in which that is held. This is evinced in the opinions expressed hereunder. In the relevant portion relating to customary marriages, the following extract support the view towards a strong sense of proper celebration and completion of customary marriages.

> Interested party 5: *I am an aunt to the bride.* [The complainant] *paid magadi to us. However, there has been no official handing over of the bride to his family.* [The complainant] *just took her by himself without following due celebration processes. We have tried to reason with* [the complainant] *and his family regarding doing right by my sister and performing the handing over ceremony…*

This fact of a marriage "self-help" was met with shock by council.

> Councillor 2: *How did you, as a family, allow* [the complainant] *to take and live with your daughter without finalising the marriage?*
>
> Interested party 5: *He just took her. There are no close male relatives at my sister's home so [the complainant] is taking advantage of that.*
>
> Councillor 2: *If it true that* [the complainant] *did what you say then I spit on such conduct. But why is the* [respondent] *not saying anything? Whenever someone feels bullied or defeated that person should approach Moshate to seek protection. A person will get herself killed whilst staying with a man without following due processes of marriage. The mother is not coming forward to tell us that her daughter has not been lawfully married. That the* [complainant] *stole her daughter. If what is being submitted here is true about you* [complainant] *then you have erred greatly. What you have done is unacceptable, if it is true.*

The submission of councillor 2 are consistent with those of councillor 4 in case 42 in that they both insist that taking a "wife" after merely paying *magadi* amounts to theft. What is different between the two cases is that in case 26 both spouses were present in the council hearing to learn that they are not considered married according to the custom of jurisdiction C.

Forms of marriages recognised in terms of indigenous cosmology

This is not as much a discussion as it is a reflection on the forms of marriages spoken about in the respective cases. Cases 16 and 26 refer to the standard **heterosexual marriages**. A caveat is perhaps necessary regarding the validity of the marriages in the respective jurisdiction. Additionally, case 26 has an element of a **woman-to-woman marriage** as per the discussion under 3.2.3. sub-theme right to title. Lastly, in case 35 a ***ngwetsi ya lapa*** **marriage** arrangement is observed.

Marriage gifts

Case 34, in part, addresses the aspect of a marriage gift in the form of *kgomo ya lenyalo*. In this case, the complainant gifted her in-laws with a cow as a token of appreciation to them. However, he then approached council to demand that the cow be placed in its proper and or intended home. This issue is more of a sidenote to the main issue discussed in 3.2.5 below.

3.2.5. Family disputes

In hindsight, but for case 9, all cases of family conflicts arises from jurisdiction C. Given that there are different types of disputes emanating from this sense of acrimony, a general theme that developed through the data collection process pointed towards unsettled family structures in that jurisdiction. The discussion takes the following form; firstly, the family setup (rights and responsibilities). Issues of maintenance arises in **cases 27; 35** and **41**; **cases 28; 29** and **40** share similarities in that a sense of violence permeate the family setup; the place and status of children in the family setup are discussed in **cases 26** and **42**. It must be noted that the term children is used rather loosely in **case 42**. Finally, and by no account least, **case 34** is a discussed here as a unique feature of the family breakdowns. Secondly, **cases 9** and **41** emanate from the practice and experience of sorcery. The discussion is in the descending order indicated here.

Family setup – rights and responsibilities

The discussion commences with **case 27**. This case is discussed in part under 3.2.1. under the sub-theme cross-section with other forms of justice. Only aspects related to the idea of maintence are discussed hereunder. Sight should not be lost over the fact that the main dispute was over a store that was legally given to the respondent in terms of a testamentary document signed and stamped by an official at the Magistrate's Court. As captured in 3.2.1.,

the respondent alleged that the store was given to her, subject to the proviso to maintain the complainant and her siblings.

> Councillor 2: *Are you hearing what your aunt is saying? She is saying that the disagreement between you and her arises out of the fact that there was no revenue generated by the shop. She is also saying that she did not cease to give you monies from the social grant benefit but that she was unable to increase it in later years due to the failing conditions of the old woman. Am I understanding you correctly [respondent]?*

To counter that view, the complainant gave an elaborate explanation of the history of the store as best as she knows it.

> Complainant: *We used to get the revenue generated from the shop until 2016. In 2016,* [third party] *was evicted from the shop. I do not have the details of what happened between him and my aunt that resulted in his eviction. From there, the shop stopped operating. I approached my aunt to request that she give me permission to find a new lessee for the premises so that the shop could generate some revenue for us. I am the only who is working at home so I do experience constrains. I assured her that we would continue to share the rent money. But my aunt declined on the reason that she engaged someone else to take up the store. She indicated that an agreement was already reached and signed at the police station. From that time in 2016, we have not consistently received monies generated from the rent of the shop… My grandmother died in January 2021 during COVID. My aunt came to me around July and said the store was closing down as the tenant was struggling financially. From that time we have been trying to look for an alternative way for the store to generate money for us. We are constrained. As I indicated, I am the only one that is working at home…*

In appreciation of the hardship and the nature of the dispute, the respondent insisted that the store belongs to her and as and when it generates money, she will continue to share the revenue with the complainant.

> Respondent: *… She (the deceased) said I must never abandon these children. I have always considered them as my brother's kids... I have never had problems with them. As far as I am concerned, I will continue with the arrangement I had with them when the shop is operational again in future.*

In essence, the respondent pledged to continue with the maintenance arrangement he made with her mother previously when the shop is operational. As already indicated, the testamentary document was deemed stronger in law irrespective of the customs of jurisdiction C.

In **case 35**, the complainant approached council for assistance in relation to the deprivation of maintenance by her sister in law. The facts of the case are used above in 3.2.1. to demonstrate the general overflow of the process of prosecution. They are not repeated hereunder to avoid unnecessary duplication. What is important is the off the record transaction relating to the maintenance of the complainant and her children.

> Interested party 15: *These people* (the respondent and her family) *knew that they were marrying this woman with her children, now what do they mean today when they claim that* [the husband] *has no children with* [the complainant]*? Who did they actually marry* [the complainant] *for?*

At the end, council took a unanimous decision that the complainant was married and as such an obligation of maintenance had been created.

Off the records of this study, this decision was affirmed with an amount of R1000.00 set to be paid to the complainant every month after the SASSA payment. In essence, this meant that the social grant was apportioned between the husband and his wife in terms of the arranged marriage.

Case 41 came before council as a clear claim for maintenance by a wife against his husband.

> Complainant: [The respondent] *and I got married in 2016, but to date I have not changed by surname into his. I tried on numerous occasions to reason with him to go change it without luck… His family does not appreciate that I have to bath and do laundry. There are goats which I take care of but when these are sold, I do not get a single cent. We do not have enough food. I am in dire poverty. I am unable to pay for societies as well.*

In his response, the respondent straddles the issue of maintenance with sorcery by claiming that he is put under a spell.

> Respondent: *I have never encountered problems with* [the complainant]*. But the main issue is that there is something walking in the yard during the night as we sleep. In the morning when I investigate I notice strange things including cracked*

windows. Upon consultation [of traditional healers]*, I was informed that there are actually two of these things. They work in tendon around the house, with one on each side of the house. According to the information I have of these type of tokoloshe,*[20] *I am informed that it is the type that stir up trouble at home.*

It is implicit in the response that the respondent is not maintaining the respondent. However, he clearly puts this down to supernatural interventions that he cannot control.

Complainant: [The respondent] *is not telling you the truth. As it is, he qualifies to be a social grant beneficiary but he is refusing to go register. On 17 April* [2023] *I gave him R200.00 so he could go register but he did not go. He refused to go claiming that it is futile because he would not get the money even if he registered. As we speak, we do not have maize at home.*

The hardship complainant experiences daily is laid bare in the above narration. Mindful of this, council deliberated on this in an endeavour to advice the respondent.

Councillor 1: *It is far more expensive to bury a person.* [Respondent] *if, for example, the complainant passes away, what are you going to do since you do not pay societies? Where is the R200.00 that you were given?*

Respondent: *To be honest,* [the complainant] *gave me the money. I previously registered for the R350.00 grand in July* [2022] *but I have not gotten anything. I have made numerous unsuccessful inquiries. On further investigation, I was told that the money is there but* [the tokoloshe] *is preventing me from getting it. I was told that even the old age grant would suffer the same fate.*

Councillor 1: *But when are you going to register?*

Respondent: *I went last week* (referring to the week starting 30 April to 06 May 2023).

No decision was made nor were the parties told to return to monitor if there is a change in the fortunes of the complainant. In principle, the case is left hanging.

[20] Defined as a "supernatural creature rooted in traditional belief, acknowledged in the day-to-day rituals and practices of contemporary South Africans, indicative of the customs associated with witchcraft" in Darryl Stephen Nel, *The Tokoloshe and Cultural Identity in Post-apartheid South Africa* (PhD thesis, SOAS – University of London, 2018) 11.

Case 40 brings an interesting dynamic of the changing dynamics of the family setup. It is summed up here more comprehensively than was the case under 3.2.2. above.

> Complainant: *I brought a complaint here regarding the hardship I am experiencing at home. I was chased out of home as I was being abused so I retreated to my maiden home. When I was home I decided to go look for work in the compounds. One of my children committed suicide as a result of being ill-treated. I think he suffered from depression which led to his death. He was buried in my absence. In fact I was only notified of his death a week after his burial. I accepted it as the way they wanted things to be. Sometime after that, their father* (the husband) *died. There were pension monies that he had registered in my name so my son setting next to me here came to request that I must go sign documents to release the money. I did as requested but I declined to take any portion of that money to avoid tension. But it was my wish that the money must be shared amongst the children. As I hear, only two of my children took the money and excluded the other two. Those who received nothing came to me to complain. I pleaded with them to not make noise about it. When my own pension monies came, I split it between these two to even things out… One day my second son called me to tell me that I was a fool and that the R3000.00 I gave to him when he got married he did not accept it. He added that he would shoot me… My grandchild is mistreating me at home. On 25 February 2023,* [she insulted me]*. An old woman my age should be insulted by such a young girl? I am asking for your intervention. This crass behaviour from my granddaughter is influenced by my sister in law. If that woman can leave my children alone, I think that we would have a better life at home. As well, whenever I attend events in the neighbourhood, [my sister in law] insults me. If I exchange insults with her at these events, would we not be ruining people's celebrations?*

Three people are flagged as instigators of the sense of acrimony at home. These are the first, third and fourth respondents respectively. The first one is the one alleged to have threated the complainant with both death and eviction. The third, who is the grandchild is accused of insulting her grandmother and so too did the sister in law as fourth respondent.

> Respondent 1 (male): *The start of our troubles between me and my mother was when I told her to buy maize at home. In her response, she said she took out a loan of R3000.00 during my magadi celebration which she is still paying to this*

day. I said to her let me not burden you, I will return that money to you. My biggest mistake seems to be that when my father was bed ridden in his last days, he ordered me to go call my mother so that they could fix things before he departs. His in-laws never honoured that request.

To complete the full array of issues, this respondent touched on the eviction in the following express statement.

> Respondent 1: *If I wanted to evict her, I would have done so the first day she set foot at home.*

The second respondent called her mother a liar and deceiver on her claims of abuse and implied that she left home voluntarily on 29 October 1989.

> Respondent 2 (female): *Is it possible that an abused person could have the time to pack her things neatly if she was being chased out? To pack her stuff, take them to her maiden home, return to take dishes and take them home as well? As we speak today, her stuff are still at her maiden home. She must stop being a liar and a deceiver. As well, if we have problems at home, she must sit me down to discuss the issue instead of going around discussing our affairs with her peers.*

This respondent echoed the sentiments of the first respondent that the complainant is not putting food on the table. This aspect has elements of an indirect counterclaim of maintenance and coul well be discussed under the above sub-theme as well. To the proposal that the sister in law is the problem, she respondent remarked as follows:

> Respondent 2: [The complainant] *is actually the one stirring the fight amongst us. I do not agree that our aunt must leave us alone.* [The complainant] *was not around all those years when our aunt took care of us. Whenever we called her she would come promptly to assist. Where was* [the complainant] *all this time when our aunt was the one doing our laundry? The child she mentioned as having being killed, she left him when he was only five years old.*

Council deemed it necessary to invite speakers from the maiden family to respondent to the aspect of abandonment raised by the second respondent.

> Interested party 20: [The complainant] *is my child. She left her home to go live in the wilderness because home was unpleasant for her. She was gone for a long time. One, at the time of the death of his son, I have no idea where she was. But*

during the death of her husband, she was around. They (the matrimonial family) *denied her access. We said to her, if they do not want you there, stay home.*

Instead of continuing on that trail of accusations and denials, the next spear thought it necessary to redirect the conversation that can be guided by a sense of respect.

> Interested party 22: *It is disheartening to hear a child calling her mother a liar and a deceiver. If we do not respect each other at home, I propose that we preserve some decorum when we come to Moshate. Equally, you* (council) *have a duty to call us to order when we speak out of turn.*

Good intentions notwithstanding, the conversation remained premised on the accusatorial mode. The third respondent denied insulting her grandmother in a bare denial. After that, the fourth respondent returned to continue the sense of battle with the other interested third party.

> Respondent 4: *I am the one accused of causing division in the family. It is a known fact that* [the complainant] *abandoned her children when they were very young. Our parents sat us down and told us to care for these children… My sister in law, is this the thank you I get for raising your children?*
>
> Interested party 23: *As a parent, enjoying the harmony of my own home, I doubt I would encourage someone else's child to threaten their own parent with death. I do not think any parent would accept that. Maybe, I should pause here and ask if anyone of you would allow that in your own homes.*

This narration of the dispute perhaps underlies the sense of difficulty regarding intentional reconciliation that council wanted to enforce in this case. As highlighted in 3.2.2. above, there was a sense of uneasiness about the reconciliation between first respondent and his mother and the third respondent and her grandmother. That is largely down to the threat of death, which was denied, and the crass language directed at the complainant, which was also denied as per the presentation here.

In **Case 28**, a family in distress approached council requiring intervention over threats to an impending funeral that was set for 21 January 2023. The troublesome children of the deceased were threatening to deny the corpse entry into his home unless his assets registry was presented prior to the funeral.

Applicant 1: *My brother passed on recently. Now his children are fighting over his assets. So when I inquired as to what the real issue was. They say that the old man's assets must be listed before he could be buried. The problem is, this other one says that he is not going to present an inventory of the old man's assets. In his argument he states that when their mother died, he did not participate in the distribution of her assets. This was done amongst his siblings. Therefore, he now says that his siblings have no right to demand a share of the father's assets. So these siblings even left to go to* [Mpumalanga Province] *in pursuit of this matter… The problem we are faced with is that my brother's corpse is due to arrive tomorrow. However, these other ones are saying that he will not enter the home unless his assets are listed.*

Councillor 2: *Where are these people at the moment?*

Applicant 1: *As things stand, we think they are in* [Mpumalanga Province].

Councillor 2: *The one that is in* [Mpumalanga Province] *all along arranging for the funeral of the deceased still insist that the burial be held on Saturday?*

Applicant 1: *Yes.*

Councillor 2: *So what is going to happen when the corpse gets here? Is the corpse going to the deceased's home or at his parents' home? If I understood you correctly last night when you called, you said the deceased was staying at her parents' home because of the discord at home. Can you perhaps call your nephew who is in Middleburg to inquire about the discussion he had with his siblings so that we know how to proceed with helping you.*

After the call, an off record arrangement was made with the local SAPS to oversee the funeral and ensure the security of mourners.

Discussed above in 3.2.2. under sub-theme exceptions (separation or avoidance), the facts of **Case 29** appear here to speak to the threat of violence by a nephew against his uncle.

Complainant: *I am the complainant. My complaint is in respect of my nephew. When I try to reprimand him for his insolence, he in turn tells me that I am the one who is being disrespectful. I have come to realise that it is not possible for us to co-exist in harmony. As a result, I have deemed it fit for me to come here to seek advice and assistance.*

Councillor 1: *Who is your witness?*

Complainant: *I am tempted to say my brother but he is not really a proper witness. I have told him before about the insolence and he did not intervene so I deemed it fit for me to approach Moshate.*

This created a stage for two contrasting versions to be put before council.

Respondent: *I do not have a lot to say. Firstly, this issue has been referred to a social worker before but they found that there was no case to answer to. Subsequent to that* [the complainant] *told my mother to get me arrested because I am always sleeping. I am not fighting with this man. I have never laid my hands on him. There are no scars anywhere to show that I lay hands on him.*

The nephew denied beating his uncle by going so far as to put it to council that the latter does not have scars to prove assault. Additionally, the respondent expropriated building bricks belonging to the complainant without permission and set up a carwash of his own.

Complainant: *In relation to the building foundation, he took bricks that belong to me to set up his own stall there* (pointing in the direction of their home).

Councillor 1: *Now tell us, what are you going to do with that foundation as they tell us that you have a foundation?*

Respondent: *I have realised that there is an opportunity to use that space for something that can benefit us. To be honest, I used the bricks that he made. But please find out from him if I stole those bricks or I asked him for permission to use them. My plan is to use that space to establish a carwash.*

Councillor one thought it best to invite the respondent's mother to speak on what he knows of the fight between the two in an effort to guide the process towards amicable solution.

Councillor 1: *His mother is here. Talk to us woman, he is your son.*

Interested party 8: *I do not have full knowledge of the issues that are being discussed here.*

Good intentions notwithstanding, the effort drew a blank. At the end, council thought interested party 8 was withelding information from them. Be that as it may, there was a sense that the respondent is anabled to be disrespectful towards his uncle.

Councillor 3: *A nephew should never be allowed too much power in the home of his mother. That home is not his but it is his mother's. So where does he get the authority to act as he does? That is not how things should be. We must be careful not to allow this kind of situations to manifest.*

As indicated in 3.2.2. above, the case was settled with a proposal for separation of the parties.

Off the records of the study, that proposal was not endorsed by the Chief.

Although contested or denied by the parties involved, **Case 26** has elements of Gender Based Violence. However, it was denied by both alleged perpetrator and victim but only narrated through the experiences of third parties. In genral, the cenral complaint here was that the respondent moved children without following due process nor did she have the permission to do so.

Councillor 1: [Respondent]*, the other day we came to your place due to your son-in-law's disquiet that you came to his house to take your daughter. Unfortunately, we did not find you. However, we left a message with the kids directing them that you should appear before us so that you can tell us why you removed your daughter without consulting the in-laws.*

Respondent: *A query reached me that the kids* (grandchildren) *are left alone. That their mother left them behind to go to the police station. On hearing this, I left to go fetch them. I took them home with me. On my return, I found* [the complainant] *and I inquired from him as to why he was assaulting my daughter. He denied that he ever assaulted her. I removed the kids from their care so that they can come live with me and go to school closer to where I stay. I expected* [the complainant]*, as a man, to come to my house to formally inquire into why the kids were removed from the matrimonial home. He did not do that.*

Councillor 1: *Is that where the conflict started?*

Respondent: *This child* (pointing at her daughter)*, is living in a stand that belongs to another family.*

This point of the "matrimonial home" belonging to another family is discussed under 3.2.3. under the sub-heading right to title above.

Councillor 2: *Pardon my interruption. You say that you went to take the kids from* [the complainant] *due to rumours that the kids were left alone because their*

mother went to police station. Was this just a rumour or it turned out to be the truth?

Respondent: *It is true that I found the kids alone, they were unattended. On my return home with the kids, this child* (pointing to her daughter) *came in.*

Councillor 2: *Where did she say she was coming from?*

Respondent: *She said she was from the police station as a result of an assault.*

Councillor 2: *Who did she say assaulted her?*

Respondent: *She said she was assaulted by* [the complainant].

The interactions between councillor and the respondent establishes neglect of the children and introduces an element of assault.

Councillor 2: *You (Daughter), is it true that you went to the police station? Was it as a result of being assulated by* [the complainant]*?*

Interested party 4: Shook her head.

Councillor 2: *You must tell us the truth. Did he assault you?*

Interested party 4: *No*.

Councillor 2: *Did you just have a disagreement?*

Interested party 4: *Yes*.

Councillor 2: *What type of a disagreement was it that even led you to seek the intervention of the police? You are sure that there was no assault at all? That he did not assault you but instead you had a disagreement?*

Interested party 4: *Yes*.

Respondent: *He assaulted her.*

This responses were characterised as untruthful without much proof.

Councillor 2: *Your daughter is untruthful. When the complaint reached us that you removed her kids from the care of the* [the complainant] *family, I sent these ones* (pointing at council members) *to come inquire from you as to what was the root cause of the issue. I needed them to establish the rationale for the removal of the kids. I spoke to her via a phone call where I inquired if she had been assaulted.*

She denied being assaulted. I proceeded to ask if she just voluntarily went to the police station without reason. She said yes. She asserts that she still loves her husband and is ready to return to the matrimonial home. That you are keeping her at her maiden home against her will. You must understand that what you (the respondent) *did is very demeaning to the* [complainant's] *family. You disrespected them. This family married your daughter, she is their makoti. Now you cannot, without consultations, go into your son in law's home and remove his children. You know you could be fined in other more cultured families if you did this same thing? Your daughter is married to [the complainant] and not in a vat n sat.*

Two things are apparent from the above elaborate opinion; one, councillor 2 takes great scorn against self-help when the tribal authority has systems in place to assist. Two, she finds it improbable that one would just go to the police station leaving children behind for no reason.

Councillor 2: *You were not supposed to go to the* [complainant's] *home as you did to remove the children. Your daughter and* [the complainant] *are married… So when issues arose, you were supposed to send people to* [the complainant's] *family to talk about the matter in an effort to try and resolve the issues. You were not supposed to do that. Do you realise that you have committed an offence against* [complainant's] *Family? Do you see that what you did is wrong?*

Respondent: *Yes*.

The concession by the respondent that fetching the children without proper consultations with the complainant's family was wrong was just about the end of the matter. However, this does not provide a satisfactory answer to the question of why she acted as she did. On this point, an interested third party offered clarity.

Interested party 2: *I believe the matter is clear. The old woman heard that the kids are left are alone, she went and fetched them without consultation. However, the question that must be asked is why she went there to take the kids? This question must be asked against the information provided that the daughter ran to the police station. Now when the daughter ran to the police station instead of running to her neighbour, for example, this shows that there is a problem here. There is a problem right there. You might find that the reason the old women took the kids is because there is something that she knows about her daughter. The contradicting versions between this old woman and her daughter regarding what actually transpired here reveals issues in this case.*

Another party attempted to provide further clarity.

> Interested party 6: … *A message was taken to the* [complainant's family] *to inform them that the kids have been removed but there was no attempt from their side to follow the issue through. I am someone who believes in humility. I like a humble person. If you can be humble, you will live well with other people...*

Suffice it to say this submission seeks to exonerate the respondent of any liability, the central issue that all this establishes is that children were neglected; the respondent stepped in to save the situation and some form of an attempt to communicate this with the complainant's family was done.

In **case 42** the reference to children is a very loose one. This is apparent from the statement of response indicating that the respondent has cared for the siblings for a period exceeding 40 years. By the state law, a 40 year old is an adult. However, the address in council was *bana*, which translates to children. For that reason, this discussion falls to be made here.

> Complainant: … *Both of their* (the siblings) *parents are now deceased, but before their father died, he married another woman. At some point this girl* (pointing at one of the siblings) *encountered spiritual difficulties which led her to going back to* [her father's family]*. First she stayed with her father's elder brother but she was chased out. Then she stayed with her father's younger brother and was also chased out. Lastly, she went to live with her step mother who also chased her out. After this she came to me with nothing but a plastic bag. After some time, this one* (pointing at the other sibling) *came from Lebowakgomo to request that her younger sister come live with him at their mother's home. I had no problem with that request. After some time, during their stay at home, trouble started to brew which led to their uncle chasing them out as well.* [The respondent] *told these children that she will lock the house and leave. And that they should go live in the cemetery, where their mother is resting. I want to ask this, is it possible for a person to go live in the cemetery? Or is it possible that when someone builds a home for her parents she must control what happens to her maiden home?*

Considered in context, the children have moved around a bit since the death of their mother. It would appear from this narration that no one person but for the complainant was willing to care for them. Before confirming the details as narrated by the complainant, the respondent started by showing that he had cared for the siblings previously.

Respondent: *I have stayed with these children for more than 40 years; feeding and clothing them… One night, this one hit* [my brother] *with an axe. Upon learning of this occurrence, I called a family meeting to inform others of this event. Secondly, when* [my brother] *was ailing her pushed him aggressively and demanded to talk to him. He pushed him into a chair.* [My brother] *called me to inform me that he no longer wished to stay with them* (the siblings) *out of fear that they* (the siblings) *would kill him…* [My brother] *told me before he passed that he no longer wanted these children to stay at home. He expressly said that was his parents' home so he does not want these children to take it. In fact, he* (the deceased brother) *has a son that he would want to inherit the home.*

As she explains, this son and the male sibling are about the same age. This fact alone mean that it was not feasible that the both of them could stay in the same house, according to the respondent averment.

Respondent: [My brother] *told the nurse on his deathbed that no matter what happens to him, these children must leave the home on 17 May [2023]. He told the nurse that they must vacate his son's home.*

Complainant: *I want to know, if* [the respondent] *is chasing these children out, where is she expecting them to go?*

The question was echoed by councillor 1 and put to the respondent.

Respondent: *That is not my wish, instead those are wishes of the deceased. The other sibling* [to the ones before council] *has a house in Pretoria.*

Councillor 1: *Do you propose that they must go to Gauteng* [province]*?*

This question went unanswered by the respondent. In truth, it appeared as though she was being evasive and avoiding a direct response. At this point, the councillors came in to deliberate.

Councillor 4: *You are mistreating these children. In our culture we expect the maternal aunt to step up after the death of her sister and care for the children. Yet in this case the children are left at the mercy of their uncle's wife. This is heart breaking… Was this child* (the female sibling) *born like this?*

It should be noted that this sibling appeared to be experiencing some emotional or mental distress, and her initial introduction was not as clear as is typical for everyone appearing before the council. The answer to the question was in the negative.

> Councillor 4: *This may have been caused by the stress of being chased out from one family to the next.*

Whilst this summation may be founded in logic or experience, the scope of the diagnosis falls outside the area of the current study.

> Respondent: *I am the one who build the house in that stand. Anything in that house, from teaspoon to every other item. Would you permit me to go take all that I had done there?*
>
> Councillor 3: *By taking the house you mean demolish it?*

The respondent shrugged this off.

> Councillor 1: *Where you not building that house for your parents? Usually, when someone gets married but things do not work out that person returns home. The same may happen to you in future.*
>
> Respondent: *I was building the house for my brother.*

If anything, these exchanges perhaps points towards the respondent as the architect of the family discord.

> Interested party 26: *Let us not do things that are not in line with the customs of* [this jurisdiction]*. According to the customs here, when a person gets married, she does not take anything from her maiden home.* [The respondent] *must not introduce practices that are not in line with customs of* [this jurisdiction]*.*

A clear evidence of mistreating the children is nowhere clearer than in the respondent's expression that they go live where their mother went, the cemetery. At the end, council found that the siblings must stay at their mother's maiden home until they can fend for themselves.

> Councillor 3: [The respondent] *must return the keys to that home so that these children can gain access to the home. What we request is that when you are married, you should desist from interfering in the affairs of your maiden home. Council concludes that* [the siblings'] *mother was never married.*

Case 34 presents a unique family dispute and perhaps affirms the changeable nature of the indigenous cosmology as experienced in jurisdiction C.

> Interested party 13: *We are here to seek your intervention as Moshate. This man* (respondent) *has looked after the cattle and they have reproduced multiple times. There are rumours that we can neither confirm nor deny that he has sold some of the cows as well. But we are not here about those issues, we want you to assist us in establishing the rightful owner of the cattle under this man's care.*

The dispute arises out of a gift that the complainant gave to his in-laws in the form of a cow.

> Complainant: *The real issue is that each time we have tried to resolve the issue with the respondent, he has proven to be evasive. I cared for the cow for a while but then I approached my brother in law to say the cow must come home as the time was right. He* (brother in law) *said he did not have anyone at home to care for the cow and could not find someone to herd it.*
>
> Councillor 1: *Are you done?*
>
> Complainant: *Yes*.
>
> Member of council 1: *But you have not told us how the dispute started. It is clear that there is a dispute in respect of this cow but it is not clear how that came about.*
>
> Complainant: *The cow is with this man* (pointing at the respondent).
>
> Member of council 1: *This man (pointing at the brother in law) said he could not herd the cow. Then what happened?*

This question is answered by the trail the cow travelled initially. Before allowing the respondent to answer to the issue at hand, a member of council asked him to factor this question of traditional trading.

> Councillor 3: *If I give you a cow for you to herd on my behalf, if that cow reproduces, to whom do the calves belong? I am certain that we are all Bapedi and therefore versed with our cultural knowledge.*

Intended as a question initially, this member continued to offer a lesson in indigenous knowledge to the respondent. He expressly pointed out that the cow and its calves will always belong to the person entrusting another with their care. If the third party wants to lay claim

to the cows, he must at the very least seek the owner out to negotiate transfer. This transfer is what they call *go fishetsa* in the indigenous cosmology.

> Respondent: *As far as I know, the cattle came to the family from this man* (pointing at the complainant)*. That is what I know. The old man* (brother-in-law) *tasked my father with herding it and cited that once they reproduced, he* (the brother-in-law) *will share the calves with him* (the respondent's father)*. Then, when they reproduced, I asked if I could exchange with someone else. I exchanged a bull for a cow so that there would be two cows and continue to reproduce.*

Indeed, the cows under the care of the respondent reproduced. In fact, according to interested third party there are 10 of them at the moment.

> Interested party 13: *There are 10 cattle at the moment. But before I make a proposal, allow me to respond to the question asked by this man (*pointing at councillor 3) *regarding the ownership of calves. The calves will always belong to the owner of the cow. Now to the issue of the 10 cattle. I think this man should take six of them to share amongst the rest of the family. Two must go to the old man (the brother-in-law) and two to my father's house. This man (the respondent) will still have six cattle left with him.*

This proposal is flawed for excluding the aunt. To his credit, this speaker self-corrected to add that another be given to the aunt. Meaning five cattle ought to be apportioned to the other siblings whilst the respondent will be left with five. This one cow to the aunt is what is referred to as *kgomo ya letswele*[21] in the indigenous cosmology of these people. At the end, after deliberations amongst themselves, council ruled as follows:

> Councillor 1: *When we combined heads here we factored that* [the respondent] *has been herding these cattle for a long time without compensation. So we decided that he must take two to give them to this old man* (the brother-in-law)*, take two and give to this man (interested party 13) and then take one cow and give to his aunt. We reached this decision because the respondent was herding the cattle on behalf of the old man without ownership ever passing hand.*

[21] It is a symbolic cow that a father gives to the family of his daughter's in-laws to further entrench the family bonds. It is intended to continue to feed the bride and his family in her new home. For all intends and purposes, this cow has traditionally always being a heifer which will reproduce first for the bride's in-laws.

Witchcraft

In **case 41**, the respondent alleges that the tokoloshe is driving a wedge between him and his wife. That but for the intervention of this creature, he has no problems with his wife.

On the other hand in **case 9**, which is discussed in full at 3.2.2, the alleged practice of sorcery by members of the family has divided them. These cases are not repeated here to avoid unnecessary duplication. More so because the facts are summed fully to present a picture of the practice of sorcery as central to either the rift in the family or the inability to support a spouse.

3.2.6. Dispute between neighbours

Cases 4; 7; 13; 20; 30 and **45** speak to the disagreement amongst the neighbours. In **cases 4 and 13** there is dispute emanating from the shared boundary between the neighbours. **Cases 7 and 20** directed one towards a conclusion that there was a sense of lack of neighbourliness amongst the people. Notably, **case 30** is not a neighbour dispute in principle. However, the off record decision demonstrated a yearning for a sense of harmony between neighbours. In **case 45**, a person lacked that sense of neighbourliness that he stole from his neighbour.

Neighbour law

In **case 4**, discussed in part in 3.2.2. for the reconciliation, the main claim was based on a dispute between the neighbours on these facts.

> Complainant: *I thank you for your assistance with the repair of the fence that had collapsed as a result of bricks falling on it. What remains to be done now is for them to install their fence on their side to ensure that there is space between the two. I moved inward on the boundaries so that there could be space between my fence and theirs but they have closed that space by removing their fence. If they put their fence back, the space will continue to be there and that will bring this issue to an end.*
>
> Member of kgoro 1: *I am not sure if I understand this correctly so I want to ask whether the fence has been fixed and if so can we take the case as resolved?*
>
> Member of kgoro 2: *Has your fence been fixed?*
>
> Complainant: *Yes.*

Member of kgoro 2: *So what remains is for them to do theirs so that there is space between the two?*

Complainant: *Yes. What happened was that they removed their fence with effect that the space that was there was nullified.*

The complainant intended to create space between herself and her neighbours to avoid any future damage that could be caused on the boundary line. A question was put to her if she was satisfied with the intervention of *Kgoro* and the actions of the respondent in the repair work.

Complainant: *I am not completely satisfied. This is the second occasion that* [a third party] *fixed my fence. On the first occasion, their tree fell on my fence and I called* [the third party] *to fix it. Now the bricks fell on my fence, they fixed it. They removed their fence* [on the boundary line]*. I moved away from them leaving space. So they removed their fence. I told them that I want there to be a space between me and them. I want them to restore their fence so that there is a space between me and them.*

Once clarified that the complainant wants the lateral support offered by the fence separated to avoid future damage to her side of the fence, a decision was made and communicated.

Member of kgoro 4: *It is true that* [the respondent] *has repaired the fence. However, he must restore his fence* [on the original boundary line] *to ensure that there is space between the two… So, to complete the repair work, it is clear that a passage must be there. My decision is that let us invite* [the respondent] *to come here so that we can tell him to restore the passage.*

On the occasion of that setting on 27 Novemver 2022, the complainant abandoned her claim as noted in 3.2.2. above.

What was essentially a dispute between neighbours in case 13 had other elements which were discussed elsewhere in this chapter. At 3.2.1. under the sub-theme of inspection and at 3.2.2. under the sub-theme on intentionality. The dispute on the lateral support needed for the damage caused by water on either side of the neighbours resulted in a supervised solution.

Neighbourliness

Case 7 brings into focus the potential of kids to stir up a fight amongst their parents. A series of events by the children has compromised the relations amongst the neighbours.

Complainant: *The first issue relates to the playground where the kids used to play. When we moved there* (the village concerned)*, we discovered that the kids used to play soccer in front of our yard. Fearing that they would break our windows with their soccer ball, we asked them to move to the soccer field instead. The kids refused. Secondly, as a result of constant bullying by the respondents' kids, our children had difficulties moving around in the village. This included family errands to go to the store. Furthermore, we even had to move one of our kids to another school to avoid the bullying. What irked me as well was one day when my child was coming back from school, he or she* (the narration of the facts does not reveal the gender of the child) *found the respondents' kids waiting for him or her. Upon arrival at the gate, the kids insulted him or her. Thirdly, one of my children was hurt by firecrackers ignited by one of the respondents' children.*

This last act prompted the complainant to send a delegation to the respondents to inquire as to what may be the reason for the lack of neighbourliness and the impudence of their children. According to the narration, the deliberation amongst the parents only ensured peace for all but three days.

Respondent 1 (male): *One day my six year old child came home crying. I asked what happened to him to which he responded that he was beaten by this woman* (pointing at the complainant's wife)*. I went to her in an effort to establish as to why she was beating my son. In her response, she said that she had not beaten him enough.*

From this address, which brings allegations that were omitted from the complainant's opening statement of complaint, it is clear that the complainant and his wife are not as neighbourly themselves. However, before the other respondents could have a say, one member of council intervened in the proceedings to question the wisdom of the litigants.

Councillor 1: *Do we really have to sit down here to listen to cases of children? Sit here and entertain cases of parents who cannot chastise their children? Some of these children are six years old and already parents cannot discipline them. No man! You* (pointing at all the disputants) *are all adults to be bringing childish issues before council.*

The castigation that this councillor meted out to the litigants was premised on the responsibility of parents to discipline children instead of using them as puns to fight. This need for chastising and or disciplining the children was carried forward by the second respondent.

Respondent 2 (male): *I think we can resolve the issues easily if* [the complainant] *can talk to his wife. We will do the same as well to avoid further conflict. I do not want to speak to the many issues that have been raised here.*

Good intentions notwithstanding, another neighbour of the litigants who was not cited as party before council cautioned that this is not a sensible approach to the dispute.

Interested party 1: *I am a neighbour to these people* (pointing at the disputants) *and very much aware of the issues brought here. My children are as much a part of this as the other ones. They have been chastised at one point or another. The way I see it, telling these people to go sit and talk will not resolve the issues. They would leave here and continue to live the same way as before. If there is alternative advises that council could give to these people it would be welcomed.*

Despite the soundness of this cautionary submission, the final decision echoed the sentiments of the first councillor to speak.

Concillor 2: *We must not hide from this simple fact; children can stir a fight amongst parents. We should not be quick to act when children come home claiming to have been wronged by other kids. It is prudent to try to establish the true facts before acting. This can be done with the other parents so that whoever is found to be wrong can be chastised. This will deter other children from wrongdoing. But if we claim that our children are loathed, we are going to breed conflict amongst us. Please go back and discipline your children. Do not expect anyone to discipline their children whilst you do not do the same in respect of yours.*

The entirety of **case 20** appears in 3.2.1. above under the sub-theme default judgment. It is not repeated here suffice it to say it was essentially a dispute borne out of the respondent's lack of neighbourliness. His antics elicited a strong response from the *Kgoro* as reflected by this expression here:

Member of kgoro 5: *The discussion here demonstrate that we yearn for peace. The discussions are not from a place of hatred or belittling others. We do not detest or belittle anyone. In fact, if we get an opportunity to sit and talk we will find that we are all related in some way or another. However, we are concerned about the stubbornness of the respondent. Now we have agreed with the respondent and furnished him with the PTO. We played our part. But after receiving the PTO, he is*

showing signs that he does not want to work well with us. So why should we keep dealing with him when he is proving to us that he is stubborn? We solve stubbornness with stubbornness. We confront it head-on, if that is the route he intends to take us through. Right?

Case 30, as apparent from the case register and the presentation in 3.2.3. above is essentially a dispute over land, more so unauthorised extension by the respondent. However, seeing the first interaction between the would-be neighbours, the chief of jurisdiction C revised the decision of council that insisted on doctrinal application of the law. The main reason for the reversal was that the two neighbours may potentially not share a sense of neighbourliness going forward.

The theft in case 45 arises out of a person's desire for his neighbour's goods.

> Complainant: *Next door to me, [the respondent] is renting the shop from* [a third party]*. I have identified my stuff in there. I went to him* (the respondent) *to inform him that those were my stuff but he denied it saying they were identical.*

This statement of complaint is refined by the complainant's wife.

> Interested party 29: *We had tall timbers at home that we only realised after a while that a few were missing. Soon after realising this,* [the respondent] *erected a shack using the same timber that we lost. We went to inquire about the timber but we were told that they are similar… We again lost a trolley. Not long after that we saw* [the respondent] *starting to use the same kind of trolley. Again we went to inquire and he raised the same point of items being similar.*

To these approaches, the respondent reported the complainant to the shop owner claiming that he was being harassed. In his statement of response, the respondent noted as follows:

> Respondent: *Let me start with the issue of the timber. Indeed they approached me but I informed them that they had mistaken them… When they lost a trolley,* [the complainant] *approached me aggressively demanding access to my shop to inspect inside. He did not initially tell me what he wanted so I could not grant him access not knowing what he wanted. Then eventually he claimed that my trolley was his.*

On the occasion of this confrontation, the respondent claims that the complainant accessed his chicken coop without permission. This access, he alleges, interferes with the natural

growth of the hens which is not acceptable. For perspective, councillors had to make inquiries to establish the true facts.

> Councillor 6: [Respondent]*, where did you get your timber?*
>
> Respondent: *There is a truck which sells timber that roams the community, I approached the men last year November* [2022] *to place an order for a specific type of timber in to be delivered in February* [2023]*. I asked them about the specific type that I needed. In their response, they indicated that they did not have stock for it but can make arrangement to have them for me this year* (2023)*. They came back in February to deliver as per our arrangements, I erected them to make the shack.*

As noted in 3.2.1 above, specifically under the sub-theme inspection, the case was resolved after an inspection. The ruling was that the respondent stole from the complainant and must return the assets to his neighbour.

3.2.7. Execution

Case 25 is notable for the difficulty experienced by traditional courts in the enforcement of its decisions. To appreciate the extent of the difficulty from the beginning, the sentiment of a member of *Kgoro* is quoted herewith.

> Member of kgoro 10: *I think the case should be taken as closed. They are not the only ones. There are people out there who have not paid us* (kgoro) *money for a year and in some cases a period of two years. We have given them time, waiting for them.* [Respondent 2] *will make time to speak to his sister and explain the outcome to her. We can read the constitution as much as we want, but it appears to me like she has already made up her mind. Let us give them time to settle the debt. There are employed people out there who still owe us for up to two years.*

In principle, this sentiment could be understood as a reflection of traditional courts' inability to enforce its decisions. Equally, one should not be too critical to an extent of overlooking the powers of *Kgoro*/council. **Case 42** is testament of that authority in that the respondent was ordered to leave the key with council so that it could be given to the complainant.

As well the seasonal claims in **case 8** were all decided the same with impeccable consistency. This is notable in *Kgoro ya sechaba*'s consistent refusal to prosecute the cases but merely isse

the penalty. Despite this, case 8(vi) underlie the difficulty of enforcing the judgment in that a *Kgoro* attendee remarked as follows:

> Interested party 1: [The respondent] *is my sister's child and I know her very well. He is only promising to pay now but he will not pay once he leaves this place. He still owes people from encroachments of over two years ago.*

It is clear that despite the clarity of principle on seasonal claims, there is as yet a system in place to ensure enforcement and or execution of the judgment debt. The remedial action suggested by councillor 1 was to get the actual owners of the cows herded by the respondent.

> Councillor 1: *Who is the Ntona for this man* [respondent]*? Find out who the actual owners of the cows are so that we can summon them here so that they can pay* [the complainant]*.*

Consistency is also observed in the actions of children in jurisdiction C. In a stringly similar vein, council found against parents for the behaviour of their children in **cases 29** and **36**. In **case 29** it expressed itself in this way:

> Councillor 1: *Ngwana ge a dira molato o direla motswadi. You should not take up space without permission. You must first come before council and request the permission to occupy. Council finds that you were wrong to extent the stand without permission.*

In **case 36**, repeated here for emphasis on the consistency of practice.

> *Councillor 1: Council has decided that the respondent must buy a new phone. That is how things are, ngwana ge a dira molato o direla motswadi. We all know that we do not play with our children, but the lesson here is that kids must respect people's assets.*

Another striking similarity is in respect of the practice of insults in jurisdiction C. A penanlty fee of R1000.00 is issued against the perpetrators as observed in **cases 40** and **43**. The evidence of this consistency is highlighted below.

In **case 40** it was held that:

> Councillor 3: *Respondent 3 and 4 are guilty of insulting the complainant and are each fined R1000.00.*

Case 43 the finding was similar that:

Councillor 11: [The respondents] *are guilty of insulting* [the complainant]*. Council agreed that since you are from a same family, a single penalty of R1000.00 be made against you.*

The case is presented here to show how the council arrived at this conclusion.

Complainant: *I work with one of the twins* [respondents] *at the crèche. Last year during the kids' graduation,* [the respondents] *came to the event drunk and wanted to force entry into the school premises. I told them that they could not come into the school yard in their condition whilst they see that there are children in there. They called me names… The left and returned after a while finding the gate opened. They insulted me in such a manner that I did not know whether to fight them or insult them as well.*

On a separate occasion, the incidence of insults continued.

Complainant: *With the passage of time I was also called a witch. They started insulting my mother instead of me. One day as I was passing their house I was accused of being caught in the act of sorcery. I was also insulted gravely on that day.*

When the respondent got their chance to respondent, the first one denied insulting the complainant.

Respondent 1: *From the statement given here, there is no truth at all. The crèche issue is not being prosecuted for the first time. Previously, we were taken to* [Mmago Kgoshi] *where she did not succeed despite having bribed and planted a witness.*

Councillor 1: *I thought you would address the current complaint.*

Respondent 1: *On this one, our sister was unwell. One morning when we got up we found that people threw flour on the gate. While we were still surprised, our sister passed on soon thereafter. One day when I was in the toilet, I heard people talking and shouting on the gate. I approached to inquire as to what was happening because we do not want people standing by the gate for long. As they moved away, they started insulting me. To this I only said "you too". Soon after that we received a letter summoning us to Moshate.*

Councillor 1: *Do you know anything about the crèche incidence?*

Respondent 1: *I do not recall insulting anyone at the crèche. We only requested access to the premises.*

What is clear from the exchanges above is that insults have been traded between the parties and that there is a question of sorcery that is suspected. The death of the respondents' sister is put down to suspected foul play. In principle, the issues that forms the basis of the complaint are confirmed, though the versions differ. On the other hand, respondent 2 denies ever speaking to the complainant. In his submission, he was shocked by the summons as he has never had an encounter with her.

Interested party 27: *We were still surprised by the flour on the gate. A few days later she passed. We did not know what was happening then we heard through the grapevine that* [the complainant] *is going around claiming to have spilled it on the gate.*

The complainant claims that she is accused of sorcery and the subtle submissions of the respondent and the third party are clear that they suspect foul play for the death. The implications from the mother's submission in particular seems to suspect that the complainant is guilty of the foul play.

Councillor 11 put it to the respondents that they are hiding the truth from council. In his view, the complainant was far older than the respondents to merely implicate them in insults. Interestingly, he based his view on the influence of alcohol.

Councillor 11: *Do you drink alcohol?*

Respondent 1: *One or two, yes.*

Member of council 2: *You are lying you drink, I can see it on your face.*

Respondent: *Yes, I drink.*

On this response, council was persuaded that the respondent insulted the complainant and are liable for the penalty for insults in jurisdiction C.

Case 35 is a success story in jurisdiction C in particular. This case was heard on 16 February 2023 and by May 2023 a total amount of three payments had been made to the complainant. It must be pointed out though that by April the judgment debt had not been honoured by the respondent. The complainant brought this to the attention of council pursuant to which the SASSA card was taken away from the respondents and was, at the time of leaving the village, in the care of the Chief. The Chief, although it cannot be confirmed if this is done by her

personally, withdraws the money then both parties are called to council to get their monies. On 11 May 2023 the complainant came to collect her money followed by a representative of the respondent. Both parties signed to acknowledge collection of their monies. This is so because council has an acknowledgement of debt system where a judgment debtors signs a record in council then pays money to council who then pass it on to the judgment credidor. This is captured from **case 32** as follows:

> Councillor 1: *Here at Moshate when we have this type of issues, we create an account in the book. What happens is that since you brought the matter here, the respondent will come pay the amount to us* (council) *then we will write* you (the Club) *a letter to come collect whatever money is given to us. Now, how much will you be able to pay? We must point out that sometimes unforeseen events happen that make it difficult to honour our commitments. When that happens, you do not just keep quiet. You notify us that we should not expect you for that period.*

The challenges are there as noted but there are equally systems in place as evinced in jurisdiction C in particular.

3.2.8. Worldviews

In chapter 3 above, regard is had to the Traditional Health Practitioners Act 22 of 2007 as an endorsement of cultural views that do not rely, for their authenticity, on the acceptance by none Natives. The notion behind this theme is, what informs the decision making process of traditional courts in the respective jurisdictions? The worldviews, be it cultural or religious, used in some of the cases were instructional to *Kgoro* or council in arriving at a decision. These are discussed here as an informer of council's decisions.

Christianity

In **case 9**, the use of scripture is used as a form of the intent to mend the family relations in a case of accusations of some members practising witchcraft. One of the accused practitioner was the mother. Councillor 4 noted this with reservations and words of wisdom from scripture.

> Councillor 4: *The way I see it and as I observed when you* (pointing at the respondents) *were talking, it seems to me like you no longer respect this old woman* (complainant 2)*. I hear you* (respondent 3) *say that you are a priest. The Holy Bible proffers that* ["Honour your Father and mother so that it may be well

with you, and that you can have a long life on the earth"].[22] *That is the Bible, we cannot change that in here. If you* (respondents) *do not go back home to sit down with your mother and ask for forgiveness, nothing will go well for you.*

This Christian worldview is relied upon in **case 40** as council's attempt to reconcile a family that was involved in a series of disputes. From threat of death, evicetion by the complainant's son to insults directed at the complainant by her granddaughter. The worldview, expressed through scripture is captured below.

Councillor 5: *Council, it is time for us to pray as* [the Bible] *says in the time of the end, we will see by the actions. It says there will be sickness* [and children will rise against parents and have them put to death].[23] *This is what we are faced with here.*

This scriptural recital is seemingly a response to the first respondent threatening her mother with death. To continue this view of the case, councillor 10 implored the respondents to forgive the complaint through this recital.

Councillor 10: [Indeed, there is not a righteous man on earth who continually does good and who never sins].[24] *There is no one here that does not have a sin. Let us not try to act more righteous at the expense of* [the complainant]*.*

Councillor continued:

Councillor 10: Psalm 50:50 says that "[a]nd call upon me in the day of trouble: I will deliver thee, and thou shalt glorify me".*[25]*

The reference and scripture quoted do not correspond. In this vein, the correct scripture is Psalm 50:15 proffers what the councillor said.

Councillor 6 continued the Christian worldview by reference to Ephesians 6:2-3 (quoted above in case 9) as guidance to respondent 3 directly and advised her to not insult her grandmother.

In case 41, councillor 10 observed the anomaly of the respondent's response to the maintenance inquiry and the steps he alleged to have taken to deal with the tokoloshe. In her guidance, councillor relied on the Christian worldview.

[22] Quoted directly from Ephesians 6:2-3 https://biblegateway.com [accessed on 06 June 2023].
[23] Quoted directly from Matthew 10:21 https://biblegateway.com [accessed on 15 June 2023].
[24] Quoted directly from Ecclesiastes 7:20 https://bible.knowing-jesus.com [accessed on 15 June 2023].
[25] Quoted directly from https://churchofjesuschrist.org [accessed on 15 June 2023].

Councillor 10: *Psalm 121 provides that* [I lift up my eyes to the mountains, where does my help come from? My help comes from the Lord, the Maker of heaven and earth].[26] *Do not trust any person to help you.*

In brief, these cases introduces a complexity of a different worldview in the business of traditional council. Whether this aids or distructs cultural wisdom is neither here nor there. The reality is that in discharging the cases before them, traditional courts uses different worldviews.

Cultural lessons (idioms)

These lessons too, aided traditional courts in arriving at a decision.

In **case 8(a)**, councillor 2, in coming to a determination on what informs the rule on no prosecution of seasonal claims remarked that:

Councillor 2: *Sekatana ga se bonwe ga bedi*…[27]

In terms of indigenous cosmology, this idiom expresses the notion of lessons deriving from past experiences. In essence, this mean that jurisdiction A developed the principle not to try seasonal claims as a result of past transgressions or failed attempts to hold licestock owners responsible.

Cases 29 and **36** are noted above in 3.2.7. as advancing the notion that parents are responsible for the mistakes of their children. In both cases, parents were liable for the deeds of committed by children. In **case 29**, the respondent extended his family yard without council's permission. This was found to be unacceptable with the consequence that the mother was ordered to pay on behalf of her son. In case 36, on the other hand, the expression was used to hold a mother responsible for the cellphone theft committed by the son. In that case, the mother was ordered to buy a new phone.

In **case 27**, councillor purported to hold a crash course on cultural knowledge pending the inspection of a legal document handed in by the respondent.

Councillor 1: *As we wait for* [councillor 2] *to process that document, I want you to please tell us what your customs say in relation to this scenario. If a man has*

[26] Quoted directly from Psalm 121 htpps://biblegateway.com [accessed on 16 June 2023].
[27] This could also be expressed as *leshilo ga le bethwi marago ga bedi*. The English equivalent of this expression is once beaten, twice shy.

two kids, two boys. If the man owns a shop and has a home as well. So far as succession is concerned, who can help with insight regarding which asset must be inherited by which son? For argument sake, say he has a shop, cattle and a home. How will these assets be distributed?

The engagements proved fruitless as the legal document trumped any cultural knowledge.

In **case 39**, it is said that *mollwane wa tshemo o shekwa mashimong*. Given that it is so, council held that it was not the appropriate *tshemo* to hear the case.

3.2.9. Social clubs

The social clubs enhance a sense of communities coming together to care for one another in various forms. From burial societies that pay a death benefit on the death of a registered member, to social clubs that assist with food parcels when one has a specified type of celebration or party. The aim is to assist financially. The interactions of people in these clubs create issues settled hereunder.

Case 12

The dispute amongst members of the burial society relates to the fact that the general meetings and operations of the society has been reduced to a spectre of profanities and general disrespect by certain elements within the executives. This, as summed up below, threatens to collapse the society at the altar of this distasteful behaviour. For context, the main issue leading to the insults is the change of meetings from 15:00 to 11:00 without due notice of all members or changing the constitution.

Complainant 1: *When we arrived there* (meeting point at a time traditionally agreed)*, we were insulted. We were even told that we are uninitiated.*

Complainant 2: *From time to time at the society, we are at the receiving end of insults. The way insults have become so standard, we even dread going to the meetings. We are always insulted. Profane language is used at will. It is not nice that whenever we go out to the meeting we are insulted, we are tired of that.*

Complainant 3: *We arrived at the meeting point at 15:00 as is the norm but those who met earlier at 11:00 came. I thought they were going to provide us with some updates but instead it was just noise. We were insulted.*

Complainant 4: *We were insulted kgoro. Unfortunately the profane terms used by these people cannot be repeated here, but they were grave. Now my husband is even questioning my reason for attending the society meetings. He insists that if I am going there to be insulted, then it is best that I recuse myself from that society.*

These complainants were invited to be specific about who exactly in the meetings was the chief architect of the insults so the conversation could be more direct. Acording to councillor 3 it had to be specific elements within the society that were acting as alleged. Once identified, the respondents were given a chance to respond.

Respondent 1: *I hear everything that was said before the kgoro. I concede that events happened as alleged…* [Complainant 1] *came to my home around 15:00 to collect the books. She did not knock, she just budged in. I asked her why she was behaving as if she was uninitiated… I followed her to the meeting where indeed insults were exchanged. It was not us insulting them, but it was an exchange of insults both ways.*

The cacophony of insults, according to the first respondent, followed one Julia home. According to her version, the first complainant and an entourage of other burial society members confronted Julia at her home with a barrage of insults. Councillor 1 intervened with a view to mending the relations.

Councillor 1: *All of us have a tendency to speak well of ourselves and none of these people will sit here and admit to insulting anyone. We are going to waste time on this issue. These are just tales because when they leave this hall they are still going to exchange insults. So I want us to proceed in this fashion. Our women, do you still wish to continue with this society?*

Various females: *Yes.*

On this suggestion, this member of council proposed that a senior lady, a Mrs Malatji, to be the responsible person to oversee the peaceful and respectful conduct of a meeting. This portion is discussed in 3.2.2. under intentionality above. Before a decision could be made councillor 6 had his turn to reprimand the disputants for their actions.

Councillor 6: *The problem I have with profanities is that you women tend to exchange that in front of women. You are ruining our children! What type of a community will we have where insults are the order of the day? The children will*

take this behaviour to school as well then we will have problems. We cannot accept these culture of insulting each other that you have started here.

At the end, there was no evidence of any minutes changing the time to 11:00. An inspection of the approved constitution equally noted the starting time as 15:00.

Councillor 8: *… The constitution is clear that the meeting time is 15:00. So we expect that from this moment going forward, the meeting must sit at that time until otherwise agreed…*

The aspect on supervised reconciliation is not repeated here to avoid unnecessary duplication.

Case 24

The facts and dispute in this case is apparent from a reading of the letter by member of kgoro 6.

We lodge a claim against [the respondent] *in respect of the following:*

1. *Monies we sent her to give to the kgoro and*
2. *Fraudulent activities in relation to the books and or records of the society.*

Properly explained, it is alleged that the respondent was given an amount of R100.00 to deliver it to the *Kgoro* as a token of appreciation to it (*Kgoro*) for assistance with a previous issue. What is common cause is that the money never reached *kgoro* though its trail is disputed.

Member of kgoro 8: *Is it true that the society gave you money to give to the Kgoro?*

Respondent: *Yes it is so.*

Chairperson: *We have not received that money.*

Respondent: *If I could be allowed to explain it a bit more. The chairperson* (of the society) *called me to inquire if I still had the money to which I affirmed that the money was still with me. She directed me to return the money to her. On the day of the meeting I returned that money as directed and was told to put it in a bowl. That money was used to purchase loafs of breads for the executive committee of the society.*

This version was disputed by another member of the executive committee who puts it to the respondent that the date of the breads was different. The chairperson attributes this response

to personal issues between herself and the respondent. Her elaboration into the personal issues between herself and the respondent is not relevant to the study nor the resolution of the dispute. Despite the accusations, counter accusations, threats to take the matter "further" and multiple inquiries by *Kgoro* to members of the society, issue number one drew to this conclusion.

> Interested party 1: *Before we drag this matter any further as well as to avoid pointing fingers at each other, through you Kgoro can I ask* [the respondent] *whether she intends to bring the money to this Kgoro or not. This will enable us as a society to take appropriate steps going forwards.*
>
> Respondent: *I will not be able to return money that I gave to you.*

In conclusion on the first issue, seeing that the fact finding inquiries were drawing blanks, *Mokgomana* decided this issue as follows:

> Member of kgoro 9: *Irrespective of the intended recipient of the money, be it Kgoro or Ntona, what is obvious is that it never reached either. Let us not make this an issue of this Kgoro. Let it be resolved by* [the respondent] *and the society. This was intended as a gift that never reached us (Kgoro), so we should not be spending the whole 2 hours prosecuting it. Let us defer it back to the society and proceed to the second issue.*

Upon invitation to do so, the chairperson of the society clarified this issue as follows:

> Interested party 1: *On 31 August* [2022] *…* [the respondent] *came to offer an apology citing a family bereavement as the reason for her absence. She indicated that her brother lost a child though she was not aware of this child as his brother was not married. In response I corrected her language by pointing out that the society benefit scheme was not based on marriage but instead was based on whether the deceased was named as a beneficiary in their books. On Tuesday* (06 September 2022) *I received a call that* [the respondent] *had lodged a claim for payment arising out of the funeral. Unfortunately we did not have electricity that evening. The following day I checked the books where I saw only the name of our member* (the respondent's brother)*, so I checked the forms as there was a time when we did forms* (as an addendum to the books)*. On the forms I only saw* [the respondent's brother] *as the sole member and beneficiary… We called* [the respondent] *to come explain to us as to why she brought a claim for someone*

that was not a named beneficiary in terms of our books. She disputed this by citing that she had a book of her own that showed that the deceased was a named beneficiary of her brother. On closer scrutiny, we realised that the child was added in August (2022) *after* [the separation of the two burial societies] *earlier in July.*

The chronology of events indicate two significant things; firstly, the complainant society separated from another in July 2022. Secondly, and critical to the claim of attempted fraud, the respondent still had access to the books of the other society. It was this access that enabled the lack of correspondence in the books. The respondent, though, lay the blame squarely at the feet of the chairperson for failing to properly manage the books.

Respondent: *There is nothing in your (burial society) constitution which stipulates that a child of a member cannot be a beneficiary even if the child is not recorded in the books. A lot of other societies paid us but you are not willing to pay because you (chairperson) are unable to manage your records.*

Admittedly, the respondent acknowledges that she added the children of her brother as beneficiaries but insists that the chairperson ought to have done the same on her side as well. A reading of the society constitution did not support the claim of the respondent. Clause 4 of that document read as follows.

Member of kgoro 10: *We only bury registered members and their named beneficiaries.*

To support this clause, another member of Meriting made the following address.

Interested party 2: *To show that the addition of the beneficiaries was done in a rush, it was done in a way that confuses me. The deceased child was first on the list, followed by the brother and their mother. From that order it is unclear who actually birthed the other. A normal benefit scheme would have the mother first, followed by the eldest child and then the deceased child. People are registered by the order of their birth. But because this was rushed, it was confusing to us.*

The constitution and this logical submission by a member does not seem to support the claim of the respondent. To further buttress this point, a form was handed to the *kgoro* to demonstrate a normal registration of the beneficiaries. From that example, a member registered herself, her husband and their children on what the burial society members confirmed as a descending order of birth. The decision was that the version put forth by the respondent was improbable.

In **case 32** the social club brings a claim against its former member for leaving the club after being serviced but wihout returning that service to other members. In total, she owes an amount of R5 600.00

> Interested party 11: [The] *club has a grievance. Our club operates through a system of food parcels. So we previously made contributions for the respondent, in 2010 and 2011. Pursuant to our contributions, the respondent withdrew from the club. We wrote her letters to inform her of her debt to us. The responded conceded to owing us without any argument. We inquired into how much she would afford in servicing the debt. She indicated that she would be able to repay us at R400.00 per month. However, the respondent lives with us and we are aware of her circumstances. So as we were not fighting, we agreed with her that she will service the debt at R300.00 per month instead. She commenced with the process of repaying her debt but was not doing so consistently. We did not have a problem with it as she is one of us. But what aggrieved us the most was when the respondent joined a similar club to ours. She participates in the contributions of that club whilst she is unable to pay us what is due. This is what led us here* (Moshate) *today.*

These clubs are called "wheels" in the language of the people in jurisdiction C. What this essentially mean is that the wheel must come full circle; meaning that for every service received from the club, the recipient must at a future time service other members of the club as and when they have a celebration covered in the memorandum of understanding. The respondent in the current case was serviced twice before but left the club before she could service other members. This, the club proves through an accounting book that keeps records of functions and the delivery of the food parcels. In this case, the debt was conceded so there was no need to interrogate the issue of accounts. The outstanding amount was R5 600.00. Council gave the respondent an opportunity to respond to the case brought against her.

> Respondent: *I am unable to pay the amount because my husband is no longer working. I am trying however I can to settle this debt. I was paying R300.00 initially. But they approached me to say that since I was inconsistent in servicing the debt, they were going to hike the repayment to R400.00.*

Interestingly, the respondent went on to allege that she was not well maintained at home hence the inability to service her debt to the club. She inquired from council if it would be possible for them to write her husband a letter summoning him before them so that he could

account as to why he was not maintaining her. This request is obviously raising a new inquiry altogether which council advised the respondent that if she has a grievance she must come to it to formally complain. The club wanted to respond to the issue of the hike in the repayment which request was accepted by council.

> Interested party 11: *We relooked at the issue and her inconsistent repayment. We then considered that things are expensive now, hence we decided to increase the money.*

It is unclear if the respondents were hiking the amount as a response to inflation[28] or if they even have a working knowledge of this term as described in academic discourse. Even if in their own way they attempted to increase the amount beyond its capital, in terms of *SA Eagle Insurance Co Ltd v Hartley*[29] currency nominalism[30] is entrenched in South African law. The issue of currency nominalism was captured in the words of one friend of the litigants in this analogy.

> Interested party 12: *I am touched by this issue that the respondent used to pay R300.00. This amount, as I understand, is geared towards repayment for one person. Now on that issue, if you go to the store to take maize on credit of R100.00. If you take years without repaying the credit, the credit cannot be increased. I will still pay the same amount as that time I took it on credit. So let us not concentrate on the current prices of goods in the shops, instead let us ask how much the respondent owes.*

Councillor 7 assured the respondent that her debt was R5 600.00 but that the complainants want an increase in the amount of the monthly repayment. What was striking by this clarity was a call for members of the club to be sympathetic to the respondent as an indigent person.

> Councillor 7: *We have heard the respondent speak here saying that she is not well maintained at home. I call for calm because I think you can all see that her call is genuine hence she even wanted us* (council) *to summon her husband here to assist with the debt. Her debt remains R5600.00 which cannot be changed.*

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[28] Defined as an economic phenomenon that leads to a sustained rise in the general level of prices or that causes a sustained depreciation in the value of money – Hendrik Delport, 'Inflation and South African Law' (1982) 4 *MBL* 115, 115.
[29] 1990 (4) SA 833 (A).
[30] This means that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of the currency. See *SA Eagle Insurance Co Ltd.* para 839G – H.

At the end, councillor 1 explained the acknowledgement of debt procedure adopted in jurisdiction C. This is discussed in 3.2.7. under debt acknowledgement and not repeated here.

The respondent indicated that she would make a monthly repayment of R400.00. The case was decided on 16 February 2023. At the point of my last visit to this jurisdiction on 18 May 2023, not a single repayment had been made.

Case 33 appears to be more of an inquiry into the affais of a family club than an actual dispute. Complainant approached council citing that she wants to withdraw from the club but that she ought to be repaid for service rendered before leaving.

> Complainant: *I want to withdraw from the club so what I demand is that everyone in the club who I have serviced must pay me back. If I gave you baking flour, I want you to give me baking flour. I do not have much to say, but what I need is for them to pay me what I gave to them previously.*

Besides queries relating to being summoned before council for prosecution, the first speaker on behalf of the club conceded that the complainant was not serviced and that she indeed has a claim against those who did not service her. However, the issue she raised was that the club was never approached by way of a letter of demand, instead they received summons to appear before council. The second speaker claimed to be unaware that the complainant had a function for which she had to be serviced. The first time she learned of this function was through a letter from *Moshate* summoning her to appear and answer to the case against her. The third member was as surprised by the summons from *Moshate* but conceded liability and committed to servicing the complainant.

What is apparent between this family club and the club in case 32 above is that there was a measure of disorganisation about this club. However, despite the issues of memorandum of understandings not being properly constructed, the procedure for claiming service not being very clear, once members of the club conceded liability to the complainant and agreed to service her, the case was over as a contest. It is noteworthy that the complainant was very specific about her claim. She insisted that the goods she bought for any member on any previous occasion must be given back to her. Easy as this sounded, it was difficult in execution as members of the club indicated that the club was down to 16 members from the original 30. Those present put it back to the complainant to find the other members who owed her.

Council members examined the books with the purpose of trying to establish the defaulters. At the end, it was decided that the club be given a period of three months to account for all

members, former or current, who have not serviced the complainant and to return the goods in question. In sum, this turned out to be a discussion about how best to assist the complainant than a dispute between the parties.

4. Chapter conclusion

This chapter presents the evidence of traditional dispute resolution in its own cultural setting. As evidenced by the variety of cases above, traditional dispute resolution is a comprehensive system that is acknowledged and used in the indigenous cosmology. Its use covers a range of different cases that were presented as themes in this chapter. Jurisdiction C saw a disproportionate amount of family disputes, whilst the other two jurisdictions saw a diverse range of issues coming before the respective forums. At the end, the cases intended to restore the social equilibrium of harmony amongst Natives in their interactions with each other.

The chapter has magnified the rich tapestry of traditional dispute resolution and the multitude of possible problems and solutions. It is clear from the different types of cases that were developed into themes in this chapter, that there is no lack of legal imagination, skill and capacity to develop solutions grounded in the shared realities of the locals. Equally, this chapter demonstrates very clearly that the legal imagination of Natives continues to be impeded by intrusive none Native ideology. This intrusion is seen through the treatment of cases of withcraft in jurisdiction A. From this, it is arguable that the intersection between Native reality and or legal imagination continue to be eroded by a foreign epistemic ideal. At the end, the themes identified in this chapter are discussed in chapter 6 through literature.

CHAPTER 6

RESULTS PART II – DISCUSSION OF FINDINGS

1. Introduction

In chapter 5 above, the study data were presented along with themes and sub-themes that emerged. In this chapter, the themes and sub-themes so developed will be discussed and supported by literature and other sources where necessary. The construction of this chapter clearly elucidate the enhancement of the familial and social capitals in the construction of the Natives' justice. Furthermore, the presentation is done with a view to the promotion of the resistant capital as a driver for a reindigenised traditional dispute resolution. In essence, therefore, the chapter is an epistemological de-linking of traditional dispute resolution from the attempt to subvert it to the state law.

2. Procedure – the hierarchy and process of dispute resolution

According to van Loggerenberg, procedure denotes a sense of forwardness.[1] This means that from the perspective of law, it refers to the system through which the disputants move their case from institution right through to finalisation. Critically, according to this author, procedure is often an indication of society's evolution and its needs.[2] Interestingly, in a two piece publication, de Vos sets the socio-political milieu of the South African civil procedure.[3] Unsurprisingly, a close reading of these sources reveal the historical make-up of the South African civil procedure without the influence of Native reality. Read in context, van Loggenrenberg and de Vos reveal a common and consistent feature of the South African civil procedure; *to wit* its evolution, needs and socio-political complexion is not based on the desires of the people similar to those in the cultural setting of the current study. Granted that Theophilopoulos has expressed an opinion on the Constitution's impact on these procedures,[4] nothing suggests the inception of a cultural reality and perspective of law on this distict common law practice. As it were, it is argued in alignment with such authors as Modiri in

[1] Danie Van Loggerenberg, 'Civil Justice in South Africa' (2016) 3(4) *BRICS Law Journal* 125, 126.
[2] *Ibid*.
[3] Wouter de Vos, 'Developments in South African Civil Procedural Law over the Last Fifty Years' (2000) 11(3) *Stellenbosch Law Review* 343 – 357 and Wouter de Vos, 'South African Civil Procedural Law in Historical and Social Context' (2002) 13(2) *Stellenbosch Law Review* 236 – 251.
[4] Constantine Theophilopoulos, 'Constitutional Transformation and Fundamental Reform of Civil Procedure' (2016) 1 *TSAR* 68 – 93.

chapter 2 above that the Constitution resulted in the democratisation of a foreign reality.[5] Taken in this light, traditional dispute resolution is excluded, maligned and marginalised from participating in the promotion of the evolution, needs and socio-political reality of South Africa.

In principle, the above introduction is intended to justify the need to de-link customary procedures from the common law practices in order to clearly appreciate its naunces.[6] Elsewhere, Monyamane bemoans the adulteration of customary law and processes through the corrective influence of other systems and languages foreign to it.[7] This need to avoid cultural adulteration draws from the desirability of including the capital of the Natives in this study.[8] Against this context, the hierarchy and process of dispute resolution is discussed in its cultural location supported by the data in Chapter 5 in particular.

The hierarchy of traditional dispute resolution is captured in clause 6(3) of the Traditional Courts Bill, 2017 which provides as follows:

> The traditional court system is made up of the following levels of traditional leadership as contemplated in the applicable legislation providing for the recognition of traditional leadership and recognised in terms of customary law:
>
> *(a)* a headman or headwoman's court;
>
> *(b)* a senior traditional leader's court;
>
> *(c)* a principal traditional leader's court; and
>
> *(d)* a king or queen's court, where available.

In principle, this cannot be faulted except that, concerning the cultural location of jurisdictions A and C in particular, the clause excludes an important feature of dispute resolution: namely, the foundational structure of the family council. As noted in Chapter 5 above, in jurisdiction C in particular, this structure is insisted upon. Several authors agree that the process of dispute resolution involves negotiation.[9] These authors acknowledge that the negotiation occurs

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[5] Joel Modiri, *The Jurisprudence Of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017) 73.

[6] See Adenike Aiyedun, *Fair Trial and Access to Justice in South Africa: How Traditional Tribunals Cater to the Needs of Rural Female Litigants* (Doctor of Philosophy in Law, University of Cape Town, 2023) who supports the notion to move away from western legal theory 130. At 141 the civilising mission of colonialists are also acknowledged.

[7] Lesetja Monyamane, 'Creating and Sustaining a 'Tunnel Vision' Argument for the Application of Customary Law — A Language Conundrum' (2023) *SAPL* 1, 9.

[8] Toni Glennrich & Laura Dison, 'Voice Matters: Students' Struggle to Find Voice' (2018) 9(1) *Reading and Writing Journal of the Reading Association of South Africa* 1, 1-2.

[9] Patience Sone, 'Relevance of Traditional Methods of Conflict Resolution in the Justice System in Africa' (2016) 46(3) *Africa Insight* 51, 54; Adenike Aiyedun & Ada Ordor, 'Integrating the Traditional with the

between families in what Sone labels an informal *fora*.[10] Whether or not the characterisation is accepted, the family council structure is important towards the ultimate goal of traditional dispute resolution. The omission of this structure from the scope of clause 6(3) results in a failure to fully appreciate the nature of dispute resolution in jurisdictions A and C. Underlying the findings of jurisdiction C, Aiyedun seems to suggest as well that negotiation and the family structure are a prescriptive aspect of traditional dispute resolution.[11] Although it may seem like a bit of an over-stretch to suggest that it is compulsory in every jurisdiction, its significance and role in dispute resolution cannot be ignored. Looked at from the perspective of the current heading, the process is the negotiation and the hierarchy is the base court demonstrated in figure 3.1. On the evidence of the data and the opinions of the quoted authors, there is an inescapable view that process and hierarchy are intertwined.

This is supported by the second stage of dispute resolution called mediation. According to this view, mediation of the dispute occurs through the court of the headman or chief.[12] Evidently, mediation equally refers to the process of resolving the dispute whilst the *fora* speaks to the structures as captured in clause 6(3). Both of these processes, negotiation and mediation, are geared towards reconciliation which is discussed below as the second theme. This process in the traditional courts is said to be based primarily on common sense.[13] Notably, Tshehla seems to suggest a casuistic approach to the procedure of traditional dispute resolution.[14] Underlying this view of casuistry is the notion that cases are moved forward on the basis of a specific party's understanding of the court and its procedure.[15] This view seems to imply that traditional *fora* are unsystematic courts with no specific processes in place. That view is unsupported by the data in the current study.

Contemporary in Dispute Resolution in Africa' (2016) 20 *Law Democracy & Development* 154, 171; MacDonald Rammala, 'Lekgotla and Idiomatic Expressions in Traditional Dispute Resolution: The Case of Makapanstad, North West Province, South Africa' (2021) 16(1) *International Journal of African Renaissance Studies* 220, 226; Tsegai Ghebretekle & Macdonald Rammala, 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' (2018) 12(2) *Mizan Law Review* 325, 336; Adenike Aiyedun, *Fair Trial and Access to Justice in South Africa: How Traditional Tribunals Cater to the Needs of Rural Female Litigants* (Doctor of Philosophy in Law, University of Cape Town, 2023) 122.

[10] Patience Sone, 'Relevance of Traditional Methods of Conflict Resolution in the Justice System in Africa' (2016) 46(3) *Africa Insight* 51 – 66.

[11] Adenike Aiyedun, *Fair Trial and Access to Justice in South Africa: How Traditional Tribunals Cater to the Needs of Rural Female Litigants* (Doctor of Philosophy in Law, University of Cape Town, 2023) 108.

[12] *Ibid* 132.

[13] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 27.

[14] *Ibid*.

[15] *Ibid*.

Similarly, this is different from the notion that traditional courts use a flexible process to dispute resolution.[16] Clause 7(2) only provides for the procedure being in line with customs as quoted below.

> Subject to subsection (3), the procedure at any proceedings of a traditional court, including the notice to attend the proceedings of that traditional court and the manner of preserving the dignity of the traditional court and the manner of execution of any order imposed by it, must be in accordance with customary law and custom.

The attitude to refer to custom and or customary law in whole has created problems elsewhere, most notably those discussed in theme 4 below. The interpretation and application of section 3(1)(b) of the Recognition of Customary Marriages Act[17] (hereunder referred to as the RCMA) is a prime example. Clause 7(2) presupposes knowledge of customary practices by all people living within the jurisdiction of these courts. The danger of the provision is equally captured by the confusion between unsystematic courts and flexible courts as noted above. Even before the legislation is promulgated, it would appear that there are already problems simmering. Furthermore, Somaru and Rautenbach echoe the view that there is mutual knowledge of the procedure and expectations by those who use these courts.[18] The interactions with the courts in the data collection process does not support this confidence. As evidence, in case 5 member of *Kgoro* 4, in his decision, laments the applicant for bringing the action for a change of name on the PTO. In his view, the very nature of the application is based on the applicant's failure to attend *Kgoro* and consequently, ignorance of its laws. Naturally, the poor attendance of *Kgoro* settings in jurisdictions A and B in particular does not seem to support the notion of knowledge of the procedure and or laws. This has the knock on effect of potentially creating problems of interpretation and or application of customary procedures when these are either brought on review (clause 11) or referred to the magistrates' courts (clause 12). The RCMA has created multiple dimensions for the exploration of customary marriages. It would appear that clause 7(2) is following in the same footsteps. The

[16] Adenike Aiyedun, *Fair Trial and Access to Justice in South Africa: How Traditional Tribunals Cater to the Needs of Rural Female Litigants* (Doctor of Philosophy in Law, University of Cape Town, 2023) 129 – 132; Fawzia Cassim & Nombulelo Mabeka, 'The Africanisation of South African Civil Procedure: The Way Forward' (2019) 6(1) *Journal of Law, Society & Development* 1, 16; Navilla Somaru & Christa Rautenbach, 'The Indian Approach to Criminal Justice: The Role of Traditional Courts as Alternative Dispute Resolution Mechanisms' (2020) 53(2) *CILSA* 1, 25; Adenike Aiyedun & Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law Democracy & Development* 154, 173; Patience Sone, 'Relevance of Traditional Methods of Conflict Resolution in the Justice System in Africa' (2016) 46(3) *Africa Insight* 51, 62.

[17] Act 120 of 1998.

[18] Navilla Somaru & Christa Rautenbach, 'The Indian Approach to Criminal Justice: The Role of Traditional Courts as Alternative Dispute Resolution Mechanisms' (2020) 53(2) *CILSA* 1, 23.

advancement of a flexible procedure has the corresponding effect that there is no cumbersome adherence to rigid rules.[19] Additionally, clause 7(9) makes provision for the language(s) used in these courts.

> (9) Subject to the provisions of subsection (10), the proceedings and records of traditional courts, as contemplated in section 13, must be in the language most widely spoken in the area of the traditional court in question.

The practicality of the clause is endorsed by authors on the subject of traditional dispute resolution.[20] What is notable about the procedure in these courts, at least as far as Rammala is concerned, is that the approaches used in the different jurisdictions share some similarities though differences exist as well.[21] Aiyedun and Ordor situated their narration of traditional dispute resolutions in other parts of the Limpopo Province and detail the procedures observed there.[22] As a point of departure, there is no indication in their work on how proceedings commence in these courts. That is, how do these courts secure the attendance of a party to a case? Clauses 4(4)(a) and 5(4)(b) makes reference to the use of summons in traditional dispute resolution. Despite this reference, the Bill does not set out to expressly deal with the issue of traditional dispute commencing by way of a summons. This creates an anomaly in light of this reference to summons read in conjuction with the provisions of clause 7(3)(b)(i) quoted below.

> During its proceedings, a traditional court must ensure that -
>
> (b) the following rules of natural justice are adhered to:

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[19] Navilla Somaru & Christa Rautenbach, 'The Indian Approach to Criminal Justice: The Role of Traditional Courts as Alternative Dispute Resolution Mechanisms' (2020) 53(2) *CILSA* 1, 25; Adenike Aiyedun & Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law Democracy & Development* 154, 162.

[20] Adenike Aiyedun & Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law Democracy & Development* 154, 169; Navilla Somaru & Christa Rautenbach, 'The Indian Approach to Criminal Justice: The Role of Traditional Courts as Alternative Dispute Resolution Mechanisms' (2020) 53(2) *CILSA* 1, 26; Adenike Aiyedun, *Fair Trial and Access to Justice in South Africa: How Traditional Tribunals Cater to the Needs of Rural Female Litigants* (Doctor of Philosophy in Law, University of Cape Town, 2023) 152; Patience Sone, 'Relevance of Traditional Methods of Conflict Resolution in the Justice System in Africa' (2016) 46(3) *Africa Insight* 51, 60; Kgopotso Maunatlala & Charles Maimela, 'The Implementation of Customary Law of Succession and Common Law of Succession Respectively: With a Specific Focus on the Eradication of the Rule of Male Primogeniture' (2020) 53 *De Jure* 36, 51.

[21] MacDonald Rammala, 'Lekgotla and Idiomatic Expressions in Traditional Dispute Resolution: The Case of Makapanstad, North West Province, South Africa' (2021) 16(1) *International Journal of African Renaissance Studies* 220, 221.

[22] Adenike Aiyedun & Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law Democracy & Development* 154, 169-171.

(i) That persons who may be affected by a decision must be given a fair hearing by the traditional court before the decision is made.

Notwithstanding the claim that the conduct of disputes must be in terms of custom, all other indications seems to suggest that the legislature intends there to be the use of summons. Failure to use these summons would naturally lend itself to difficultis so far as compliance with the natural justice spoken off above. It is arguable that this would create a minefield of future disputes regarding what is customary and or whether the affected party had been notified of a suit against them. The danger is further enunciated by the view that customary law is not static.[23] Perhaps underscoring this evolution in the jurisdictions observed, summons are used to secure the attendance of parties to the suit. These are attached as Appendixes 4 to 6 below.

Interestingly, an element of cross-examination was observed in some regions.[24] In the current study, this was more of an exception than the norm. These were only observed in cases 17 and 18 in jurisdiction A, as recorded in the previous chapter. Largely, Tshehla is correct to aver that traditional dispute resolution is inquisitorial.[25] Another interesting point of difference is regarding the taking an aoth by parties to the suit.[26] This aspect was not observed anywhere in the three jurisdictions. Other than this notable distinctions, the authors are within reason to aver that there are some universally shared notions of justice amongst the respective tribal authorities.[27] Whilst these view is indicative of the generic nature of traditional dispute resolution, certain issues developed in the current study merited a discussion as sub-themes of procedure. These were either unique to the study or are magnified here to support the notion of traditional dispute resolution as a comprehensive system in its own right.

2.1. Correct forum

Clause 6(3) makes provision for a layered system of traditional dispute resolution. The definitions of the terms "senior" and "principal" traditional leader are provided for in Act 3 of 2019. Two issues arise from this clause. On the one hand, and from the data collected, it is unclear which specific court would qualify as that covered by clause 6(3)(c). On the other hand, there is the referral of these courts functioning in terms of customary law. It is argued

[23] Adenike Aiyedun & Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law Democracy & Development* 154, 155.
[24] *Ibid* 169.
[25] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 27.
[26] Adenike Aiyedun & Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law Democracy & Development* 154, 170.
[27] *Ibid* 171.

above that subjecting the application of a norm to customary law and or custom presents limitless opportunies for future disputes. If the RCMA is the precedence set, then the law of the courts and the law of the Natives will continue to differ. This will continue to birth paper law as bemoaned by Manthwa,[28] and create a fertile ground for opportunistic litigation as similarly created in Act 120 of 1998.[29]

It is argued that the structure of the courts in figure 3.1 best represent jurisdiction A. There is a temption to argue that the structure in jurisdiction B is represented by the provisions of clause 6. In this jurisdiction, there is an appearance of *Kgoro ya Bakgomana* as evinced by case 23. It is tempting to categorise this forum as that of a senior traditional leader's court. This would appear both logical and practical in keeping with the structure of traditional leadership here. However, there is also *Kgoro ya Bakgoma* in this jurisdiction. This underlies the fact that seniority is layered as well in terms of indigenous cosmology. This fact of layered seniority is not at all factored in the Bill. Jurisdiction C is neither represented by figure 3.1 nor the provisions of clause 6. That is because in this jurisdiction, council plays a starring role in dispute resolution. The councillors do not qualify in terms of the definitions of the structures herewith.

Another issue with the sustenance of the potential minefield for future disputes is in relation to the missing clarification of the powers of each structure. In the data collected, case 39 makes it clear that the flexibility of the system does not create a free flow in the system. One must institute suit in the correct forum. In essence therefore, it is critical to outline the powers of each structure in the same breath that the state courts are specifically regulated by statute. The idea would be to enhance traditional dispute resolution and not to create fertile grounds for future dispute.

2.2. Legal standing

Clause 4 makes provision for the issue of legal standing in these courts in the following terms:

> 1(a) Any person may, subject to subsection (3), institute proceedings in respect of a dispute in any traditional court.

[28] Tshepo Manthwa, 'Handing Over of the Bride as a Requirement for Validity of a Customary Marriage - *C v P* (1009/2016)' (2019) 82 *THRHR* 652, 657.
[29] Mpho Bapela, & Lesetja Monyamane, 'The "Revolving Door" of Requirements for Validity of Customary Marriages in Action – *Mbungela v Mkabi [2019]* ZASCA 134' (2021) 42(1) *Obiter* 186, 192.

The provisions of this clause are different from those in section 38 of the Constitution.[30] The rationale for a vague scope of clause 4 cannot be fathomed nor sustained. From the premise of the Bill, the provisions of clause 7(3)(a) demands for traditional dipute resolution to promote the rights in chapter 2 of the Constitution. It is noted that in the other system, the Constitution demands the evolution of civil procedure to be aligned.[31] The respect that this Constitution demands does not seem to be underlined by the provisions of clause 4. Whether this is a slight oversight or the negligible draftsmanship in the scope of customary law is debatable. The question is, who is anyone? Case 6 raises questions on the issue of legal standing to institute an action in this *fora*. It is reasonable to infer that this case was decided on the need to prevent third parties from meddling in other people's affairs.[32] In principle, the case was decided correctly on its facts. Be that as it may, the legislature could express itself better in order to advance its constitutional re-positioning of traditional dispute resolution.

2.3. Cross-section with other forms of justice

In the data collection process, a few intersections with the state's other legal apparatus was observed. Cases 1 and 38 suggest a mutual relationship of respect between the SAPS and traditional *fora* in jurisdictions A and C. Notwithstanding that implied relationship, clause 4(2)(b) seems to suggest no functional co-operation.

> A traditional court may not hear and determine a dispute which —
>
> (i) is being investigated by the South African Police Service;
>
> (ii) is pending before any other traditional court or any other court; or
>
> (iii) has already been finalised by a court, which means that a verdict has been given in a criminal matter or final order has been made by the court in a civil matter.

On closer examination, in case 1, the final decision taken was to seek clarity from SAPS regarding the handling of a case by one of the members of that *Kgoro*. On the other hand,

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[30] Anyone listed in this section has the right to approach a competent court, alleging that a rightin the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declarationof rights. The persons who may approach a courtare-
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an associationacting in the interest ofits members.

[31] Constantine Theophilopoulos, 'Constitutional Transformation and Fundamental Reform of Civil Procedure' (2016) 1 *TSAR* 68 – 93.

[32] *Ibid* 80.

case 38 was an initiative by council to seek the assistance of the SAPS with the execution of a judgment. Case 31 dealt with issues brought in that were pending before magistrates' court through the criminal prosecution. Council decided to defer the whole matter to the other state apparatus. The inferiority complex of the system could be inferred,[33] or at the very least the other apparatus are privileged by the text of clause 4(2)(b).

This privileging is nowhere clearer than in case 27 where traditional succession is neutralised by a legal document from the magistrates' court. This privileging of the common law of succession is nothing new. From an academic perspective, the *Law of Succession* textbook, for example, devotes a lot of space to commenting on the limitations of customary succession than its actual fabric.[34] From chapter 3 through to chapter 13, the textbook expresses this limitation at the end in a paragraph or two on average. This does nothing more than continue to privilege the common law as the system more expansively discussed. This attitude seem to belly that of the courts[35] in such judgments as *Bhe v Magistrates, Khayelitsha*.[36] According to Ntlama, the Constitutional Court privileged a common law reality in coming to a decision to declare section 23 of the BAA unconstitutional.[37] Morodu and Maimela characterise this privileging as subversion of customary law.[38] Significantly, the privileging of the common law through the *Bhe* decision has resulted in the promulgation of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.[39] This legislation promoted the application of the Intestate Succession Act 81 of 1987 which was initially intended by the court as a temporary measure.[40]

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[33] Patience Sone, 'Relevance of Traditional Methods of Conflict Resolution in the Justice System in Africa' (2016) 46(3) *Africa Insight* 51, 58.
[34] Juanita Jamneck et al, *The Law of Succession* (3rd ed., Oxford, 2017).
[35] Chuma Himonga, 'The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession' (2005) *Acta Juridica* 82, 83.
[36] 2005 1 BCLR 1 (CC).
[37] Nomthandazo Ntlama, 'The Centrality of Customary Law in the Judicial Resolution of Disputes that Emanate from it – *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC' (2019) 40(3) *Obiter* 202, 209.
[38] Ntebo Morodu, & Charles Maimela, 'The Indigenisation of Customary Law: Creating an Indigenous Legal Pluralism Within the South African Dispensation: Possible or Not? (2021) 54(1) *De Jure* 54, 61-62. In Kgopotso Maunatlala & Charles Maimela, 'The Implementation of Customary Law of Succession and Common Law of Succession Respectively: With a Specific Focus on the Eradication of the Rule of Male Primogeniture' (2020) 53 *De Jure* 36 this is characterised as creating a discord between customary law and the common law 37.
[39] Julia Sloth-Nielsen & Lea Mwambene, 'Talking the Talk and Walking the Walk: How Can the Development of Africa Customary Law Be Understood' (2010) 28(2) *Law in Context: Socio-Legal Journal* 27, 33.
[40] Ntebo Morodu, & Charles Maimela, 'The Indigenisation of Customary Law: Creating an Indigenous Legal Pluralism Within the South African Dispensation: Possible or Not? (2021) 54(1) *De Jure* 54, 62.

It is unsurprising that clause 4 privileges other forms of justice at the expense of customary justice. In fact there is considerable privilege of the common law and other state apparatus at the expense of customary law and its legitimate systems.[41] The overall feeling from the cases observed is an expression of an inferiority of the complex of traditional *fora* in so far as their interaction with other justice apparatus.

2.4. Default judgment

Clause 7(3)(b)(i) makes reference to the dictates of natural justice. Cassim and Mabeka endorse the view that this provision support the application of the *audi alteram partem* rule.[42] On top of agreeing with this view, Aiyedun and Ordor opine further that traditional dispute resolution applies the *nemo judex in causa sua*.[43] This principle implies that a person may not adjudicate over their own case.[44] Case 23 is proof of the application of this principle in jurisdiction B.

On the question of traditional dispute *fora* exempting from natural justice prescribed by the *audi alteram partem* rule, cases 20 and 38 in jurisdictions B and C respectively appear to be the exception more than the norm. A close reading of the cases suggest that the decisions taken were based more on the circumstances than rules. Evidently, it is argued, traditional dispute can where necessary respond to the issues at hand in order to give an appropriate decision. In case 20, *Kgoro* was moved to think the respondent was bullying the female children that were his neighbours. His failure to honour the summons coupled with the fact that a delivery could not be made at the complainant's residency due to lack of access suggested that the issue could not be delayed. In case 38, on the other hand, council deemed the complainant's action undesirable in light of the fact that the respondents travelled from another province to honour the suit. That the complainant was a local who opted not to honour the hearing prompted council to take a decision. As such, this is evidence of casuistry and a comprehensive system of inquiry that is responsive. The responsive nature of this *fora* should not be confused with the correctness of the procedure, however.

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[41] Chuma Himonga, 'The Constitutional Court of Justice Moseneke and the Decolonisation of Law: Revisiting the Relationships between Indigenous Law and Common Law' (2017) *Acta Juridica* 101, 103.
[42] Fawzia Cassim & Nombulelo Mabeka, 'The Africanisation of South African Civil Procedure: The Way Forward' (2019) 6(1) *Journal of Law, Society & Development* 1, 12.
[43] Adenike Aiyedun & Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law Democracy & Development* 154, 163.
[44] *Ibid*.

2.5. Single person inquiries

Two arguments are enhanced by this sub-theme of procedure: Firstly, traditional dispute resolution is a comprehensive system of law in its own right. Secondly, there is a marginalisation of an African reality and or experience in legal texts.[45] To arrive at this conclusion, one attempts to underlie the emphasis dispute is given in the preamble to the Bill. The relevant portions are quoted in full for context of that emphasis.

> … **AND SINCE** it is necessary to replace the current legislative framework in terms of which *disputes are resolved in terms of customary law*, in line with constitutional imperatives and values, including the right to human dignity, the achievement of equality and the advancement of human rights and freedoms;
>
> **AND SINCE** it is necessary to have a single statute applicable throughout the Republic, regulating the *resolution of disputes in traditional courts* in accordance with the Constitution;
>
> **AND RECOGNISING** that the Constitution recognises customary law as a legal system that lives side by side the common law and legislation;
>
> **AND RECOGNISING** that the Constitution guarantees everyone the right of access to the courts as contemplated in Chapter 8 of the Constitution *for purposes of resolving their disputes*;
>
> **AND FURTHER RECOGNISING** that customary law plays an integral role in the *resolution of disputes in communities* between members of those communities who observe the accepted practices and customs applicable in those communities;
>
> **AND FURTHER RECOGNISING** that the flexibility of customary law provides for consensus seeking and the prevention of and *resolution of disputes and disagreements*;
>
> **AND FURTHER RECOGNISING** that everyone has the right to *have any dispute that can be resolved* by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum;
>
> **AND FURTHER RECOGNISING** that there are *different levels of dispute resolution* in terms of customary law, in addition to the role played by traditional courts. [Emphasis added]

From the foregoing, it is clear that the overriding purpose of the promulgation of the Bill is disputes. This fact cannot, on its own, be faulted. However, understood in the proper cultural

[45] Lesetja Monyamane, 'Creating and Sustaining a 'Tunnel Vision' Argument for the Application of Customary Law — A Language Conundrum' (2023) *SAPL* 1, 9.

setting that Rammala invites us to, *Kgoro* is more than a dispute resolution platform.[46] It is a platform that discusses a variety of issues,[47] including but not limited to disputes and other matters of public interest. The observance of single person issues in all three jurisdictions is consistent with the view that traditional dispute resolution is comprehensive. Cases 5, 19 and 28 all speak to pressing issues in the indigenous cosmology. These issues were discussed, negotiated and mediated with a view to reaching a solution that ensures the upkeep of the communitees as discussed in 3 below. The Bill makes no provision for this aspect of traditional justice and as such it is deficient in that respect. The comprehensive nature of traditional justice must be underlined in the Bill itself to ensure its legal protection.

2.6. Hearsay (probative value)

Section 3 of Act 45 of 1988 makes provision for the application of hearsay in the other system not covered by the present study.[48] In the current Bill, no attempt is made to address this

[46] MacDonald Rammala, 'Lekgotla and Idiomatic Expressions in Traditional Dispute Resolution: The Case of Makapanstad, North West Province, South Africa' (2021) 16(1) *International Journal of African Renaissance Studies* 220, 227.

[47] *Ibid*.

[48] (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -
(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
(c) the court, having regard to -
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.
(4) For the purposes of this section -
'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

point of contention. It is tempting to aver that since the provisions of this section apply to proceedings in criminal or civil proceedings, this can and must equally be applicable to customary dispute resolution. To justify this temptation, traditional *fora* has capacity to hear civil and criminal proceedings in terms of sections 12 and 20 of the BAA respectively. However, before that conclusion can be reached, one must be alive to the view that participants in traditional justice are at liberty to submit anything they deem appropriate to the case.[49] Evidently, this has the implicit impression that there are no such limitations including on hearsay in traditional *fora*.

From the data, case 11 is an interesting one. The very basis of the complaint was a third party's account that the respondent had accused the complaint of the practice of witchcraft. Councillors neither dismissed this notion nor did they expressly ask for the claims to be supported by the third party herself. What was evident though, was that at the end the claims were supported by the third party when invited to speak to the issues according to her knowledge. It would seem, that was more in support of the Tshehla assertions than the legal requirement to corroborate the hearsay. In case 21, on the other hand, hearsay is equated to gossip with little significance in the process of traditional dispute resolution. There exists a potential risk that the attitude of this court to hearsay evidence would be challenged in future. To negotiate this potential risk, it would be advisable for the legislature to express itself on this issue. The question is whether this is of value to the process of dispute resolution or it is merely gossip?

2.7. Inspection

Whilst the argument for a comprehensive system is enhanced by this heading, the ability of the Bill to fully manage that system is diminished as well. In *Abdullah v S* the inspection *in loco* is notable for two primary reasons: one, enabling a *fora* to trail evidence given orally and; two, enabling the court to observe the evidence so given orally.[50] Nothing suggests that *Kgoro ya sechaba* in jurisdiction A and council in jurisdiction C was acting on the strength of the law as advanced by the SCA in *Abdullah*. Despite this, the respective jurisdictions made decisions that, to some extent, support the pronouncements of that case. In cases 13 and 18 respectively, the declaration for inspection was made with the view to a supervised and or negotiated agreement between the parties. In case 13 in particular, the call was made on the strength of contrasting evidence by the disputants. In cases 37 and 45, on the other hand,

[49] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 27.
[50] (134/2021) [2022] ZASCA 33 at para 24.

the inspection was made with a view to facilitating the decisions of council. In both of these cases, oral evidence was followed, observed and then a finding made as required by *Abdullah*.

At the end, it is argued that the procedure in customary courts is not as simple and easy as one woud imagine. The data supports a notion of a comprehensive procedure and system of law. From the discussion above, it is apparent that none of the sub-themes as developed through the ethnographic study is covered satisfactorily by the text of the current Bill.

3. Reconciliation - Primary purpose of traditional dispute resolution

Literature is abound on the premise that the very essence of traditional courts is to usher a sense of restorative justice amongst parties to the suit.[51] The natural consequence of this view is that punishment plays a limited role in this *fora*.[52] In fact, this view of restorative justice in traditional courts is expressed from clause 1 of the Bill and augmented in clause 6(2)(d) in the following terms:

> Traditional courts must be constituted and function under customary law so as to — …
>
> (d) resolve disputes where they have occurred, in a manner that promotes restorative justice, Ubuntu, peaceful co-existence and reconciliation, in accordance with constitutional imperatives and the provisions of this Act.

From the above, it is clear that the Bill's intention is to ensure the achievement of the primary goal of traditional justice. The long and short of it is that through restorative justice, traditional courts in a real sense manifests the actual values and norms that underlie traditional life.[53] These norms and values are espoused by the notion of *Ubuntu.* The essence in terms of indigenous cosmology is that *motho ke motho ka batho* which presents an overriding need for community orientation in all aspect of interaction.[54] Care must be taken to read with suspicion, such arguments by authors like de Souza that an overriding emphasis on the community may have the adverse effect on the rights of the individual.[55] Such views, good

[51] Kgopotso Maunatlala & Charles Maimela, 'The Implementation of Customary Law of Succession and Common Law of Succession Respectively: With a Specific Focus on the Eradication of the Rule of Male Primogeniture' (2020) 53 *De Jure* 36, 39.
[52] Monica de Souza Louw, 'Evolution of Provisions Relating to Violence against Women in South Africa's Traditional Courts Bill' (2020) *Acta Juridica* 87, 106.
[53] Tsegai Ghebretekle & Macdonald Rammala, 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' (2018) 12(2) *Mizan Law Review* 325, 337.
[54] *Ibid* 328. See also Kathryn Coe, Craig Palmer & Khadijah elShabazz, 'The Resolution of Conflict: Traditional African Ancestors, Kinship, and Rituals of Reconciliation' (2013) 3(2) *African Conflict and Peacebuilding Review* 110, 117.
[55] Monica Monica de Souza Louw, 'Evolution of Provisions Relating to Violence against Women in South Africa's Traditional Courts Bill' (2020) *Acta Juridica* 87-133.

intentions notwithstanding, saddle the values and norms of customary law with a burden to prove the significance of individualism. Markedly, the attitude similar to this cannot be sustained in the current study. One must appreciate the worldview of the people and their cultures in meaning making.[56] Additionally, it is incorrect to assume that being merged in the greater whole amounts to the deprivation of individual choices.[57] Obviously, if one accepts that traditional justice advances *Ubuntu,* it must then be understood as advancing kinship embedded within the individual and societal values.[58] That is, it is not a contest of the individual against an over-powering community. Instead, it is a desire to advance the ethical ideal embodied by *Ubuntu*.[59]

This view is centred on the notion that social relations in the indigenous cosmology are based on kinship.[60] From the collected data, case 20 supports Coe, Palmer and elShabazz's view. While care must be taken to acknowledge the heated nature of the conversation, it was noted at the end that the conflict should not blind members of *Kgoro* to the real sense that they may all be related to each other in some form or another. In a real sense, the actions of the respondent threatened to damage a yearning for harmony by *Kgoro*.[61] It is noteworthy that the authors, Coe, Palmer and elShabazz, opine that the notion of reconciliation must be culturally learned.[62] Despite the broadly unanimous agreement amongst writers on the topic that reconciliation is the ultimate goal of traditional courts, not much is said on the cultural training of it.

In case 40 it was observed that the reconciliation felt forced in respect of the first and third respondents. In view of this observation, it would appear that there is an absent sense of education on this aspect. Be that as it may, the case, read with case 23, attested to the ritual of reconciliation.[63] This refers to a display of some activities and or gestures performed in a

[56] Andreas Velthuizen, 'Applying Endogenous Knowledge in the African Context: Towards the Integrated Competence of Dispute Resolution Practitioners' (2012) 42(1) *Africa Insight* 73, 76-77.
[57] Tshepo Manthwa, *Re-ordering the Existing Legal Hierarchy to Reinstate African Law to its Rightful Place as the Primary Component of the Legal System of South Africa (Azania)* (LLD thesis, UNISA 2022) 185.
[58] Andreas Velthuizen, 'Applying Endogenous Knowledge in the African Context: Towards the Integrated Competence of Dispute Resolution Practitioners' (2012) 42(1) *Africa Insight* 73, 79.
[59] Andreas Velthuizen, 'Applying Endogenous Knowledge in the African Context: Towards the Integrated Competence of Dispute Resolution Practitioners' (2012) 42(1) *Africa Insight* 73, 79.
[60] Kathryn Coe, Craig Palmer & Khadijah elShabazz, 'The Resolution of Conflict: Traditional African Ancestors, Kinship, and Rituals of Reconciliation' (2013) 3(2) *African Conflict and Peacebuilding Review* 110, 117.
[61] *Ibid* 114.
[62] *Ibid*.
[63] *Ibid* 118.

specific place and designed to influence otherworldly entities or forces.[64] Amongst the rituals of reconciliation, handshakes and embracing are identified.[65] From the data, a handshake occurred in case 23 while an embrace was observed between the complainant and the first respondent in case 40. It is notable that reconciliation can happen through offerings of food and drinks as well.[66] Nothing suggests that money cannot be added as a form of an offering. For that reason, and although the discussion by the authors speak to the offer being made by the offenders of social harmony, in case 9 it was the complainant who offered to pay *vula-vala* for herself and her siblings who were respondents in the case. In a practical sense, the data herewith supports the theory advanced by the authors hitherto.

In conclusion, Baloyi *et al* argue through an empirical study of their own that traditional dispute resolution promote *Ubuntu* and peace in the societies in which it is used.[67] Interestingly, the authors advance the notion that the usurpation of this *fora* in Vatsonga communities by the state courts has created space for vigilantism to fester.[68] It is debatable whether the same conclusion can be reached in other jurisdictions. In 2.3. above an unfavourable intersection between customary law and the state's law is presented. The conclusion reached there is that customary law retains an inferior complex in its relationship with the other law as observed in case 27 in particular.

4. Dispute over land

The case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*[69] offers quite an insightful history lesson on the chequered past of disposition caused by colonialism and apartheid. From artice 13 of the Pretoria Convention, 1881, the Black Land Act[70] and Native Trust and Land Act[71] these legislations were intended to deprive Natives of most of the land in South Africa.[72] This position was consolidated in the BAA and furthered in other apartheid legislations.[73] The effect of these legislations is that the creation of the communal system in rural areas is a legislative design as opposed to an inherent indigenous

[64] *Ibid*.
[65] *Ibid* 119.
[66] *Ibid*.
[67] WA Baloyi et al, '"When the law fails to serve us, we must serve as the law": The Role of Traditional Leaders in Conflict Resolution at Bungeni, Limpopo Province' (2022) 1(2) *AJLJS* 61, 77-78.
[68] *Ibid* 65.
[69] (CCT100/09) [2010] ZACC 10.
[70] 27 of 1913.
[71] 18 of 1936.
[72] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10 at para 10-12.
[73] *Ibid* para 16.

system. Be that as it may, the court in *Tongoane* accepted the notion that communal land is managed in terms of indigenous law.[74] It is arguable that the bad faith attained through the promulgation of the Black Land Act, 1913 and the legislative design of indigenous rule over Native land was always going to present notable challenges over land once there was regime change. This is proved by the factual matrix of the *Tongoane* judgment.

Four communities, which are Kalkfontein, Makuleke, Makgobistad and Dixie challenged the post constitutional reform that was envisaged through the promulgation of the Communal Land Rights Act 11 of 2004.[75] It was their collective case that communal land is managed according to customary law.[76] Therefore, by creating new mechanisms such as those under the Communal Land Rights Act, 2004 their tenure as protected under customary law will be compromised.[77] In consideration of the procedural aspects relevant to the legislative process, the Constitutional Court agreed with the communities that indeed the Act attempted to substitute customary law with a different mechanism.[78] The essence, therefore, is that upon the declaration of the Act as unconstitutional in whole,[79] the position of Native land requires constitutional reform as required by section 25(5) of the Constitution.[80] The discussion that follows must be understood against the context created herewith.

Land and land ownership or use in the indigenous cosmology carries a different meaning and understanding according to Mailula.[81] In terms of this view, Natives form an intimate relationship with the land through a combination of spiritual rituals.[82] These rituals and the significance they hold for the land creates complexities that a different worldview of the land may not always comprehend.[83] This, at least as far as some authors are concerned, creates difficulties in the articulation of Native land rights.[84] Difficulties, though, must be distinguished

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[74] *Ibid* para 21.
[75] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10 at para 18.
[76] *Ibid* para 31.
[77] *Ibid* para 33.
[78] *Ibid* 96.
[79] *Ibid* 112.
[80] The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
[81] Douglas Mailula, 'Customary (Communal) Land Tenure in South Africa: Did *Tongoane* Overlook or Avoid the Core Issue' (2011) 4 *Constitutional Court Review* 73, 73-74. This view differs materially from that of Olivia Zirker, 'This Land Is My Land: The Evolution of Property Rights and Land Reform in South Africa' (2003) 18(2) *Connecticut Journal of International Law* 621, 621.
[82] *Ibid*.
[83] *Ibid* 75.
[84] Anne Pope, 'Get Rights Right in the Interests of Security of Tenure' (2010) 14(1) Law Democracy & Development 1, 3.

from inferiority of the Native land rights.[85] The idea, as advanced by Pope is that Native land rights are different from those created by other systems of law.[86] Naturally, this should mean that the interrogation of tenure as provided for by section 25(6)[87] of the Constitution requires an appreciation of Native land epistemology. Some suggest that the tenure of Natives should result in a socially embedded security to underlie indigenous cosmology.[88] The idea of this socially embedded tenure is discussed through the following sub-themes developed in this study.

4.1. Right to title

The capacity to hold title lies in the definition of communal land tenure. This is defined as "embedded in a range of social relationships where land rights are inclusive rather than exclusive, being shared and derived from accepted membership of a social unit".[89] From this definition we learn that kinship plays a significant role in terms of indigenous cosmology. This view endorses the notion that birth is one of the primary consideration of kinship.[90] Case 14 confirms the view encompassed in the definition and its support by Pope. Secondary to the right to title are the components that support that tenure. According to Tlale this involves the breadth, duration and assurance of that title.[91] Of significance to the study is the breadth component. This alludes to the extent of the right of use of the land. Case 17 is important to the limitations that jurisdiction A imposes on its constituency's capacity to use the land.

4.2. Unauthorised occupation

Generally, unauthorised occupation of land is gorverned by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.[92] The Preamble to the Act provides a fair scope of

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[85] *Ibid*. Distinguish this view from some propositions advanced in Gerrit Pienaar, 'The Need for a Comprehensive Land Administration System for Communal Property in South Africa,' (2007) 70(4) *THRHR* 556 that suggest that these right are inferior 557.
[86] Anne Pope, 'Get Rights Right in the Interests of Security of Tenure' (2010) 14(1) Law Democracy & Development 1, 3.
[87] A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
[88] Jushua Mawere et al, '"Much Ado about Nothing": A Review of Communal Land Laws in South Africa' (2021) 56(2) *Journal of Public Administration* 233, 246.
[89] Gerrit Pienaar, 'The Land Titling Debate in South Africa' (2006) 3 *TSAR* 435, 435.
[90] Anne Pope, 'Get Rights Right in the Interests of Security of Tenure' (2010) 14(1) Law Democracy & Development 1, 9.
[91] Mpho Tlale, 'South african Customary Land Tenure (In)security: Is There Hope under the Communal Law Tenure Bill? (2022) 85(1) *THRHR* 50, 55.
[92] 19 of 1998.

the Act's objectives. However, the discourse of this element would do nothing to support the study findings in that in case 25, which dealt with unlawful occupation of communal land, the issue did not turn on eviction but instead was geared towards confirmation of that occupation in terms of local customs. In that case, the respondents were entitled to title by means of birth[93] but had not paid monies due to *Moshate.* The prosecution of the cases aligned with theme 2 above as an endeavour to ensure that the respondents were in harmony with *Moshate*.

4.3. Communal interests

According to Piennar, the system of communal land tenure is layered and inclusive.[94] Thus, in the embedded social structure, the rights are shared by all inhabitants based on a combination of individual use (one's allocated stand), communal use (public spaces shared by all) and mixed interests (regulated according to custom).[95] The communal and mixed uses are explained with reference to the collected data. Case 21 is a classic example of communal use. As per the facts, the farmers approached *Kgoro* to demand enforcement of the right to graze livestock in the space demarcated for such. In the network created by title in jurisdiction B, the farmers were entitled to grazing land and as such *Kgoro* granted them that wish. With regards to mixed uses, this speaks to seasonal interests that overlaps between the individual use and communal interests.[96] Cases 8 speak to mixed interests. During the sowing season beginning in October and reaping season ending April/May, the ploughing fields are individualised.[97] In the winter months beginning May through the the sowing season, the field is available for grazing, which is a communal interest.[98] This is in accordance with the social dynamics of the indigenous cosmology.

Care must be taken to note that the promotion of the communal interest according to customary law and customs operates under a functional system.[99] There is a notion that the

[93] Anne Pope, 'Get Rights Right in the Interests of Security of Tenure' (2010) 14(1) *Law Democracy & Development* 1, 9.
[94] Gerrit Pienaar, 'Regulating Communal Land Rights: The Story Continues' (2009) 72(1) *THRHR* 1, 13.
[95] *Ibid*. Nina Braude, 'A "Uniform Procedure" for All Expropriations? Customary Property Rights and the 2015 Expropriation Bill' (2017) 28(1) *Stellenbosch Law Review* 68, 73.
[96] See Mpho Bapela & Lesetja Monyamane, 'The Vexed Question of Customary Law 'Ownership' of Sacred Waters – A Real or Imagined Dispute Post Constitutionalism?' in Jill Robbie & Bram Akkermand (eds) *Property Law Perspectives VII* (Eleven International Publishing 2021) who indicate the overlapping period of mixed uses in rural Limpopo province 74.
[97] *Ibid*.
[98] *Ibid*.
[99] Gerrit Pienaar, 'The Need for a Comprehensive Land Administration System for Communal Property in South Africa,' (2007) 70(4) *THRHR* 556, 560.

state of anomie has potentially created a system through which traditional leadership is undermined.[100] Essentially, this would mean that the elements that fail to recognise the role of traditional leadership in the management of the communal land threaten the interests of all. Whilst the reasons for this anarchy may be many, the abuse of rights by traditional leaders themselves play a significant role.[101] Case 20 had the potential for the abuse with the threat made by member of *Kgoro* 4 to "tear the *yellwana* (PTO)" of the respondent apart because of his hostile attitude towards the traditional leadership. There are potential pitfalls in the system which, unmistakably, will enhance arguments that communal land tenure is insecure or even inferior.[102] However, a proper interchange between individual, communal and mixed land use rights actually enhances the communal rights of everyone in the indigenous cosmology.

5. Customary marriages – completion of marriage

Customary marriages are regulated under the RCMA. The requirements for validity are provided for in section 3(1).[103] Divorced from the context discussed below in 5.1. these requirements appear simple and unproblematic.[104] In reality it is not so, as acknowledged in the opening paragraph in *Moropane v Southon*.[105] The main issue, it is contended, is the overriding influence that flexibility of customary law has had on the courts. In particular, there is a willingness by the courts to accept that Western influences have altered customary law and how marriage rituals are practiced.[106] This willingness to civilise Natives in line with Western ideology can be observed from a reading of the RCMA in total.[107] According to Himonga, the Act has, as far as is possible, used civil marriages standards in the place of

[100] *Ibid*.
[101] Gerrit Pienaar, 'Security of Communal Land Tenure by Registration of Individualized Title: Is the Communal Land Rights Bill of 2003 the Final Solution' (2004) 67(2) *THRHR* 244, 247.
[102] Gerrit Pienaar, 'The Need for a Comprehensive Land Administration System for Communal Property in South Africa,' (2007) 70(4) *THRHR* 556, 557.
[103] (1) For a customary marriage entered into after the commencement of this Act to be valid-
(a) the prospective spouses -
(i) must both be above the age of 18 years; and
(ii) must both consent to be married to each other under customary law; and
(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.
[104] Mpho Bapela, & Lesetja Monyamane, 'The "Revolving Door" of Requirements for Validity of Customary Marriages in Action – *Mbungela v Mkabi [2019]* ZASCA 134' (2021) 42(1) *Obiter* 186, 186.
[105] (755/2012) [2014] ZASCA 76 (29 May 2014) para 1.
[106] *Moropane v Southon* (755/2012) [2014] ZASCA 76 (29 May 2014) para 45; *Southon v Moropane* (14295/10) [2012] ZAGPJHC 146 para 85; *LS v RL* 2019 4 SA 50 (GJ) para 21; *Mabuza v Mbatha* 2003 (4) SA 218 (C) para 25.
[107] Chuma Himonga, 'The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession' (2005) *Acta Juridica* 82, 84.

customary law practices.[108] This practice sustains the misrepresentation of indigenous reality by the courts. In effect, it is true that the recognition of customary marriages through the RCMA is the advancement of an assault on the genuine laws of the Natives.[109] This assault has, it is arguable, ensured the retention of European reality and the deprivation of Native ideology in the preservation of marriage practices.[110] It is in this regard that the discussion that follows below is alive to the threat of distorting customary practices as cautioned by some authors.[111]

5.1. Negotiation and or celebration in terms of culture

It is observed that in *Moropane v Southon* the court acknowledged the difficulty of applying the validity requirements for a customary marriage. It is assumed that this concession has persuaded Manthwa and Ntsoane to opine that the provisions of section 3(1)(b) have taken on an unpredictable life in the South African jurisprudence.[112] This opinion is not supported by the decisions coming out of the SCA in particular in recent times. It is the view of this study that the law is actually settled on this position. However, the question of correctness of that jurisprudence is an altogether different inquiry. The settlement is proved through a discussion of some of the leading cases in the interpretation of section 3(1)(b).

In *Mabuza v Mbatha*[113] the court was faced with a question of validity of a customary marriage on these abridged facts. In or about November 1989 the defendant's family approached that of the plaintiff with a view to negotiating damages and a customary marriage. During the negotiations, an amount of R2500.00 was agreed as *magadi* pursuant to which it was paid in full.[114] Subsequent to the negotiations, the plaintiff moved in with the defendant and for all intents and purposes acted and performed functions of a wife.[115] Despite this, the defendant argues that the plaintiff was never married in terms of isiSwati customs owing to the absence

[108] *Ibid* 85.
[109] Corbin Golding, '(Mis)Recognition of Customary Marriages: A Comparative Analysis of Canadian and South African Family Law' (2022) 34(2) *Canadian Journal of Family Law* 67, 73.
[110] *Ibid* 75. See also Fatima Osman, 'The Recognition of Customary Marriages Amendment Bill: Much Ado about Nothing?' (2020) 137(3) *SALJ* 389, 401.
[111] Keneilwe Radebe, '*Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020); *Sengadi v Tsambo; in re: Tsambo* (40344/2018) [2018] ZAGPJHC 666; [2019] 1 All SA 569 (GJ) (8 November 2018) - Assessing the Insurmountable Challenge in Proving the Existence of a Customary Marriage in Terms of Section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 and the Misplacing of Gender Inequality' (2022) 55 *De Jure* 77, 77.
[112] Aubrey Manthwa & Lefa Ntsoane, 'The Space for Lobolo in the Post-Constitutional South African Era: Revisiting the Debate' (2022) 85(4) *THRHR* 509, 514.
[113] 2003 (4) SA 218 (C).
[114] *Ibid* para 4.
[115] *Ibid* para 8.

of the *ukumekeza* ritual.[116] In its judgment, the court found it improbable that the practice of *Ukumekeza* had remained stagnant over the years nor that its importance overrides the requirements for validity.[117] On the passport of this view, the court decided that a valid customary marriage had been concluded.[118]

It is notable that at paragraph 26, the court found itself persuaded by the views of Bennett on the flexibility of customary law. Read closely, at paragraph 25, the court expressed an opinion that the practice of *ukumekeza* is "probably practised differently than it was centuries ago". On the judgment as a whole, nothing suggests that the judge had knowledge of this change except to infer that change is constant in customary law as advanced by Bennett. It is tempting to concede to the notion of customary law as an evolving system. However, it cannot be correct for a judge to not demonstrate this change by reference to practices and the moment when these are changed. It is telling that this unsupported opinion has shaped the life of the South African jurisprudence on the validation of a marriage under section 3(1)(b) of the RCMA.

In *Southon v Moropane* the court found itself persuaded by the reasoning above.[119] In this case, the court had to determine whether a valid customary marriage had been entered into between the parties. It was the plaintiff's case that on or about 17 April 2002, a delegation of the defendant visited her home in Seshego, Limpopo Province, to negotiate *magadi* and conclude a customary marriage between herself and the defendant.[120] On the other hand, the defendant argues that the amount of R6000.00 paid to the plaintiff's family was for *pula molomo/go kokota* and was not intended as payment for *magadi*.[121] In effect, the defendant was arguing that no valid customary marriage was entered into on the date mentioned hitherto. In its expressions towards a decision, the court found the custom of handing over to be an indispensable part of the validity requirements.[122] Consequently, it ruled that all things considered, a valid customary marriage had been entered into.[123] This decision, with its inherent view that handing over is indispensable to validity of a marriage, was endorsed by the SCA in *Moropane v Southon*.[124]

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[116] *Ibid* para 17.
[117] *Ibid* paras 24-25.
[118] Ibid para 27.
[119] (14295/10) [2012] ZAGPJHC 146 (18 July 2012) para 106.
[120] *Ibid* para 9-30.
[121] *Southon v Moropane* (14295/10) [2012] ZAGPJHC 146 paras 42-54.
[122] *Ibid* para 92.
[123] Ibid para 118.
[124] (755/2012) [2014] ZASCA 76 (29 May 2014) para 55.

Ordinarily, this would have settled the jurisprudence on the interpretation of customary marriages in terms of section 3(1)(b). But, the SCA itself took a different view in *Mbungela v Mkabi*.[125] It was the respondent's case that on or about 2 April 2010 he sent his emissaries to the deceased's home to negotiate a marriage between himself and the deceased. It is common cause that pursuant to the negotiation a part payment of R9000.00 was made.[126] Subsequent to this, and believing that he was married to the deceased, a "white wedding" ceremony was held in a church.[127] The appellant denies that the union between the respondent and the deceased was valid owing to non-complaince with some *essentialia* for validity.[128] In coming to a decision, the court found itself persuaded by Bennett on the notion of an abridged celebration rituals.[129] Furthermore, perhaps guided by the thoughts of Bennett, at paragraph 17 the court noted the dynamism and flexibility of customary law. In support of its viewpoint, reference was had to the opinion of the court in *Mabuza v Mbatha*.[130] At the end, the court resolved that the clear volition by parties to marry should be placed above an inflexible application of the need to hand over the bride.[131]

It would appear that the SCA has promoted the notion of personal choices as more significant than the rights of a group to determine its customs. This aspect of personal choices, seems to be underlined by the advancement of consent to marriage as a critical feature of marriage as apparent from paragraph 27 of the judgment. The decisions in the *Sengadi* cases discussed below support the notion of personal choices as a substitute for an authentic system of law. To achieve this view, courts argue flexibility of the custom of handing over and its change being constitutionally sound. In fact to achieve this objective, the court in *LS v RL* goes so far as to declare the practice of handing over to be unconstitutional on the grounds of violation of the equality clause.[132] It must be noted that this remark was made in passing though potentially opening space for future discourse and or litigation.

In this highly publicised case, the applicant sought urgent relief from court. The abridged facts will be limited to the validity of the marriage between the applicant and the deceased. It was the applicant's case that on or about 28 February 2016 the two families met to negotiate and enter into a customary marriage. The amount was set at R45 000.00 and was set to be paid

[125] (820/2018) [2019] ZASCA 134.
[126] *Ibid* para 5.
[127] *Ibid* para 7.
[128] *Ibid* para 12.
[129] *Ibid* para 24.
[130] *Ibid* para 21.
[131] *Ibid* para 30.
[132] 2019 4 SA 50 (GJ) paras 33-35.

in three separate parts.[133] Subsequent to an agreement being reached, the applicant avers that a mini celebration took place as affirmation of the conclusion of a valid marriage.[134] On the other hand, the respondent argues that an *essentialia* of the marriage has not been complied with; *to wit* handing over of the bride.[135] At paragraph 18, the court expressly denies that the absence of handing over alone invalidates a customary marriage. It too found itself bound by the opinion of Hlophe JP in *Mabuza* in deciding that the custom of handing over was not keeping pace with changes in society.[136]

Interestingly, the court found itself persuaded by the views of Nkosi, which are generously quoted in the judgment of the high court.[137] This cherry picking is problematic in developing a full jurisprudence. More so when a personal choice to waive custom, as the court seemed to suggest at paragraph 19, is aggregated to the status of a change of law. As earlier opined, the claim to flexibility and notable change in law must be preceded by evidence of that change.

On appeal to the SCA in *Tsambo v Sengadi* the court had an opportunity to clarify its views on the contrast between *Moropane* and *Mbungela*.[138] In a clear sign of which view would be favoured, the opening paragraph of the judgment relegated the requirements of section 3(1)(b) to the periphery.[139] From this view, it is unsurprising that the opinion of Hlophe JP in *Mabuza* is endorsed.[140] In its decision, the court upheld the notion of waiver in ruling that a valid customary marriage had been concluded.[141]

In the light of the above, the current study is justified in finding that recent jurisprudence is settled on the dim view courts take of section 3(1)(b) of the RCMA. From *Mabuza v Mbatha*[142] through to *Tsambo v Sengadi*[143] the courts have settled on a pattern that is ideologically suspect so far as customary marriages are concerned. This ideological assault is seen in *Muvhali v Lukhele & Others*.[144]

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[133] *Ibid* para 5.
[134] *Ibid* paras 6-9.
[135] *Ibid* para 15.
[136] *Ibid* para 24 and paras 33-35.
[137] *Ibid* para 22.
[138] (244/19) [2020] ZASCA 46.
[139] *Ibid* para 1.
[140] *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 para 16.
[141] *Ibid* para 30.
[142] 2003 (4) SA 218 (C).
[143] (244/19) [2020] ZASCA 46
[144] (21/34140) [2022] ZAGPJHC 402.

It was the applicant's case that on or about 22 December 2018, the emissaries of the deceased met up with her family to negotiate the conclusion of a customary marriage.[145] A total amount of R90 000.00 was agreed with a part payment of R23 000.00 made.[146] The respondents deny the conclusion of the marriage and aver instead that the applicant and the deceased were cohabiting.[147] In aligning itself with the SCA finding in *Mbungela*, the court followed the same line of thought of the attendance of a funeral as confirmation of marital relations between parties.[148] At paragraph 64, the court ruled that a valid customary marriage was entered into. To justify its decision, the court made reference to individualised aspects of the relation between the deceased and the applicant.[149]

The question to be answered is whether individualised and personal choices of the parties is in keeping with current ethos and evolution of customary law of marriage? Evidently, this would ordinarily mean that the person alleging a change must prove their point. In fact, the courts themselves ought not to accept implications of change without evidence.[150] Notwithstanding the soundness of this view, the court in *Mabuza v Mbatha* came to a decision that had far reaching consequences based on a probability.[151] This probability of change, which could arguably be no more than a hunch, has been accepted by the courts as authority or evidence of dynamism and flexibility of law in subsequent cases as cited above. Even where evidence is adduced by an expert, this is a far cry from creating stability as witnessed in *Southon v Moropane*.[152] Prof Mokgwatsane, who testified for the plaintiff, overemphasised the change in the social structures and the impact urbanisation has had on certain rituals in the completion of a customary marriage.[153] On this view, it is submitted that the expert thinks away the reality of the people in jurisdiction C as per case 42. This, it is arguable, is a form of marginalisation of Natives and their cultural capital. It further falls foul to the pretext of civilising them to suit an urban socio-economic setup.[154] Admittedly, this cannot be an acceptable situation.

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[145] *Ibid* para 15.
[146] *Ibid* para 18.
[147] *Ibid* para 31.
[148] *Ibid* para 60.
[149] *Ibid* paras 62-63.
[150] Tshepo Manthwa, 'Handing Over of the Bride as a Requirement for Validity of a Customary Marriage - *C v P* (1009/2016)' (2019) 82 *THRHR* 652, 656.
[151] 2003 (4) SA 218 (C) para 25.
[152] (14295/10) [2012] ZAGPJHC 146.
[153] *Ibid* paras 25-26.
[154] Tshepo Manthwa, 'Towards a New Form of Customary Marriage and Ignorance of Precedence: *Mbungela v Mkabi* 2020 SA 1 41 (SCA)' (2021) 1 *TSAR* 199, 207.

On the other hand, however, Mr Sekhukhune, who testified for the defendant, overemphasised the traditional rituals of the Bapedi people as if these were homogenous.[155] His views would not support the practice and decision in jurisdiction A as per case 16. Mr Sekhukhune and Manthwa are clearly speaking from the same homogenous view of the rituals of marriage.[156] That notion, as demonstrated from case 16, is not correct in all circumstances. If anything, these contestations reveal the difficulty of determining the validity of a customary marriage and significantly, the use of generic views in precedents.[157] It is edifying that in the above cases that have created settled law, the actual reality of the people living in terms of the system is not fully canvased before the court to properly develop the jurisprudence. The significance of canvassing these viewpoint is underlined by the existing differences even amongst the same ethnic group.[158] It bears repetition that the current study observed the Bapedi people with different results between cases 16 and 42.

Other than an attempt to civilise Natives, what else justifies the relative ease with which the courts have reached their decisions? The formal requirements in section 3(1)(a) are notably unproblematic.[159] The consent element is two-fold in that it an agreement to marry each other and to do so in terms of customary law.[160] Despite the fact that *magadi* are not an express legislative provision, it is accepted that payment of a portion of the agreed amount is sufficient.[161] This view is also supported by Ntlama.[162] From the data, the validity of this is underlined in case 16 where councillor went so far as to state that the amount could be as little as R500.00 to suffice as part payment of *magadi*. *Mbungela v Mkabi*, at paragraphs 27 and 30 in particular, creates the unsettling impression that the formal requirements outweigh those of section 3(1)(b).[163] This is so because the SCA prices the expression of the parties' volition as a clear sign of an intention to marry.[164] Bakker forms the same opinion of the *LS v*

[155] *Southon v Moropane* (14295/10) [2012] ZAGPJHC 146 para 46-49.
[156] Tshepo Manthwa, 'Towards a New Form of Customary Marriage and Ignorance of Precedence: *Mbungela v Mkabi* 2020 SA 1 41 (SCA)' (2021) 1 *TSAR* 199, 205.
[157] Fatima Osman, 'The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage' (2019) 22 *PER/PELJ* 1, 13.
[158] Siyabonga Sibisi, 'Is the Requirement of Integration of the Bride Optional in Customary Marriages?' (2020) 53 *De Jure* 90, 92.
[159] Pieter Bakker, 'Integration of the Bride and the Courts: Is Integration as a Living Customary Law Requirement Still Required?' (2022) 25 *PER/PELJ* 1, 2.
[160] *Ibid*. See also Tshepo Manthwa, 'Handing Over of the Bride as a Requirement for Validity of a Customary Marriage - *C v P* (1009/2016)' (2019) 82 *THRHR* 652, 660.
[161] See *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 para 13.
[162] Nomthandazo Ntlama, 'The Centrality of Customary Law in the Judicial Resolution of Disputes that Emanate from it – *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC' (2019) 40(3) *Obiter* 202, 211.
[163] (820/2018) [2019] ZASCA 134.
[164] *Ibid* 30.

RL[165] decision.[166] At the end, the courts seem to ease their decisions with reference to flexibility of customary law and the Constitution.[167]

On its own the use of the Constitution to shore up lack of clear evidence of change and the dynamism of customary law or marriages is unproblematic. However, a court judgment would not legitimise the marriage in the indigenous cosmology of Natives who live in terms of that system.[168] See for example, case 26 from the data collected for this study. The facts share similarities with those in *Mbungela*[169] in that there was a white wedding. On that precedent, a court would likely decide that a valid marriage has been entered into. Notwithstanding that, in jurisdiction C it is a prerequisite for validity that all integration rituals be performed. It is argued here that the court annexed marriages, as a promotion of Western influence, urbanisation, the Constitution and unsubstantiated flexibility, are problematic in legitimating the beneficiaries of these decisions to their respective communities. It is further contended that these judgments will breed the state of anomie if the court continues to characterise individual preferences as a form of altering customs for the general good. To this end, Manthwa rightly submits that communities are likely to ignore court annexed marriages in favour of their own practices.[170]

5.2. Forms of marriages recognised in terms of indigenous cosmology

A properly centered customary marriage statute would regulate the various possibilities available under the system. But the RCMA does not come close to reflecting the multiple possibilities available under this system.[171] The implicit impression could be formed from the provisions of section 7(6) that polygamous relationships are recognised.[172] However, that would be ignoring the unsubtle texts of the RCMA as an attempt to bring customary marriages

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[165] 2019 4 SA 50 (GJ).
[166] Pieter Bakker, 'Integration of the Bride and the Courts: Is Integration as a Living Customary Law Requirement Still Required?' (2022) 25 *PER/PELJ* 1, 5.
[167] Tshepo Manthwa, 'Towards a New Form of Customary Marriage and Ignorance of Precedence: *Mbungela v Mkabi* 2020 SA 1 41 (SCA)' (2021) 1 *TSAR* 199, 204.
[168] *Ibid* 207.
[169] *Mbungela v Mkabi* (820/2018) [2019] ZASCA 134.
[170] Tshepo Manthwa, 'The Interplay between Proving Living Customary Law and Upholding the Constitution' (2019) 30(3) *Stellenbosch Law Review* 464, 472.
[171] Segoane Monnye & Matshilane Mokotong, 'A Study of Complex and Unfamiliar Customary Marriage Outside the Recognition of Customary Marriages Amendment Bill: Distortion of a Traditional Customary Marriage' (2013) 27 *Speculum juris* 78, 80.
[172] A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages. See Jan Bekker & Mariana Buchner-Eveleigh, 'The Legal Character of Ancillary Customary Marriages' (2017) 50 *De Jure* 80, 81.

in line with civil marriages.[173] Be that as may, the Constitutional Court has decided on the issue of validity of this type of marriage in the context of Tsonga ethnic group.[174] The Reform of Customary Law of Succession and the Regulation of Related Matters Act 11 of 2009 recognises woman-to-woman marriages in section 2(2)(c).[175] It must be pointed out though that Monnye and Mokotong opine that the application or interpretation in Act 11 of 2009 raise anomalies and distorts *go nyalela mosadi lapa* marriage.[176]

These authors define this type of marriage broadly to encompass a situation where a woman is married into a family to revive and continue that family's lineage.[177] From this definition, it is apparent that these marriages happen at the instance of a family that has no children and are aimed at siring an hier for that family.[178] Another significant point is that these marriages are common between a woman (usually childless) and another woman.[179] It is worth noting that these marriages do not have the same character as civil unions between two women and should not be construed as such.[180] In fact, the relation between the two women are similar to that of a daughter in-law and a parent in-law.[181] Despite there being no clear evidence of this, Maphalle asserts that in the post RCMA regulation, these marriages must pass the muster for validity set out in that statute.[182] This view is not shared by Bekker and Buchner-Eveleigh who rightly content that these marriage falls outside of the ambit of the RCMA.[183] From the observed data, case 26 supports the characterisation of this type of marriage by the authors quoted hitherto.

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[173] Chuma Himonga, 'The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession' (2005) *Acta Juridica* 82, 83.
[174] *Mayelane v Ngwenyama and Another* 2013 (4) SA 415 (CC).
[175] [I]f the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.
[176] Segoane Monnye & Matshilane Mokotong, 'A Study of Complex and Unfamiliar Customary Marriage Outside the Recognition of Customary Marriages Amendment Bill: Distortion of a Traditional Customary Marriage' (2013) 27 *Speculum juris* 78, 87.
[177] *Ibid* 83.
[178] Kagiso Maphalle, Succession in Woman-to-Woman Marriages Under Customary Law: A Study of the Lobedu Kingdom (Master of Laws, University of Cape Town, 2017) 9.
[179] *Ibid* 8.
[180] Segoane Monnye & Matshilane Mokotong, 'A Study of Complex and Unfamiliar Customary Marriage Outside the Recognition of Customary Marriages Amendment Bill: Distortion of a Traditional Customary Marriage' (2013) 27 *Speculum juris* 78, 79.
[181] *Ibid* 94.
[182] Kagiso Maphalle, Succession in Woman-to-Woman Marriages Under Customary Law: A Study of the Lobedu Kingdom (Master of Laws, University of Cape Town, 2017) 70.
[183] Jan Bekker & Mariana Buchner-Eveleigh, 'The Legal Character of Ancillary Customary Marriages' (2017) 50 *De Jure* 80, 86.

It is interesting to observe that case 35 creates a marriage akin to *go nyalela mosadi lapa.* Notably on that case, *ngwetsi ya lapa* was taken by an elder man without children of his own in a literal sense. Whether this is an adaptation to the *ngwetsi ya lapa* marriage is unclear. There is a school of thought that suggests that these types of marriages cannot be concluded with a man.[184] However, the same authors concede that there may be circumstances were an exception is made, for example in a case of impotence.[185] In case 35, not enough evidence is adduced to suggest nor let alone prove that the parent in-law is impotent. With that being so, it is arguable that the example provided by Monnye and Mokotong does not create a closed list. A childless old man should qualify to benefit from this type of marriage. Critically, the man must satisfy an important aspect of no sexual intercourse with the daughter in-law in order to retain the true characterisation of *go nyalela mosadi lapa* marriage.[186]

On the facts, the marriage has the same characteristics as described above and should, by extention, be granted the same status for the benefit of the daughter in-law and the children. This adaptation, on the facts of case 35, had the same desire to sire an hier for the father in-law. Furthermore, no sexual intercourse was intended between the daughter in-law and his father in-law.

5.3. Marriage gifts

Marriage gifts are no more than an ancilliary aspect to customary marriages. In *Mbungela v Mkabi* the SCA acknowledges them in the negotiation stage.[187] Despite this acknowledgement, nothing turns on this issue in the case as a whole. The attitude of the courts as per the cases cited above, points towards an inference that the absence of gifts will not affect the validity of a marriage. Even if it is so, a distinction must be made between pre marriage gifts and post marriage gifts. The former refers to gifts that emissaries bring for the family of the bride on the day of the negotiations and or completion of marriage. The latter, on the other hand, refers to gifts that are exchanged after a valid marriage has been completed. There is a sense of a norm about the former whilst the latter are based on the generosity of each family.[188]

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[184] Segoane Monnye & Matshilane Mokotong, 'A Study of Complex and Unfamiliar Customary Marriage Outside the Recognition of Customary Marriages Amendment Bill: Distortion of a Traditional Customary Marriage' (2013) 27 *Speculum juris* 78, 85.
[185] *Ibid*.
[186] *Ibid*.
[187] (820/2018) [2019] ZASCA 134 para 5.
[188] See Tshepo Manthwa, 'The Interplay between Proving Living Customary Law and Upholding the Constitution' (2019) 30(2) *Stellenbosch Law Review* 464 on the distinction between a norm and a practice 470.

6. Family disputes

From the data in jurisdiction C, quite a number of family disputes arose. From the discussions of the problems to the decisions given by council, there was an attempt to advance kinship than destroy it. It must be conceded though that there are exceptions to this. The idea is seemingly to advance the kinship ties and underscore the responsibilities each owes to the family.[189] This care was traditionally the preserve of the family head to anchor the family structure and ensure that the interests of the family were advanced.[190] Within this context, Nhlapo debated the idea of rights of the group against a notion he called individualisation.[191] It would appear that by making the cultural rights consensual in sections 30 and 31 of the Constitution, a leeway for individualisation was created. This individualisation, according to Nhlapo, is a consideration of the rights of women in the collective and the corresponding duty to remove offensive undertones from the kinship.[192] The discussion below is made in appreciation of this insight.

6.1. Family setup – rights and responsibilities

In *Bhe* Ngcobo J, in his minority decision, set out to explain the family setup from an African perspective.[193] I borrow generously from his judgment as it best captures my observations of the data. Conceptually, according to him, the African family unit is made up as follows:

> … At the heart of the African traditional structure was the family unit. The family unit was the focus of social concern. Individual interests were submerged in the common weal. The system emphasised duties and responsibilities as opposed to rights. At the head of the family there was a patriarch or a senior male who exercised control over the family property and members of the family. The family organization was self-sufficient. Within this system, the position of each member of the family was based on an equitable division of labour.[194]

A responsibility befell the family head to provide members of the household with the necessities of life.[195] Whilst traditionally the role of the family head was the preserve of adult

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[189] Thandabantu Nhlapo, 'The African Family and Women's Rights: Friends or Foes' (1991) *Acta Juridica* 135, 145.
[190] Jan Bekker & Mariana Buchner-Eveleigh, 'The Legal Character of Ancillary Customary Marriages' (2017) 50 *De Jure* 80, 81.
[191] Thandabantu Nhlapo, 'The African Family and Women's Rights: Friends or Foes' (1991) *Acta Juridica* 135.
[192] *Ibid* 146.
[193] 2005 1 BCLR 1 (CC).
[194] *Ibid* para 162.
[195] *Ibid* para 165.

males, it is observed that nothing should preclude women from occupying this role presently.[196] This adjustment would be constitutionally inclined and in no way changes the make up of customary law systems.[197] Whether this change in gender is observed, it cannot be emphasised enough that the African law family unit is not centered on the family head.[198] Instead, the family head should be understood as a pivot through which the advancement of rights and discharge of responsibilities occur. This view is underlined by the court in *Ramuhovhi and Others v President of the Republic of South Africa and Others* which correctly posited that the family head did not enjoy exclusive rights to the family assets.[199] The idealistic notion of the role of the family head is properly captured in an apt article of Ndima.[200] Although that article offers a comprehensive living law account of the role of the family head, one must appreciate the capitulation of the system to distortion and other factors.[201] A clear example of this capitulation comes from case 42. In that case, the respondent, who had played the role of head of the family in her maiden home, was prepared to abondone her nephew and niece. In an extreme case of the threat to the system of kinship embodied by the family head, the respondent was willing to destroy the family house in order to deprive the siblings of shelter.

The underlying notion of the family in Ngcobo J's judgment was observed as the structure through which families in the jurisdictions live. However, case 42 is an extreme example of the threat posed to the system. Equally, case 31 is an indicator of a strong inclination towards patriarchy. To some extent, the nature of the complaint validates narratives that suggest that kinship privileges men at the expense of everyone.[202] The complainant, a man, took issue with the respondent sending women to come effect a traditional separation. To his mind, that was offensive. *Mabena v Letsoalo* is authority for the view that women's participation in the negotiation of *magadi* validates the marriage.[203] This notion, by extention, would mean that women should, as of right, be competent to negotiate separation. Be that as it may, council did not impose a rights based decision to the case or any decision at all as indicated above.

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[196] *Ibid* para 175.
[197] Dial Ndima, 'The Anatomy of African jurisprudence: a Basis for Understanding the African Socio-legal and Political Cosmology' (2017) 50(1) *CILSA* 84, 86.
[198] Thandabantu Nhlapo, 'Indigenous Law and and Gender in South Africa: Taking Human Rights and Cultural Diversity' (1994) 13(3) *Third World Legal Studies* 49, 58.
[199] 2018 (2) SA 1 (CC) para 62.
[200] Dial Ndima, 'The Anatomy of African jurisprudence: a Basis for Understanding the African Socio-legal and Political Cosmology' (2017) 50(1) *CILSA* 84, 84-108.
[201] *Bhe and Others v Magistrate, Khayelitsha and Others* [2004] ZACC 17 para 173.
[202] Thandabantu Nhlapo, 'The African Family and Women's Rights: Friends or Foes' (1991) *Acta Juridica* 135, 137.
[203] *Mabena v Letsoalo* 1998 (2) SA 1068 (T).

6.2. Witchcraft

The prevalence of alleged witchcraft related activities in the Limpopo Province at the turn of the millennium made it a priority issue.[204] For the ease of reference, alleged witchcraft activities relates to claims of witchcraft and the consequent actions taken by either the victims and or the communities against the alleged witch. Such was the bothersome nature of the witchcraft activities that a commission of inquiry was established to look into finding solutions to the problem. In 1996 the commission published its findings.[205] What is equally clear is that the topic of witchcraft is not a purely legal issue. In fact, it has been tackled through various disciplines by scholars.[206]

Flowing from the above, it is unsurprising that there are multiple definitions of the concept. The common thread amongst these definitions is that the act of witchcract entails the negative use of *muti* to cast bad spells or cause harm to another.[207] The patterned behaviour observed by researchers suggests that witchcraft activities happen amongst relatives and is mostly gendered prejudicially against elderly women.[208] Amongst others, jealousy appears to be a prime reason to induce the act of witchcraft.[209] Despite contestations and undertones of ridicule,[210] it is commonly accepted that the practice is acknowledged in traditional African communities. [211] Ludsin indicates how the process of identification, prosecution and punishment of a witch happened in a prestine African setup.[212] Regrettably, this system and its operations in traditional courts has been suppressed through Eurocentric imagination, or

[204] Karl Peltzer, 'Community Perceptions on the Witchcraft Suppression Act in South Africa' (2000) 13(3) *South African Journal of Criminal Justice* 312, 312.
[205] Victor Ralushal *et al* 'Report of the Conmnission of Inquiry into Witcbcraft, Violence and Ritual Murders in the Nortbern Province of the Republic of Soutb Africa' (Human Sciences Research Council, 1996). The contents of the report are not necessary to the current study.
[206] Steward Kugara *et al*, 'Exploring the 21st Century Factors Precipitating Witchcraft Beliefs and Imputations in South Africa and Zimbabwe' (2023) 13(1) *AJDS* 65, 72.
[207] Elijah Baloyi, 'A pastoral examination of the Christian Church's response to fears of and reactions to witchcraft amongst African people in the Limpopo province of South Africa' (2014) 7(2) *Theological Studies* 1, 2.
[208] Karl Peltzer, Motlatso Phaswana & Prince Mokgoshing, 'Attitudes and Beliefs of Police Officers Towards Witchcraft (Bolôi) and their Intervention Role in the Northern Province, South Africa' (2001) 14(2) *Acta Criminologica* 100, 100-101.
[209] *Ibid*.
[210] Steward Kugara *et al*, 'Exploring the 21st Century Factors Precipitating Witchcraft Beliefs and Imputations in South Africa and Zimbabwe' (2023) 13(1) *AJDS* 65, 74.
[211] Elijah Baloyi, 'A pastoral examination of the Christian Church's response to fears of and reactions to witchcraft amongst African people in the Limpopo province of South Africa' (2014) 7(2) *Theological Studies* 1, 1.
[212] Hallie Ludsin, 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law', (2003) 21(62) *Berkeley Journal of International Law* 62, 78-79.

lack of comprehension.[213] The idea to civilise Natives came through legislative endeavour which culminated in the Witchcraft Suppression Act.[214] Contrary to the intention to civilise Natives, scholars suggest that the Act has had an opposite effect on cultural communities. According to these views, the Act deligitimased traditional courts and breeded a surge in vigilantism.[215] As it stands, the position in jurisdiction A supports Hund's assertion that traditional leaders decline to participate in these cases.[216] It is worth reiterating that a councillor in that jurisdiction pointed towards the Act and the consequent vigilantism premised on how *Kgoro ya sechaba* handled the case. If anything, that view demonstrates awareness of the other law and its expectations for councillors.

7. Disputes between neighbours

Nowhere else is the dangers posed by none customary law praxis more apparent than under this theme. This study bemoans the overemphasis on the distinction between living law and official versions of it in the academy and the dearth of customary law jurisprudence and or legal vocabulary on wide ranging issues covered by traditional courts. It is apposite to point out that Monyamane has argued that the difference in epistemological formulation between

[213] *Ibid* 64.

[214] 3 of 1957. Section 1 provides that [a]ny person who-
(a) imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard;
(b) in circumstances indicating that he professes or pretends to use any supernatural power, witchcraft, sorcery, enchantment or conjuration, imputes the cause of death of, injury or grief to, disease in, damage to or disappearance of any person or thing to any other person;
(c) employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard;
(d) professes a knowledge of witchcraft, or the use of charms, and advises any person how to bewitch, injure or damage any person or thing, or supplies any person with any pretended means of witchcraft;
(e) on the advice of any witchdoctor, witch-finder or other person or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operation any means or process which, in accordance with such advice or his own belief, is calculated to injure or damage any person or thing;
(f) for gain pretends to exercise or use any supernatural power, witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill in or knowledge of any occult science to discover where and in what manner anything supposed to have been stolen or lost may be found…

[215] Hallie Ludsin, 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law', (2003) 21(62) *Berkeley Journal of International Law* 62, 87; Karl Peltzer, Motlatso Phaswana & Prince Mokgoshing, 'Attitudes and Beliefs of Police Officers Towards Witchcraft (Bolôi) and their Intervention Role in the Northern Province, South Africa' (2001) 14(2) *Acta Criminologica* 100, 100; John Hund, 'Witchcraft and Accusations of Witchcraft in South Africa: Ontological Denial and the Suppression of African Justice' (2000) 33(3) *CILSA* 366, 366-367.

[216] John Hund, 'Witchcraft and Accusations of Witchcraft in South Africa: Ontological Denial and the Suppression of African Justice' (2000) 33(3) *CILSA* 366, 366.

customary law and the state law has resulted in the annihilation of the former in legal texts.[217] He argues that this is largely due to the fact that the law of the Natives is communicated in a language that is different to those used in the academy.[218] The clarity of this view, it is submitted, is more apparent in the niche area encompassed in this theme. The sampled communities do not necessarily express themselves in the manner that neighbour law has been written, yet there are some underlying similarities. Nkosi is on record as opining that there are incidences where the common law coincides with the philosophical underpinnings of *Ubuntu*.[219] The present author submits that the notion of neighbour law as understood in the common law context coincide with the cultural expectations in rural communities.

The underlying intention to delink the present study to prexis foreign to it remains. For that reason, there is an endeavour to discuss only elements relevant to the business of the traditional courts. Based on the closeness of the sub-themes in the cultural communities, the discussion is made under a single heading.

Traditionally the idea of neighbour law is said to be premised on two cardinal points; *to wit* harmonisation of competing rights between adjacent dwellers and reasonable enjoyment of the rights of ownership.[220] In essence, the landowner's use of their land should not burden others in an unreasonable way.[221] According to this view, a consideration of the normative factors on reasonableness encompasses the social, cultural and customary attributes amongst others.[222] From a customary law perspective, the need to care for the welfare of everyone underscores strong communal responsibilities as discussed above.[223] Case 13 best underlies the cardinal points of neighbour law and traditional justice's interpretation of the concept. Whereas from a common law perspective, the owner of a lower lying land was expected to show greater tolerance for the flow of water,[224] it was decided that a negotiated settlement was best under the circumstances. In this way, the social, cultural and customary attributes

[217] Lesetja Monyamane, 'Creating and Sustaining a 'Tunnel Vision' Argument for the Application of Customary Law — A Language Conundrum' (2023) *SAPL* 1, 3.
[218] *Ibid*.
[219] Sipho Nkosi, 'Ubuntu and South African Law: Its Juridical Transformative Impact' (2018) 33(1) *SAPL* 1, 5.
[220] Andre van der Walt & Gerrit Pienaar, *Introduction to the Law of Property* (7th ed., Juta, 2016) 99.
[221] Tina Kotze & Zsa-Zsa Boggenpoel, 'Living Together as Neighbours: Rethinking the Reasonableness Standard in Nuisance Law under the Constitution' (2021) 24 *PER* 1, 3.
[222] *Ibid* 4.
[223] Thandabantu Nhlapo, 'The African Family and Women's Rights: Friends or Foes' (1991) *Acta Juridica* 135, 145.
[224] Andre van der Walt & Gerrit Pienaar, *Introduction to the Law of Property* (7th ed., Juta, 2016) 108.

as premised on the idea of harmony amongst the community members was insisted upon in a careful manner.

It is in this light fitting to endorse the broader meaning of neighbour as including people living together as members of the same community.[225] Thus, the indigenous cosmology, as undergirded by shared rights and responsibilities, would fit the cardinal points of neighbour law. It is submitted that Kotze and Boggenpoel are correct to aver that the normative African value system of *Ubuntu* would best advance the rights and obligations of mutual beneficiation between neighbours.[226] This, they argued, is because the normative value system of *Ubuntu* inherently presupposes co-existence with other people in social solidarity.[227] It is unsurprising as such that in case 30, a threat to this peaceful co-exitence was avoided by moving the complainant to a new stand.

Evidently, this theme advances the notion of communal interests discussed in 4.3. above. As a result, it seems logical to agree that the rights that each person enjoys to use their land is socially embedded in terms of indigenous cosmology.[228]

8. Execution - enforcement of decisions

Hlophe JP, in his dissenting judgment, in *Congress of Traditional Leaders of South Africa v Speaker of the National Assembly and Others*[229] makes two telling opinions that underlie the direct and brief discussion of this element. At paragraph 60 the judge president concedes, rightly so, that His Majesty King Dalindyebo's "customary justice" is not exemplary. Fittingly for current purposes, the learned judge president correctly posit that the failure to legislate on customary law leaves it on an unending constest with the Constitution.[230] In fact, Nkosi seems to suggest that most of the powers held and exercised by traditional leaders are unconstitutional.[231] This view seems to create an unjustifiable notion that customary law and the exercise of customary powers is inimical to a justiciable Bill of Rights. Flowing from this type of thinking, and to support the dissenting judgment, the absence of legislation leaves

[225] Tina Kotze & Zsa-Zsa Boggenpoel, 'Living Together as Neighbours: Rethinking the Reasonableness Standard in Nuisance Law under the Constitution' (2021) 24 *PER/PELJ* 1, 4.
[226] *Ibid* 5.
[227] Ibid. See Sipho Nkosi, 'Ubuntu and South African Law: Its Juridical Transformative Impact' (2018) 33(1) *SAPL* 1-20 for a jurisprudential take on the wideth of *Ubuntu*.
[228] Nina Braude, 'A "Uniform Procedure" for All Expropriations? Customary Property Rights and the 2015 Expropriation Bill' (2017) 28(1) *Stellenbosch Law Review* 68, 73.
[229] (2474/16) [2016] ZAWCHC 206.
[230] *Ibid* para 70.
[231] Sipho Nkosi, 'When the King can do a lot of Wrong: Some Reflections on *S v Dalindyebo* 2016 (1) SACR 329 (SCA)' (2020) 35(2) *SAPL* 1, 10.

traditional leaders at the mercy of the state law in the execution of the decisions of the traditional courts.[232] Granted that the King can do wrong and in fact did wrong, the view is that the exercise of judicial powers must be in consonant with the Constitution.[233] A legislative framework that clearly sets out the scope of these constitutional powers would enhance traditional justice.

Unfortunately, there is no such legislation at the moment. Clause 9 of the TCB, which seeks to deal with enforcement of orders is a poor attempt to regulate the post prosecution procedure in traditional courts. On the whole, the clause intents to create no more than different stages of inquiry into the fulfilment of a judgment debt. Clause 9(2) intents to give the clerk of the traditional courts the initial inquiry. Clause 9(4)(a) grants the second inquiry to the justice of the peace. At the end, if the debt is still not satisfied due to the judgment debtor's fault, the matter is intended to be started afresh in the magistrate's court in terms of clause 9(4)(b)(ii). Essentially, non-fulfilment of a traditional court's decision will be rewarded with a retrial in the state courts. The view that the execution of traditional justice depends on the goodwill of the judgment debtor appears to be well founded in light of this legislative text.[234] Clause 9 does not intent to create an effective system of execution. The intention to recognise traditional court but saddle them with contemptable powers continues to undermine the recognition of this *fora*.

From the available data it seems as though these courts can do no more than inquire from the judgment debtor. A classic example of this lack of effective framework for execution[235] is from case 25. Member of *Kgoro* 10 notably highlights that people can take upto two years without settling their debt. These act is inconsequential and would continue to be so even post the text of clause 9 in its current form. It is difficult to reconcile the claim that traditional justice is swift with the clear lack of execution mechanism. More so, as apparent from case 25, when the enforcement of judgments is entirely dependent on the goodwill of the judgment debtor.

[232] *Congress of Traditional Leaders of South Africa v Speaker of the National Assembly and Others* (2474/16) [2016] ZAWCHC 206 para 90.
[233] Sipho Nkosi, 'When the King can do a lot of Wrong: Some Reflections on *S v Dalindyebo* 2016 (1) SACR 329 (SCA)' (2020) 35(2) *SAPL* 1, 10-11.
[234] Patience Sone, Patience Sone, 'Relevance of Traditional Methods of Conflict Resolution in the Justice System in Africa' (2016) 46(3) *Africa Insight* 51, 58.
[235] *Ibid*.

9. Worldviews - an informer of the decision of the various *fora*

It is worth reiterating that a worldview is an expression of people's reality, place and purpose in the world.[236] In the light of this, one must accept that Natives too have a specific understanding of their place in the world.[237] Against this context, one must equally be alive to the view that religion has been described as a "way of seeing and being in the world".[238] It is fitting therefore to reflect on the manner in which traditional justice is imagined in the sampled jurisdictions. What is apparent from the collected data is that there is a mix of Christian worldview by *Kgoro* (case 9 is evidence of this) and council (case 40 in particular) with cultural expressions made through idioms (case 8(a) is an example). This would suggest, on the whole, that the decision makers use a blended approach to their reality, place and purpose as decision makers in this *fora*. The question that is inescapable, in light of the argument for marginalisation of indigenous reality, is whether this blended approach continues the subjugation of culture or compliments it. This question is tricky if one accepts, as this study does, that customary law is constituted by an inseparable matrix of customs, religion and lived experience.

This trickiness is amplified by the view of the Constitutional Court in *MEC for Education: Kwazulu-Natal and Others v Pillay* that there is often an overlap between religion, of which Christianity is a form, and traditions of people.[239] Despite this, the court rightly noted, the overlap does not necessarily mean oneless between the two.[240] Interestingly, at paragraph 66 of the judgment, Langa CJ, creates an important distinction that manifests an uneasy relationship between these two worldviews. The learned Chief Justice acknowledges that there is space for convenience in the adherence of culture whilst faith may not necessarily afford people the same fate. This convenience is apparent from the view that people may choose which cultural rites or traditions to observe whilst opting out of those which are considered burdensome.[241] This is not to suggest thet religious views must be adhered to strictly and to the complete disregard of the state law, on the other hand. This is at least the view of a unanimous court in *Christian Education South Africa v Minister of Education*.[242] In spite of

[236] Mpsanyana Makgahlela, *The Psychology of Bereavement and Mourning Rituals in a Northern Sotho Community* (PhD in Psychology, University of Limpopo, 2016) 10.
[237] *Ibid*.
[238] Patricia Lenaghan, 'Restoring the Historical Deficit: The Exercise of the Right to Freedom of Religion and Culture in Democratic South Africa' (2013) 29(2) *SAJHR* 294, 296.
[239] 2007 (2) SA 106 (CC) para 47.
[240] *Ibid*.
[241] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2007 (2) SA 106 (CC) para 66.
[242] (CCT13/98) [1998] ZACC 16 para 35.

these choice argument and the instructional tenets of religion, it seems as though the Constitutional Court considers sections 15[243] and 31 of the Constitution to be bedfellows.[244] This view is not shared by all. In fact, Kumalo remarks that the religious transformation of South Africa has had an adverse effect on social capital and cohesion.[245] In the context of his view, it is clear that he had misgivings on the impact of religion on the social ordering of Natives.

9.1. Christianity

In *S v Lawrence*, *S v Negal*; *S v Solberg* the Constitutional Court had the first post constitutional opportunity to decide on the right to religion in South Africa.[246] Sachs J gave an account of the bias towards Christianity by the pre constitutional governments.[247] Notwithstanding the bias of earlier governments to this form of religion, the post constitutional order cannot endorse that view without necessarily being prejudicial towards other belief system.[248] It is submitted that it is naïve to concede that there was historical bias to Christianity but to equally claim that such biasness did not necessarily preclude the practice of other religions.[249] This view seems to ignore the attempt to civilise other peoples and religions through a concerted endorsement of Christianity.[250] Care should be taken to acknowledge that although the Constitutional Court, per Sachs J, makes it clear that there was no post constitutional endorsement of one religion over others, the court was equally careful to avoid speaking about indigenous religion and or spirituality. Choosing instead to

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[243] Freedom of religion, belief and opinion - (1) Everyone has the right to freedom of conscience, religion, thought, beliefand opinion.
(2) Religious observances may be conducted at state or state funded institutions, provided that -
(a) those observances follow rules made by the appropriate public authorities;
(b) they are conducted on an equitable basis; and
(c) attendance at them is free and voluntary.
(3)(a) This section does not prevent legislation recognising -
(i) marriages concluded under any tradition, or a system of religious, personal or
(ii) systems of personal and family law under any tradition, or adhered to by persons professiong a particular religion.
(b) Recognition in terms of paragraph (a) must be consistent with this section and other other provisions of the Constitution.

[244] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2007 (2) SA 106 (CC) para 66.

[245] Raymond Kumalo, 'Christianity and Political Engagement in Post-Apartheid South Africa' (2014) 15(3) *Political Theology* 220, 221.

[246] 1997 (4) SA 1176 (CC).

[247] *Ibid* paras 148-152.

[248] *Ibid* para 152.

[249] David Bilchitz & Alistair Williams, 'Religion and the Public Sphere: Towards a Model that Positively Recognises Diversity' (2012) 28(2) *SAJHR* 146, 160.

[250] Makau wa Mutua, 'Limitations on Religious Rights: Problematizing Religious Freedom in the African Context' (1999) 9(1) *Buffalo Human Rights Law Review* 75, 79.

focus on the exclusion of forms of religious marriages as an example of offensive actions arising from the Christian bias.[251] On the face of it, it would appear innocent to use other examples of recognised religions and not all of them. However, the study is persuaded by the views of Makau wa Mutua who questions if at all human rights discourses actually factors in indigenous religion.[252] Aligned with that doubt and the messianic intolerance of indigenous religion, one is tempted to aver that the court avoided the subject in favour of a less controversial position. Yet the court speaks of a religious standard encompassing what Sachs J called the "reasonable South African".[253] Here too, the faiths exampled extent to include etheists but was careful to exclude indigenous religion.

Despite possible abuses in the past or justification of segregation using religion, or Christianity to be precise, it is accepted that South Africa has a large section of believers.[254] Of these different beliefs, the view seems to be that Christianity is the dominant religion.[255] Be that as it may, care must be taken not to assume that Christianity is homogenous. On the contrary, there are different ways in which Christianity has evolved in South Africa.[256] From African Initiated Churches to Evangelical, Pentecostalism and other variations, it is argued that these different Christians have different goals and or interpretation of Christianity.[257] It is unsurprising that somewhat bitter rivalries have developed which create deep seated antagonism amongst people.[258] This rivalry and antagonism is best exemplified by the views of councillor 10 in case 41 where she reflected scornfully to the use of traditional doctors to address claims of a roaming tokoloshe by the respondent. It would seem that this view in particular is aligned to de-Africanisation and its flirtation with foreign taxonomy.[259]

Research points towards the popularity of Christianity in South Africa.[260] Whether its worldview is encompassed in the inseparable matrix of customary law is undefined. Despite this, it is pointed out above that Christianity is itself diverse. Therefore, the construction of

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[251] *S v Lawrence*, *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) para 152.
[252] Makau wa Mutua, 'Limitations on Religious Rights: Problematizing Religious Freedom in the African Context' (1999) 9(1) *Buffalo Human Rights Law Review* 75, 93.
[253] *S v Lawrence*, *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) para 162.
[254] David Bilchitz & Alistair Williams, 'Religion and the Public Sphere: Towards a Model that Positively Recognises Diversity' (2012) 28(2) *SAJHR* 146, 160-162.
[255] *Ibid* 161-162.
[256] See Raymond Kumalo, 'Christianity and Political Engagement in Post-Apartheid South Africa' (2014) 15(3) *Political Theology* 220.
[257] *Ibid* 226.
[258] Makau wa Mutua, 'Limitations on Religious Rights: Problematizing Religious Freedom in the African Context' (1999) 9(1) *Buffalo Human Rights Law Review* 75, 91.
[259] *Ibid* 96-97.
[260] David Bilchitz & Alistair Williams, 'Religion and the Public Sphere: Towards a Model that Positively Recognises Diversity' (2012) 28(2) *SAJHR* 146, 160-162.

customary law as imagined through a religious construction is actually difficult to define. What this demonstrates is that in the seeing and being within the traditional justice framework, one must be careful not to promote their own perspective as an incontrovertible truth.

9.2. Cultural lessons (idioms)

The case of *Smit v King Goodwill Zwelithini kaBhekuzulu* offers some insight into the post constitutional pitfalls of intolerance of religious and cultural diversity in South Africa.[261] In this case the Applicants were seeking an urgent interdict against His Majesty King Goodwill Zwelithini kaBhekuzulu disallowing the slaughtering of bulls or in any way causing them distress at the *Ukweshwama*, the Festival of First Fruits event.[262] The whole premise of the application to interdict the festival was based on unsubstantiated hearsay about how animals are killed during the event.[263] Notwithstanding the fact that the court found against the applicants on the issue, the case revealed deep seated antagonism against an African reality, imagined or real. On page 14, Van der Reyden J, noted with concern the disdain shown to the Zulu Monarch by the applicants. Furthermore, the court found it lamentable that the underlying purpose of the application seemed to be the insistence on secularisation.[264]

It is this secularisation that historically disenfranchised Natives from themselves and forced a cultural genocide on indigenous reality.[265] In the past it was easier for missionaries to impose their view of indifference to Native culture and indigenous religion with impunity. This was based on the insufferable notion of their superiority and the corresponding inferiority of Natives.[266] According to Amoah and Bennett, therefore, African worldview fell to be replaced by higher order civilised religion.[267] In this regard and to justify their lack of appreciation of indigenous religion and culture, the missionaries classified it as no more than animism.[268] At the end, two possible outcomes seem viable; firstly, indigenous religion risks being eclipsed by the dominant religions.[269] Under a new order, this is likely to take the form of constitutionalism as the applicants attempted to do in *Smit.* Secondly, the growth of the church

[261] (10237/2009) [2009] ZAKZPHC 75.
[262] *Ibid* page 2.
[263] *Ibid* page 5.
[264] *Ibid* page 15.
[265] Makau wa Mutua, 'Limitations on Religious Rights: Problematizing Religious Freedom in the African Context' (1999) 9(1) *Buffalo Human Rights Law Review* 75, 75.
[266] *Ibid* 83-84.
[267] Jewel Amoah & Tom Bennett, 'The Freedoms of Religion and Culture under the South African Constitution: Do Traditional African Religions Enjoy Equal Treatment? (2008) 8(2) *SAJHR* 357, 363.
[268] *Ibid* 360.
[269] *Ibid* 372.

has had an adverse effect on social cohesion and harmony in indigenous communities.[270] Pummelled into oblivion through disuse and or eclipsed by dominant religion as insisted upon in case 40, the mating between indigenous religion and reality in the jurisdictions is a curious one. It would be shallow to argue that the Christian worldview is in and off itself polemic or leads to the de-Africanisation of the indigenous reality. By the same token, one ought to concede that the dominance is threatening to the continuation of traditional reality as experienced by Rammala.[271] This threat, it is submitted, is further envinced by the romantic notion of *Ubuntu* as advancing Christian discourse of forgiveness.[272] Granted that in *Pillay* the Constitutional Court acknowledged the overlap between religion and culture, care must be taken not to assimilate *Ubuntu* into religious discourse with effect that it takes on a Christian character altogether.

Motsepe v Khoza,[273] as discussed in Chapter 2 above, retains its relevance on the instructional wisdom of idioms. It is disconcerting that very few such idioms were used to lend the litigants the wisdom and rich tapestry of a traditional reality and worldview.

10. Social clubs

Social clubs are a popular and gendered[274] social phenomenon[275] in the South African landscape. So popular in fact that it is not uncommon for people to join more than one such clubs, in particular the burial societies.[276] According to Ncgobo and Chisasa, the representation in these clubs is favourable towards women.[277] The umbrella word for these social clubs in the literature is stockvel, which is defined by the National Stockvel Association of South Africa (hereunder referred to as NASASA) to mean "voluntary associations of individuals who come together to pool funds into a common place for the equal benefit of members".[278] From this,

[270] Raymond Kumalo, 'Christianity and Political Engagement in Post-Apartheid South Africa' (2014) 15(3) *Political Theology* 220, 227.
[271] See MacDonald Rammala, 'Lekgotla and Idiomatic Expressions in Traditional Dispute Resolution: The Case of Makapanstad, North West Province, South Africa' (2021) 16(1) *International Journal of African Renaissance Studies* 220.
[272] See Megan Shore, 'Christianity and Justice in the South African Truth and Reconciliation Commission: A Case Study in Religious Conflict Resolution' (2008) 9(2) *Political Theology* 161, 166-167.
[273] [2013] ZAGPJHC 162.
[274] Lindiwe Ngcobo & Joseph Chisasa, 'Success Factors and Gender Participation of Stokvels in South Africa' (2018) 14(5) *Acta Universitatis Danubius* 217, 217-219.
[275] Michael van Wyk, 'Stokvels as a Community-based Saving Club Aimed at Eradicating Poverty: A Case of South African Rural Women' (2017) 17(2) *The International Journal of Community Diversity* 13, 14,
[276] Zimkhitha Mbhekeni, *Legal Perspectives on the Potential Regulation of Stokvels in South Africa* (LLM Mini dissertation, University of Johannesburg, 2021) 12.
[277] Lindiwe Ngcobo & Joseph Chisasa, 'Success Factors and Gender Participation of Stokvels in South Africa' (2018) 14(5) *Acta Universitatis Danubius* 217, 218.
[278] https://nasasa.co.za (accessed on 16 August 2023).

it is apparent that there may be as many different types of stockvels as there are common goals. For that reason, NASASA identifies the following different types of stockvels; rotational; savings; grocery; investment; burial Societies and social clubs.[279] For current purposes, only the burial societies and the social clubs appeared before the traditional *fora* in the respective jurisdictions. In fact such is the popularity of the stockvels that in all three jurisdictions they had disputes emanating from these social arrangement.

Despite their popularity in the indigenous cosmology, scholars are agreed that these clubs represent an informal social security for its members.[280] This informality, it is surmised, arises from the fact that NASASA cannot oblige stockvels to join the body.[281] For that reason and despite their relative importance to its members, stockvels operate outside the realm of the formal sector as regulated through legislation.[282] These informality necessarily demands that the founding memorandums, referred to as the constitution, to determine the scope of operation for the stockvel in clear terms.[283] Nkoane submits that the constitutional prescripts of these stockvels determines membership, the operational goal, contributions to be made, periodical meetings and significantly indicates the process for the appointment of leadership.[284] Each of these constitutional prescripts are of importance as discussed herewith.

First, Membership can promote either kinship or be community based.[285] According to this view, kinship based stockvels are those that are entered into by relatives.[286] This may result in what is called *a re tsebaneng* (let us know each other).[287] On the other hand, community based stockvels can take many forms. From these forms, and for practicality of the data, the following are mentioned here; block society (as the name suggests, these is for people who live on the same block); street society (for people who live on the same street).[288] The block

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[279] *Ibid*.
[280] See Andriette Dekker, 'Mind the Gap: Suggestions for Bridging the Divide between Formal and Informal Social Security' (2008) 12(1) *Law, Democracy and Development* 117, 119; Clarence Tshoose, 'The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa' (2009) 3 *African Journal of Legal Studies* 12.
[281] Paul Nkoane, 'Unpacking the Laundry Machine: Why Is Dirty Money in the Social Club' (2018) 11(2-3) *African Journal of Legal Studies* 254; 273.
[282] Zimkhitha Mbhekeni, *Legal Perspectives on the Potential Regulation of Stokvels in South Africa* (LLM Mini dissertation, University of Johannesburg, 2021) 12.
[283] Paul Nkoane, 'Unpacking the Laundry Machine: Why Is Dirty Money in the Social Club' (2018) 11(2-3) *African Journal of Legal Studies* 254; 270.
[284] *Ibid*.
[285] Andriette Dekker, 'Mind the Gap: Suggestions for Bridging the Divide between Formal and Informal Social Security' (2008) 12(1) *Law, Democracy and Development* 117, 119.
[286] *Ibid*.
[287] David Semenya, 'Burial Society versus the Church in the Black Society of South Africa: A Pastoral Response' (2013) 34(1) *Verbum et Ecclesia* 1, 2.
[288] *Ibid*.

and street societies are more common or rather were experienced in jurisdiction A. Another form of society, experienced in jurisdiction C, is the eating utensils society. In terms of this form, food parcels are delivered to a member as and when they have a function.[289] Semenya does not profess to create a closed list of the different types of societies. In fact, there are community wide societies as well that he has not identified in his work. Case 24 is an example of a community based burial society. There is a suggestion that the membership of burial societies in particular are a response to poverty[290] and lack of education.[291]

Second, the operational goals of the stockvels are determined by the type of stockvel entered into. For example, a burial society is intended to cover the member against a certain contingency, being death.[292] Thus, on the occurance of this contingency, a member becomes entitled to claim from the society in terms of its constitution.[293] The process to claim is simplistic and payment is often said to be prompt.[294] Third, the constitution determines the contributions that each member must make. It must be noted that contributions may be in the form of money and services[295] or goods and services.[296] A critical factor of joining and staying in any such stockvels entrenches social relations in that members of the burial societies often offer services that effect healing on the bereaved family.[297] In this way, the stockvel enhances social renewal amongst kinship or the community.[298] Fourth, the constitution makes provision for periodical meetings. The meetings can be weekly, per fortnight or monthly.[299] The frequency of the meetings are said to promote group identity and in turn support a systematic socialisation between kinship or the community.[300] It is arguable then that the regular socialisation bodes well for enhanced trust and honesty amongst members of the kin

[289] *Ibid*.
[290] Victor Molobi, 'The History and Potential of Burial Societies in Creating Basic Christian Communities in South Africa' (2006) 32(2) *Studia Historiae Ecclesiasticae* 153, 154.
[291] Lindiwe Ngcobo & Joseph Chisasa, 'Success Factors and Gender Participation of Stokvels in South Africa' (2018) 14(5) *Acta Universitatis Danubius* 217, 226.
[292] Clarence Tshoose, 'The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa' (2009) 3 *African Journal of Legal Studies* 12, 15.
[293] *Ibid*.
[294] Lindiwe Ngcobo & Joseph Chisasa, 'Success Factors and Gender Participation of Stokvels in South Africa' (2018) 14(5) *Acta Universitatis Danubius* 217, 220.
[295] Clarence Tshoose, 'The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa' (2009) 3 *African Journal of Legal Studies* 12, 15.
[296] David Semenya, 'Burial Society versus the Church in the Black Society of South Africa: A Pastoral Response' (2013) 34(1) *Verbum et Ecclesia* 1, 2.
[297] Victor Molobi, 'The History and Potential of Burial Societies in Creating Basic Christian Communities in South Africa' (2006) 32(2) *Studia Historiae Ecclesiasticae* 153, 158.
[298] *Ibid*.
[299] https://nasasa.co.za (accessed on 16 August 2023).
[300] Michael van Wyk, 'Stokvels as a Community-based Saving Club Aimed at Eradicating Poverty: A Case of South African Rural Women' (2017) 17(2) *The International Journal of Community Diversity* 13, 18.

or the community at large.[301] The various litigation in the collected data challenges this view though, it is submitted, more as an exception than a norm. Case 32 supports this view of a collegial sense of socialisation amongst members of the social club and the respondent. So far as the time of meetings is concerned, Semenya posits that these are generally held on Sundays in the mornings or in the afternoon.[302] His argument that meetings cannot be held during weekdays cannot be correct for all circumstances.[303] From the data, case 12 is in opposition to his seemingly incontrovertible opinion. On the facts, the meetings for the society were held weekdays at 15:00 but there was a purported effort to move it to 11:00 because of the experiences of load shedding. Finally, the constitution must determine the process of appointing leaders. According to Molobi, the leadership is premised on the qualities of the members, judged by the standard of the people appointing them.[304] According to clause 3 of the NASASA constitution, there is an expectation that each stockvel must have a chairperson, secretary and treasurer in its leadership.[305]

What is apparent from the discussion above is that stockvels create a durable network amongst its people and as such a vehicle through which the social capital can be advanced.[306] Seemingly, the mutual trust expected from kinship or the extended members in a community stockvel, reciprocity of actions and the expectations or certainty of services insured confirms this view.[307] Furthermore, the scope of each stockvel determines the shared interests of its members and as such is a base on which socialisation or networking commences.[308] At the end, there is a view that social clubs are a tool that can be used for the empowerment of women.[309]

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[301] *Ibid*.
[302] David Semenya, 'Burial Society versus the Church in the Black Society of South Africa: A Pastoral Response' (2013) 34(1) *Verbum et Ecclesia* 1, 3.
[303] *Ibid*.
[304] Victor Molobi, 'The History and Potential of Burial Societies in Creating Basic Christian Communities in South Africa' (2006) 32(2) *Studia Historiae Ecclesiasticae* 153, 156.
[305] https://nasasa.co.za (accessed on 16 August 2023).
[306] Cora Burnett, 'Building Social Capital Through an 'Active Community Club'' (2006) 41(3-4) *International Review for the Sociology of Sport* 283, 283.
[307] *Ibid* 384.
[308] *Ibid*.
[309] Lindiwe Ngcobo & Joseph Chisasa, 'Success Factors and Gender Participation of Stokvels in South Africa' (2018) 14(5) *Acta Universitatis Danubius* 217, 221.

11. Additional discussion

11.1. Introduction

The secondary questions of the study, in particular questions b) and c) necessitate the below discussion. Despite the relative importance of these questions to the study as a whole, the general observation of the results did not support the inclusion of these aspects as themes. Notwithstanding this, the literature in chapter 3 painted a picture of either total exclusion or limited participation of women in traditional justice. The below discussion offers some insight into the working of this *fora* and its interaction with women. Additionally, the below discussion comments of the indigenous cosmology's understanding of *bohlatse*.

11.2. Evidence of women's participation

The relationship between women and traditional courts is a troubled one. To respond to it directly from the evidence in the jurisdictions, this study in no way generalises this aspect nor wishes to be insensitive to the claims of suppression as noted in other provinces in Chapter 3. Whether the attitude in these jurisdictions is a direct response to the observations of the Law Commission in the province cannot be established either.[310] Aiyedun trails evidence of gender bias against women in their engagement with these *fora*.[311] Although he acknowledges that improvements have been made in some parts of the country to respond to constitutionalism, it is equally noted that the male representation of the female voice is observed in other parts of the country.[312]

For context, it must be qualified that the constitutions used here are not those of the respective *Meshate* but instead drafted by a single *kgoro ya Ntona* in each jurisdiction but apparently endorsed by the high structures of the respective *Meshate*. It must be clarified further that not all *dikgoro tsa di Ntona* have constitutions. *Moshate* does not insist on there being constitutions and as such some *Ntonas* and their *fora* do not draft these documents.

For current purposes, clause 9 of the constitution of jurisdiction A makes it clear that women have been allowed to attend *Kgoro* sessions since 2001.[313] This landmark clause does not, however, establish whether attendance corresponded with women being eligible to bring suit

[310] Project 90 'Report on Traditional Courts and the Judicial Function of Traditional Leaders' (2003) 8.
[311] Adenike Aiyedun, *Fair Trial and Access to Justice in South Africa: How Traditional Tribunals Cater to the Needs of Rural Female Litigants* (Doctor of Philosophy in Law, University of Cape Town, 2023) 122-127.
[312] *Ibid* 123-124.
[313] Clause 9 provides that as of 19/03/2000, women were allowed to attend meetings of the kgoro.

in their own name. What is clear from the data though is that women are competent to litigate in their own names in this jurisdiction. It appears that there is equality in so far as representation is concerned in that both genders can appear in their own names as either complainant or defendant. The distinction comes in the form of presentation of their cases or narration of their legal story. As far as this is concerned, women speak seating down whilst men are expected to stand up to address the *fora*. The rationale is that men "stand for the women". This symbolic gesture of standing for the women appears to be based on the gendered representation of family head. As argued in Chapter 3, the bottom up reconsideration of the social matrix suggest that this cannot be a correct representation of the indigenous cosmology. More so if this position is read against clause 10 of the constitution that establishes eligibility for a stand.[314] The eligibility criteria is based on birth, which confirms the kinship notion.[315] As such, the absence of gendered qualification for a stand mean that women are eligible to seek and own a stand in their own names. In fact cases 14 and 16 is confirmation of this submission. Under these circumstances, who qualifies as the family head? It is illogical to sustain the symbolic standing of men on behalf of women in a socially changed community or kinship.

The illogicality is maintained in a joint reading of clauses 25[316] and 26.[317] Granted that death and its ritualisation are not distinct matters of law but also touches on psycho-socio aspects, it is unfathomable why women are excluded for longer (12 months) while men are excluded for a shorter period (three months). Added to this clear bias, the exclusion of men from *Kgoro* is dependent on their discretion not to attend. As argued in Chapter 3 above, this is a clear case of gendered bias that is unsustainable. As submitted there, an evolution to either exclude or include both genders equally would be sound.

In jurisdiction B, clause 5 makes it clear that any man or woman of 25 years of age is eligible to attend *Kgoro* (see appendix 8).[318] The clause is express about the attendance of women.

[314] If a person (resident) wants a residential stand, he/she shall pay R250.00 to kgoro and an amount of R500.00 in the tridtional authority office. A non-resident shall pay R1500.00 to us and R3000.00 at the traditional authority office. If a resident wants a business stand (including a site to open an initiation school), he/she shall pay R5000.00 to kgoro and pay the amount of R10000 in the traditional authority office. A non-resident who wants a site for business shall pay R7500.00 and the R15000 to the traditional authority office.
[315] Anne Pope, 'Get Rights Right in the Interests of Security of Tenure' (2010) 14(1) Law Democracy & Development 1, 9.
[316] A widow is excused from the meetings of the kgoro for a period of up to 12 months.
[317] A widower may be excused from the meetings of the kgoro for a period of up to three months. However, he may, if he wishes, attend the meetings.
[318] A man or woman of 25 years of age and who is a resident of this jurisdiction is eligible to attend kgoro.

Despite this clear promotion of gender equality, the constitution is in no way gendered. It is neautral in material respects and should be taken as an advancement of a gender neautral draftsmanship. Notwithstanding the positivity embraced by this constitution, in this jurisdiction as well women speak seated and men are expected to address *Kgoro* while standing. The illogicality of this against a gender neautral constitution is similar to that in jurisdiction A.

In jurisdiction C there is no constitution. However, what was observed here was that a woman cannot get a residential stand in her own name unless she is at least 45 years old. There is no such provision in respect of men. The men are only expected to be married in order to acquire a stand. Furthermore, a married woman is expected to be accompanied by a married male relative in order to acquire a stand if the husband is not around. No such requirement is attached to married men. This positionality explains the symbolic representation of women's address before council. The view is gendered and unjustifiable in a bottom up reconstruction of the indigenous cosmology let alone in light of the equality clause of the Constitution of the Republic of South Africa.

It is the view of this study that symbolic representation fails to heed the standing of women in the current epoch. The ethos of the current indigenous cosmology clearly demonstrate women headed families. As such, culture must be adjusted to reflect this reality without a need to test this against the Constitution. The social structure has changed and so too is it expected that culture must adjust to the change.

11.3. Evidence in traditional justice

The literature in this thesis leads to the conclusion that constitutionalism, based on the notion of its supremacy, insist on itself. This is despite its characterisation and nature as the validation of colonial conquest.[319] Furthermore, the insistence on civilising Natives to comply with its seemingly immutable human rights culture is not lost on this study. If anything, this insistence on itself led Manthwa to opine that courts use it as a tool to further obliterate the system of customary law.[320] To this end the view expressed by Nanima on the application of section 35(5) of the Constitution in traditional courts displays symptoms of this insistence and a total

[319] Joel Modiri, *The Jurisprudence Of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017) 76.
[320] Tshepo Manthwa, *Re-ordering the Existing Legal Hierarchy to Reinstate African Law to its Rightful Place as the Primary Component of the Legal System of South Africa (Azania)* (LLD thesis, UNISA 2022) 200.

lack of understanding of traditional justice.[321] To promote the view that rights may potentially be violated in collecting evidence, the author expresses the notion that traditional decisions are subjective[322] and that in carrying out any investigations the actors would be no more than vigilantes.[323] To validate his view further, the author submits that the only protection an "accused" will receive from this untrained adjudicators lies on review to the high court.[324] Despite the obvious relegation of the traditional courts, the author is correct in submitting that these courts do not have authority to adjudicate over matters that are being under investigation by the police.[325] Case 1, with its careful treatment of matters under consideration, and case 31, which dismissed the case in its entirety, are testament of this view. However, in these *fora* nothing turns on councillors or members of *Kgoro* acting as vigilates.

Traditional dispute resolution is inquisitorial in nature.[326] The nature of the trial process and the law applicable in these courts necessarily imply that acts such as the Law of Evidence Amendment Act 45 of 1988 were made for the other courts and not these *fora*.[327] This means a different set of evidentiary norms are followed in traditional courts. This view seems irreconcialiable with the notion of constitutional insistence and a foreign view of customary law. In reality, these *fora* allows all participants the freedom to narrate their version of events as they deem fit.[328] In the observed data, cross-examination happened in cases 17 and 18 more as an exception than the norm. In the main in case 10, *Kgoro* noted its lack of capacity to establish from the respondent if he stole the goats or colluded with others to steal the goats. These potential vigilantes, as Nanima characterises councillors, have not in any way obstructed the liberty of any individual. Case 45 was the only issue that dealt directly with theft. In it, the respondent or accused if you will, was summoned to appear without there being any prior investigation being made. It is unclear how these courts would potentially violate human rights of participants without an investigative wing attached to the court. Perhaps this will happen if one hypothesis on their capacity as Nanima did.[329] Undoubtedly,

[321] Robert Nanima, 'A Missing Link in the Traditional Courts Bill 2017: Evidence Obtained Through Human Rights Violations' (2018) 65 *SA Crime Quartely* 23.
[322] *Ibid* 25.
[323] *Ibid* 28.
[324] *Ibid* 26.
[325] *Ibid* 27.
[326] Hallie Ludsin, 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law', (2003) 21(62) *Berkeley Journal of International Law* 62, 71.
[327] *Ibid*.
[328] Boyane Tshehla, *Traditional Justice in Practice: A Limpopo Case Study* (ISS 115, 2005) 27.
[329] Robert Nanima, 'A Missing Link in the Traditional Courts Bill 2017: Evidence Obtained Through Human Rights Violations' (2018) 65 *SA Crime Quartely* 23, 25.

unless viewed from the vintage point of the constitutional insistence and corollary common law principles, nothing in these *fora* supports the imagined fears of this author.

At the end, there is legal storytelling in traditional courts that is not akin to the law of evidence as known in the common law system. It is incorrect to conclude that difference in perspective naturally mean the system of customary law is unconstitutional. This too is not to suggest that there are no threats to people's rights. Above it is conceded that the King can do wrong, as some have. But exceptions should not be treated as the norm. The thesis advanced is that legal storytelling should not be characterised with the lenses foreign to it. All 45 cases considered in whole, point towards the conclusion that *bohlatse* in these *fora* is the total sum of tales that each party puts before the respective traditional forum to enable it to inquire into and reach a determination that will help the parties patch their relations for the advancement of kinship or harmony in the community as a whole.

12. Chapter conclusion

In this chapter, the research findings were discussed in view of existing literature. The chapter was discussed under the following broad outline; procedure, reconciliation, dispute over land, customary marriages, family disputes, disputes between neighbours, execution, worldviews and social clubs. The discussion was intentional about locating the participants and their reality in the study. For that reason, a sustained de-linking of the other law from their shared reality was undertaken. In light of this de-linking, a view is that traditional justice is a comprehensive system in its own right. To fully appreciate that comprehensive view, the next chapter advances the notion of traditional dispute resolution that fully respects indigenous reality and imagination.

CHAPTER 7

SUMMARY, CONCLUSION AND RECOMMENDATIONS

1. Introduction

In the preceding Chapter 6, the study's findings were meticulously discussed in the context of relevant literature and document analysis. This chapter aims to provide a concise summary of these findings and subsequently emphasises their significant contribution to the field of jurisprudence. In line with this objective, recommendations are put forth to reaffirm the reindigenisation of the customary law paradigm. It is essential to underscore that the overarching goal of this research was to establish traditional justice as inherently distinct from the other legal system by delving into its unique epistemological boundaries. Accordingly, a deliberate detachment from conventional frameworks was consistently maintained throughout the study. Ultimately, it is demonstrated herein that the common thread unifying traditional justice is the intrinsic concept of humanness

2. Summary of the findings

The central theme threading through the summary of these themes pertains to the establishment, preservation, and restoration of idealistic familial and social capital. This underlying principle is elucidated through the exploration of the following major themes and their corresponding sub-themes.

2.1. Procedure

A case is made out for the view that traditional dispute resolution is a comprehensive system in its own right. Despite the poor drafting of clauses 4, 6, and 7 of the TCB, the data reveals a self sustaining system of dispute resolution in the jurisdictions sampled. The discussion does not make a distinction between structural hierarchy of the cases and the process of resolving cases. Clause 6(3) establishes the hierarchy of traditional dispute resolution in vague terms. Particularly lamentable is the fact that this clause omits the family structure from the ambit of traditional dispute resolution. This omission is suspect in that in jurisdiction C, this structure is insisted upon. The family structure negotiates a disturbance of the harmony with the intention of maintaining kinship. If this fails, mediation by the headmen or headwomen is sought.

In terms of clause 7(2), proceedings must be conducted in terms of customary law. It is contended that this clause assumes that knowledge of customary law of procedure is common cause. This attitude does not appear to show that any lessons have been learned from the potential abuse of process and or opportunistic litigation arising out of the interpretation and application of section 3(1)(b) of Act 120 of 1998. The two provisions create open-ended narratives dependent on customs. From the data, the assumption of knowledge of customary process is proved to be ill-founded and as such likely to lead to unending litigation and possible perversion in future. Further anomalies in the intended legislative texts are observed. In spite of these anomalies, the findings present varied procedural aspects in these *fora*.

2.1.1. Correct forum

Clause 6(3) does not express itself on the powers of each layer in the hierarchy. In the absence of that expression, cases 23 and 39 reveal that the system is not a freefall and that there are limitations on the capacity to hear certain cases in some layers.

2.1.2. Legal standing

Clause 4 implies that anyone may approach a traditional forum to have their case heard. No attempt is made to qualify this right for people with an interest in the case, as is done in section 38 of the Constitution. However, to demonstrate due legal process in traditional dispute resolution, case 6 was dismissed on the ground that the complainant was none-suited to litigate the issue in his own name.

2.1.3. Cross-section with other forms of justice

Clause 4(2)(b) expressly relegates traditional dispute resolution to a servient system. It is submitted that this clause privileges other systems at the expense of customary law. This attitude is a continuation of the *Bhe* legacy and such legislation as Act 11 of 2009. From the data, it is clear from case 1 that interaction with other systems in the state apparatus compromises traditional dispute resolution. This is affirmed in case 27. In this case, the law of testate succession is established as the dominant law over the servient customary norms of succession.

2.1.4. Default judgment

Clause 7(3)(b)(i) does not create space for default judgments in the *fora*. The rationale for this is not explained. Despite this exclusion of default proceedings in traditional dispute resolution, cases 20 and 38 are notable as creating that possibility in the indigenous cosmology. It must be noted though that the decisions were responsive to the issues before the respective *fora*. The data, considered in whole, suggest that this is made more as an exception than the norm.

2.1.5. Single person inquiries

The preamble of the TCB does not envisage traditional dispute resolution being comprehensive enough that people may approach it for relief that does not affect another party other than themselves. Due to this limited perspective of traditional justice, it places excessive emphasis on dispute resolution. For that limiting view of the *fora*, it overemphasised dispute resolution. Notwithstanding that, the data in cases 5, 19 and 28 present evidence of a single person inquiries in all three jurisdictions. This enhances the rich tapestry of the system and its comprehensive nature.

2.1.6. Hearsay (probative value)

Act 45 of 1988 was promulgated for the state courts and not traditional *fora*. In that light, this aspect remains unregulated in dispute resolution. The silence of the TCB on this leaves a void that will open the issue up for future litigation. This arises from the fact that jurisdiction A and B have different approaches to it. The entirety of case 11 is premised on hearsay. The claim, though corroborated without the express use of this term, was based on a third party's accounts of the events. In case 21, *Kgoro* equated hearsay to gossip and gave no value to it. This position creates an irreconciliable contest between two jurisdictions.

2.1.7. Inspection

It does not appear likely that the TCB envisaged a space for these *fora* having these powers and as such excluded its regulation. In jurisdiction A and C this option is utilised where the dispute demands it. Cases 13 and 45 are testament to this practice.

2.2. Reconciliation

Literature largely properly captures this theme as the underlying rationale for traditional dispute. Clause 6(2)(d) also underlines this purpose of dispute resolution. The resolution purpose is derived from and intends to advance *Botho* in the reparation of harm.

2.3. Dispute over land

This theme advances respect for Native land epistemology. It is argued that Natives establish and maintain intimate relationships with the land through the performance of spiritual rituals. This epistemology must be understood along the sub-themes developed.

2.3.1. Right to title

Kinship plays a significant role in the establishment of this right. In essence, one must be born in the specific jurisdiction in order to qualify for the right to title, first and foremost. However, jurisdictional foreigners may be entitled to the right to title provided that they are properly transferred. Case 14 attests to this extended qualification for the right of title. Thus, the idea of the right to title is premised on familial capital. But, in jurisdiction A in particular, an expansion of the network is permitted if a valid transfer is made. Furthermore, in accordance with Clause 10 of the *Kgoro ya Moshate* constitution, a different set of monetary requirements is prescribed to acquire the right to title.

2.3.2. Unauthorised occupation

The data demonstrates that state law addresses this issue in Act 19 of 1998. However, in the broader context of jurisdiction B, the matter was pursued with the aim of promoting social harmony between *Kgoro* and its subjects. This underscores a commitment to preserving relationships to the greatest extent possible.

3.3.3. Communal interests

The system of land tenure is said to be layered. This mean that there is an interaction between individual, communal and mixed interests at any given one time. In jurisdiction A, there is evidence of mixed use in so far as the fields are concerned. An owner of the land ploughs and harvest the land for individual needs. However, after the harvest, the field becomes available for communal grazing. Interference with the former interests is punishable by penalty as evinced in cases 8.

2.4. Customary marriages

It is common cause that customary marriages are governed in terms of Act 120 of 1998. The regulation has created difficulties of interpretation as per the jurisprudential data in sub-themes under 2.4.1.

2.4.1. Negotiation and or celebration in terms of culture

The difficulty of pronouncing on validity of customary marriages is discussed here. The general view seems to be that the jurisprudence is stable but not correct for all circumstances. In jurisdiction A, the payment of a portion of money towards *magadi* is sufficient for conclusion and validity of a marriage. On the contrary, in jurisdiction C, it is not so. In this jurisdiction it is necessary that all marriage rituals be performed. This includes the integration rituals of *mohlobolo*. In the absence of the ritual, the view is that the bride is stolen or not validly married. The data establishes that the two jurisdictions attach different meaning to the marriage negotiation and or celebration. What this sugests is that there is no universal truths on this aspect, despite what the courts seem to think.

2.4.2. Forms of marriages recognised in terms of indigenous cosmology

The data reveals that there is a limitation on Act 120 of 1998 to address issues of customary marriages and their nuanced variety. Case 35 creates a unique type of *go nyalela mosadi lapa* marriage. This type of marriage falls outside the parameters of the RCMA. This means that without traditional *fora*, the spouse or more aptly the daughter-in-law is legally vulnerable in all legal issues falling outside of the RCMA. The attempt to civilise Natives through the Act fails dismally in regulating Native reality of marriage.

2.4.3. Marriage gifts

The post marriage gifts are optional. Where they are given, it is difficult to envisage how the state courts would be suited to make a win-lose finding on such. Case 34 addresses this issue to sustain the bond amongst the various families.

2.5. Family disputes

The data demystifies the notion that the family head is the only person entitled to civic rights under customary law. On the contrary, the evidence supports the notion of building kinship

where there is a breach in the family. This argument is supported through the following sub-themes.

2.5.1. Family setup – rights and responsibilities

Jurisprudence establishes that the family head is a pivot through which the unit is anchored. As such, the head is supposed to ensure the demarcation of rights and responsibilities to each member of the unit. The development and interpretation of the indigenous cosmology from the bottom up approach suggests that women can be family heads. This gender neutral view is endorsed in case 42. Regrettably, this acknowledgement corresponds with the possible abuses of the role of anchor by unscrupulous people. Council affirmed the view that the head cannot unjustly deny others their rights.

Notwithstanding that development, the nature of the complaint in case 31 is steeped in patriarchy. By acceding to the other state apparatus without expressing its view, council was unable to once and for all clarify its worldview on the position of patriarchy in this jurisdiction.

2.5.2. Witchcraft

This sub-theme appears in jurisdiction A only. *Kgoro ya sechaba* declined to make a determination of the issues on the passport of Act 3 of 1957. Instead in case 9, it endeavoured to encourage bondage amongst the family members. In case 11, on the other hand, it advised for a separation of the complainant from the respondent and her grandmother on the instruction of idiomatic wisdom. What this theme proved, despite *Kgoro* declining to prosecute, is that kinship is valued but not promoted at all cost as evinced by the different decisions in cases 9 and 11 respectively.

2.6. Dispute between neighbours

Botho and neighbourliness are virtues that are encouraged in all jurisdictions under study. In case 13 in particular, *Kgoro ya sechaba* took the view that a balance must be struck between enjoyment of one's individual interests and ensuring harmony with others. To achieve this, *Kgoro* opted for a negotiated settlement of the issue as a form of promoting neighbourliness. In case 30, a possible future infraction was avoided by moving the complainant to another vacant stand. This was a form of preventative measures intended to preserve the social harmony.

2.7. Execution – enforcement of decisions

There is a view that like the RCMA, the TCB aims to civilise Natives and by extension traditional dispute resolution. Failing which, the latter legislative text deprives these *fora* of an effective enforcement mechanism. The lack of effective execution is seen in case 25. The data from this case and case 8 support the notion that enforcement in these *fora* depends on the judgment debtor's goodwill. Clause 9 of the TCB does nothing to tame this view.

2.8. Worldviews – an informer of the decision of the various *fora*

Religion is a way of seeing and being in the world. Within the indigenous cosmology, this is seen through the lenses of Christianity.

2.8.1. Christianity

The data establishes two things under this sub-theme; one, South Africans are fairly religious. Two, Christianity enjoyed a position of privilege in previous governments. This is particularly true of the Apartheid government. Case 9 establishes a window of opportunity for a Christian teaching in encouraging family bondage. On the other hand, case 41 creates an unsettling impression that councillors in jurisdiction C privilege this religion and worldview at the expense of others. This position is undesirable and unjustifiable at best. Council ought to be sensitive to the worldview of others within the boundaries of reasonableness as understood in the indigenous cosmology.

2.8.2. Cultural lessons (idioms)

The instructional wisdom of idioms is observed in a few cases. The reactive nature of the penalties for infringement of individual interest in case 8 is premised on idiomatic expression that makes one alive to their surrounding. In case 11 separation of parties is justified by reference to an idiom. Furthermore, case 36 demonstrate parental responsibility for the actions of children. The instructions embodied in the idiom renders parents liable for their children's indiscretion.

2.9. Social clubs

Stockvels are, in their nature, a clear advancement of the familial and social capitals. Literature posits that this coming together of people is the result of poverty and a lack of education. The contestation of this point will not serve any purpose to the current study. What is apparent

from the data though is that there are various forms of stockvels that enhances or consolidates the networking of people with increased socialisation. Indigenous cosmology will likely benefit from greater interaction than separation. This submission is underlined by the fact that this socialisation is premised on shared common goals.

2.10. Additional discussion

As pointed out in Chapter 6 above, the addition of these discussion is premised on secondary research questions b) and c).

2.10.1. Evidence of women's participation

This aspect has presented evidence of a difficult relationship. On the one hand, women can litigate in their own names. This is a win for women rights groups. On the other hand, patriarchy reserves a right for symbolic representation in as far as addresses to the *fora* is concerned. It is argued here that the reformulation of the social order makes this practice to lose touch with development and social evolution. Furthermore, the ritualisation of death and its relationship with these *fora* is unjustifiable in jurisdiction A. *Kgoro ya Moshate*'s constitution creates gendered notions of grief and mourning in clause 10. This view is illogical and unsustainable in an evolved indigenous cosmology.

2.10.2. Evidence in traditional justice

A foreign epistemology of law and unexamined consequences of lack of regulation has created space for irresponsible hypothesis on the nature of traditional dispute resolution. What is apparent from the observation of the data as a whole is that traditional justice depends on legal storytelling as opposed to the rules of the law of evidence. Folklore is different to evidence in material respects. Therefore, it is crucial to envision traditional dispute resolution within its cultural context without attempting to impose Westernisation on the system. The conclusion of the study on this view is that *bohlatse* is not bound by the same convictions as evidence in the other system.

3. Contribution of study to jurisprudence

3.1. Introduction

The empirical data collected for this study shows that customary law and traditional dispute resolution do not have universal truths for all circumstances and issues. A case in point is

demonstrated by the issue of negotiation and celebration of customary marriages. The primary example on this arises from the issue of negotiation and or celebration of customary marriages. As alluded to above, the construction of this law by the courts is stable but not correct in all circumstances. It is odd that the courts have, since the unsubstantiated hunch of Hlophe J in *Mabuza*[1] settled the law on this point as per the SCA's endorsement in *Tsambo*.[2] This view of a settled law is cascaded down to lower courts as exampled in *Muvhali*.[3] The oddity of this settled law is premised on the fact that in the cases under consideration there were different ethnic groups in the inquiry into validity. The current study was conducted amongst the Bapedi people of the Limpopo Province yet different jurisdictions arrived at different answers on the same point. On this passport, the study arrives at a view that there are similarities and or consistencies, but there may as well be material differences on the same issue. This same pattern is observed in as far as the attitudes of the respective jurisdictions are concerned on the treatment of hearsay in these *fora*.

It is correct that the development of customary law and by extension traditional dispute resolution must be undertaken by communities themselves.[4] It is equally correct to aver that courts have proved to be largely unfit to advance a customary jurisprudence that is centered on the imagination of the Natives.[5] As argued above in Chapter 2, and indeed the view in *Mabuza* endorses the notion of a separation between indigenous reality and the high chairs of the courts.[6] From a legislative perspective, the legislature has attempted to apply common law principles to customary law legislation.[7] This is seen through the RCMA as an example. Beyond giving customary marriages civil consequences, the Act does not regulate other variety of customary marriages recognised in the indigenous cosmology, like in case 35. In essence, the South African view of customary law is polluted even where there is some level of good intention. The question that ought to be asked is whose worldview or positioning should matter? In grappling with this question, the study accepts that the Constitution *in* South Africa

[1] *Mabuza v Mbatha* 2003 (4) SA 218 (C).
[2] *Tsambo v Sengadi* (244/19) [2020] ZASCA 46.
[3] *Muvhali v Lukhele and Others* (21/34140) [2022] ZAGPJHC 402.
[4] Tshepo Manthwa, *Re-ordering the Existing Legal Hierarchy to Reinstate African Law to its Rightful Place as the Primary Component of the Legal System of South Africa (Azania)* (LLD thesis, UNISA 2022) 195-196.
[5] *Ibid* 208.
[6] Tshepo Manthwa, 'Handing Over of the Bride as a Requirement for Validity of a Customary Marriage - *C v P* (1009/2016)' (2019) 82 *THRHR* 652, 657.
[7] Ntebo Morodu, & Charles Maimela, 'The Indigenisation of Customary Law: Creating an Indigenous Legal Pluralism Within the South African Dispensation: Possible or Not? (2021) 54(1) *De Jure* 54, 62-63.

is not accepted as imagining let alone attempting to locate the reality of the Natives.[8] This perspective is rooted in the belief that the Constitution reflects Western values.[9]

3.2. Re-centering indigenous reality on Natives

Jurisprudence, no different from education,[10] has imposed, justified and privileged the realities of others in the space of Native laws. This, as Grosfoguel corrcetly posits, is done without a proper investigation of the differences in time and space between the imposed, dominant view and the people living according to the servient, inferior system.[11] During times and space gone by, there was express denial of other realities as so overtly expressed in the repugnancy clause in the repealed section 11 of the BAA.[12] The repugnancy clause was a clear example of privileging the reality of the settlers at the expense of an indigenous reality and imagination. To sustain this privileging of a foreign reality on the social order, western epistemes continue to be embedded in education in general to further ostracise indigenous reality from the minds of the so called literate Natives.[13] In this fashion, none-Native episteme is normalised and so too are the subtle pervesion of that worldview.[14] It is argued above in Chapter 2 that this endorsement of a dominant foreign episteme has relegated customary law to otherness in legal education.[15] The Constitution sustains this order through the use of seemingly progressive language and universal rights of equality and human dignity. Having established that there is a suppression of indigenous reality in both jurisprudence and education, this study proposes a re-indigenisation through community cultural wealth.

Yosso and Burciaga have invited scholars to be fierce in their re-generation of the cultural capitals necessary to advance social justice.[16] This need to be fierce is necessary to unlearn the problems created by deficit ideologies[17] and the miseducation or misalignment identified

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[8] Joel Modiri, *The Jurisprudence Of Steve Biko: A Study in Race, Law And Power in the "Afterlife" of Colonial-Apartheid* (PhD in Law, University of Pretoria, 2017) 76.
[9] *Ibid* 73.
[10] Ramón Grosfoguel, 'The Structure of Knowledge in Westernized Universities Epistemic Racism/Sexism and the Four Genocides/Epistemicides of the Long 16th Century' (2013) 11(1) *Journal of the Sociology of Self-Knowledge* 73, 74.
[11] *Ibid*.
[12] 38 of 1927.
[13] Mogomme Masoga & Hassan Kaya, 'Globalisation and African Cultural Heritage Erosion: Implications for Policy' (2008) 7(2) *INDILINGA* 141, 144-145.
[14] Rosa Jimenez, 'Community Cultural Wealth Pedagogies: Cultivating Autoethnographic Counternarratives and Migration Capital' (2020) 57(2) *American Educational Research Journal* 776, 777.
[15] M Maithufi & Charles Maimela 'Teaching the "Other Law" in a South African University: Some Problems Encountered and Possible Solutions' 2020 (41) *Obiter* 1 – 10.
[16] Tara Yosso & Rebeca Burciaga, 'Reclaiming Our Histories, Recovering Community Cultural Wealth' (2016) 5 *Research Briefs* 1, 2.
[17] *Ibid* 3.

above. It is important that one express a caveat before advocating for community cultural wealth as the lense through which to re-generate and or re-indigenise customary law and by extension traditional dispute resolution: *to wit* these framework was originally intended for American education and its exclusion of people of colour.[18] However, the discussion in this thesis has established the degradation of indigenous reality and imagination to necessitate its application as an intentional framework to defend indigeneity. Thus, community cultural wealth is an intentional stance to reject marginalisation of indigenous imagination in the legal context.

The question that naturally follows is how can we justifiably use the community cultural wealth framework to protest against constitutionalising Natives? Asked another way, is this framework justifiable in a constitutional state like South Africa? As argued earlier, it is contended that the adulteration of customary law is accomplished through legislation in the constitutional state. The view to civilise, modernise and constitutionalise Natives without appreciating their lived reality and intellectual consciousness is proof of suppression of their worldview. Focused on the Constitution *in* South Africa, the study contents that the transaction between indigenous imagination and the Constitution elicit a view of deficit ideology against the former. In essence, sections 30 and 31 of the Constitution's limited scope for the enjoyment of cultural rights seemingly proceed from a position that other rights must be protected against cultural rights. The view is that other rights are privileged and the rights to culture are enjoyed on the understanding that this must be compatible with others. On the whole, erosion of indigenous imagination is camouflaged as constitutionalism. It is unsurprising that the privileging of other views by the South African episteme and Constitution has allowed none Natives to question whether traditional courts should be called courts to begin with;[19] to insist on a somewhat universalisation of the rights of the individual above the group;[20] and other authors to assume a universal sense of oddity between cultural rights and the right to equality,[21] to name a few examples of dominant but misplaced ideology.

[18] Tara Yosso, 'Whose Culture has Capital? A Capital race Theory discussion of community cultural wealth' (2005) 8 (1) *Race ethnicity and Education* 69-91.

[19] Navilla Somaru & Christa Rautenbach, 'The Indian Approach to Criminal Justice: The Role of Traditional Courts as Alternative Dispute Resolution Mechanisms' (2020) 53(2) *CILSA* 1, 4.
[20] Monica Monica de Souza Louw, 'Evolution of Provisions Relating to Violence against Women in South Africa's Traditional Courts Bill' (2020) *Acta Juridica* 87-133.
[21] Janine Ubink & Sindiso Mnisi Weeks, 'Courting Custom: Regulating Access to Justice in Rural South Africa and Malawi' (2017) 51(4) *Law & Society Review* 825, 831.

It is arguable that indigenous reality is espoused by the cultural practices, norming, morality and the values embraced in terms of the indigenous cosmology.[22] Therefore, it is correct that in order to properly represent Native voices in research, one must address their unique challenges within their time and space.[23] *Motsepe* has rightly instructed us to view Native reality in the light of their relationship with nature.[24] Shokane and Masoga expand on this to propose a consideration of Natives' experience with their surrounding eco-system.[25] The view supports the notion advanced in this study of a complex Native reality and imagination that has been subverted by dominant ideologies. At the end, to properly imagine a re-centering of Native reality, the fierce rejection of marginalisation must validate indigenous imagination through what Grosfoguel calls a pluri-verse.[26] This is advancing epistemic plurality.[27] It is strange that jurisprudence has suggested that South African law is plural but has not as openly advocated for epistemic plurality as a parallel. In the articulation of this parallel plurality, care must be taken to ensure understanding of Native worldview and how that influences social and cultural spaces.[28]

To distinguish the attitude of the Constitution *in* South Africa from the importance attached to culture at the World Conference on Cultural Policies, I borrow generously from the latter source.

> Therefore, expressing trust in the ultimate convergence of the cultural and spiritual goals of mankind, the Conference agrees:
> that in its widest sense, culture may now be said to be the *whole complex of distinctive spiritual*, *material*, *intellectual* and *emotional* features that characterize a *society or social group*. It includes not only the arts and letters, but also *modes of life*, the fundamental rights of the human being, *value systems, traditions and beliefs*;

[22] Allucia Shokane & Mogomme Masoga, 'African Indigenous Knowledge and Social Work Practice: Towards an Afro-Sensed Perspective' (2018) 30(1) *Southern African Journal of Social Work and Social Development* 1, 2.
[23] *Ibid*.
[24] *Motsepe v Khoza* [2013] ZAGPJHC 162 para 16.
[25] Allucia Shokane & Mogomme Masoga, 'African Indigenous Knowledge and Social Work Practice: Towards an Afro-Sensed Perspective' (2018) 30(1) *Southern African Journal of Social Work and Social Development* 1, 4.
[26] Ramón Grosfoguel, 'The Structure of Knowledge in Westernized Universities Epistemic Racism/Sexism and the Four Genocides/Epistemicides of the Long 16th Century' (2013) 11(1) *Journal of the Sociology of Self-Knowledge* 73, 89.
[27] *Ibid*.
[28] Allucia Shokane & Mogomme Masoga, 'African Indigenous Knowledge and Social Work Practice: Towards an Afro-Sensed Perspective' (2018) 30(1) *Southern African Journal of Social Work and Social Development* 1, 5.

> that it is culture that gives man the ability to reflect upon himself. *It is culture that makes us specifically human, rational beings, endowed with a critical judgement and a sense of moral commitment*. It is through culture that we discern values and make choices. It is through culture that man expresses himself, becomes aware of himself, recognizes his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations.[29] [The emphasis is my own].

Clause 5 of the Declaration specifically takes the stance that a singular culture cannot determine the cultural currency of the world.[30] The idea, as espoused by this Declaration, makes it clear that there is no justification for ostracising indigenous imagination and replacing it with a uni-versal notion embodied by whiteness, or whiteness that is ensconsed in the Constitution. By definition, culture refers to "behaviours, beliefs, values, attitudes and practices that are tramsmitted or communicated from generation to generation".[31] Literature has identified a few uses of culture; however, only those relevant to the current discussion are mention here. Historical use, which chronicles the people's traditions; normative use, which expresses rules and norms of a people; and psychological use, which expresses a group's capital in solving conflict.[32] By intepretating this from the perched seat of the court in *Mabuza*, the court interrupted the transmission to the next generation based on a hunch and epistemic universality of South African legal education. It must be noted that from the perspective of Native reality, culture is based on an attitude of orality.[33] Properly understood, an attitude of orality is not the same as lack of literacy as interpreted by Western canons.[34] It is instead, the embodiment of Native reality and the vehicle through which morality is transmitted.[35] Therefore, the suppression of this imagination through legal education and jurisprudence necessitate the use of community cultural wealth to magnify it.

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[29] Mexico City Declaration on Cultural Policies, 1982.
[30] *Ibid*. The universal cannot be postulated in the abstract by any single culture: it emerges from the experience of all the world's peoples as each affirms its own identity. Cultural identity and cultural diversity are inseparable.
[31] Allucia Shokane & Mogomme Masoga, 'African Indigenous Knowledge and Social Work Practice: Towards an Afro-Sensed Perspective' (2018) 30(1) *Southern African Journal of Social Work and Social Development* 1, 6.
[32] Mogomme Masoga, Memory, orality and 'God-talk' in sub-Saharan Africa' (2022) 78(3) *Theological Studies* 1, 3.
[33] *Ibid* 1.
[34] Rosa Jimenez, 'Community Cultural Wealth Pedagogies: Cultivating Autoethnographic Counternarratives and Migration Capital' (2020) 57(2) *American Educational Research Journal* 776, 784.
[35] Mogomme Masoga, Memory, orality and 'God-talk' in sub-Saharan Africa' (2022) 78(3) *Theological Studies* 1, 2.

As defined in Chapter 2 above, community cultural wealth is about overcoming any and all kinds of racism and or oppression using a variety of knowledge, skills and abilities.[36] In the current thesis, Native imagination is suppressed through the universality of foreign, dominant ideology and constitutionalism. The data clearly demonstrate a comprehensive system of legal imagination by Natives in the indigenous cosmology. That comprehensive reality has not been sufficiently covered in literature. Instead, there is an attempt in the literature to overemphasise the limitations of traditional dispute resolution. It is argued here that that is deficit inquiry that seeks to maintain the status of traditional dispute resolution as underdeveloped. This deficit is exacerbated by the insufferable notion that traditional courts cannot properly dispense justice because presiding officers lack the education to do so.[37] As argued in Chapter 3, this view is the clearest form of advancing foreign episteme and notions of knowledge on issues of customary law. That view clearly advocates for a dominant none Native imagination of knowledge and perverts their epistemology. Yosso is correct to postulate that cultural capital is diverse and must, out of necessity, include the composite skills and abilities of all people.[38] To advance this framework, six capitals are identified as discussed in Chapter 2. Of particular interest to the current study are (i) familial capital; (ii) social capital; (iii) linguistic capital; and (iv) resistant capital. These capitals are discussed below. The limitation of the study to these capitals is not to suggest that aspirational (hope) and navigational (maneuvering) are insignificant. Above I argue that these are bounded together by *Ubuntu.* As such, it is the position adopted in the study not to restate the jurisprudence on this, especially sense the data does not alter or present new understanding of this virtue.

Familial capital, referred to as pedagogy of the home, taps into the composite skills acquired in the home.[39] From the available data, the pedagogy of the home seems especially troubled in jurisdiction C. The threat of unstable homes to the cultural wealth of Natives is immeasurable. As the data establishes, kinship and its varied application is the centre for the enjoyment of rights in the indigenous cosmology. Notwithstanding the challenges to kinship, it begets proper transmission of Native imagination from the home set up. The relationship that Natives have with the eco-system surrounding them is traditionally commenced through

[36] Tara Yosso, 'Whose Culture has Capital? A Capital race Theory discussion of community cultural wealth' (2005) 8 (1) *Race ethnicity and Education* 69, 77.
[37] Discussion Paper 82 'The Harmonisation of The Common Law and Indigenous Law: Traditional Courts And The Judicial Function Of Traditional Leaders' (1999) 13 – 15.
[38] Tara Yosso, 'Whose Culture has Capital? A Capital race Theory discussion of community cultural wealth' (2005) 8 (1) *Race ethnicity and Education* 69, 76.
[39] *Ibid* 79.

the planting of the umbilical cord in the family yard after a successful birth.[40] That is the point of departure from which the *Motsepe* judgment must be understood as an expression of Native relationship with the land. Whilst *Motsepe* properly reflects Native imagination, the re-teaching or more aptly, the creation of stable but not always correct jurisprudence under marriage law disturbs the pedagogy of the home without evidence nor proper substantiation. This has the tendency to disorientate Natives.

Social capital embraces the creation of networks in the indigenous cosmology.[41] In Chapter 6 above, the data establish the promotion of communal interest and the insistence on harmony of the people. This, no doubt underscores this capital. Critically, the stockvels make for an improved sense of networking in the communities. However, care must be taken to appreciate the change in the indigenous cosmology influenced by socio-economic factors amongst others. This change can be both a gift and a curse. On the one hand, the bottom up change of the social order creates improved standing of women in the social order. On the other hand, the change can lead to a state of sustained chaos and anomie. These changes require an encouragement of an adaptive system of social capital. Crumb *et al* opine that community unity is necessary to unify and organise behaviours of rural inhabitants.[42] This is equally applicable to the changes within the social structures of the indigenous cosmology.

Linguistic capital speaks to the intellectual consciousness of a people and the ability to speak in multiple languages.[43] In the current context, this is interesting because Eurocentric episteme and education has desecrated indigenous reality.[44] This has resulted in young people being alienated from their culture and their language.[45] This would mean that the attitude of orality is threatened and as well that there is voluntary assimilation into the culture of the dominant episteme. This must, out of necessity, invite fierce resitance if Native imagination is to be sustained.

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[40] Tholene Sodi, Diphete Bopape & Mpsanyana Makgahlela, 'Botho as an Essential Ingredient of African Psychology: an Insider Perspective' (2021 51(3) *South African Journal of Psychology* 441, 448.
[41] Tara Yosso, 'Whose Culture has Capital? A Capital race Theory discussion of community cultural wealth' (2005) 8 (1) *Race ethnicity and Education* 69, 79.
[42] Loni Crumb, 'Rural Cultural Wealth: Dismantling Deficit Ideologies of Rurality' (2023) 17(2) *Journal for Multicultural Education* 125, 130-131.
[43] Tara Yosso, 'Whose Culture has Capital? A Capital race Theory discussion of community cultural wealth' (2005) 8 (1) *Race ethnicity and Education* 69, 78-79.
[44] Mogomme Masoga & Hassan Kaya, 'Globalisation and African Cultural Heritage Erosion: Implications for Policy' (2008) 7(2) *INDILINGA* 141, 144,
[45] *Ibid*.

Resistant capital, as the pillar on which this framework relies, is the composite knowledge and imagination necessary to oppose suppression and inequality.[46] The thesis advances the notion that indigenous dispute resolution is not a parallel system of law, but instead it is an existing and vibrant system of cultural orientation. The data is clear that the system is comprehensive and not as simplistic as the literature seems to suggest. Granted that there are no universal truths in this space, the thesis insists on a notion of comprehensive traditional dispute resolution that will not be properly regulated under the TCB as it is. For that reason, as based on the flexibility of this framework,[47] there is space for the addition of legal capital.

Legal capital, this relates to the array of skills, intellectual consciousness, ability and knowledge of Natives in the discharge of dispute resolution. The study locates this capital in the paradigm that is opposed to the notion of South Africa having been a *terra nullius* at the arrival of the settlers. This capital further advances the hypothesis that this system of law will continue to exist with minimal influence from the modernising and or suppressing view of legislation and constitutionalism. Though informed by an attitude of orality, Natives' legal capital will evolve to include literacy constructed for local conditions. The multitude of themes and sub-themes developed by the data endorses the notion of Natives having the intellectual consciousness to attend to their unique problems and attempt to restore either kinship or communal (social) harmony. The idea is primarily based on harmonised interactions in the indigenous cosmology. This is called *botho* in the indigenous cosmology of the sampled jurisdictions. Traditional dispute resolution is, therefore, a systematic process through which these *fora* monitors, restores and maintains *botho* in the indigenous cosmology. As a social fabric underlying Native imagination, *botho* in no way threatens the foreign ideology jealously guarded by the self anointed supreme Constitution *in* South Africa.

4. Recommendations of the study

The recommendations made herewith are aligned to the study findings. These recommendations are intended to enhance the phenomena of tradional dispute resolution and ensure its continuity.

- The study recommends that there be epistemic alignment of traditional dispute resolution with indigenous reality and imagination. Dispute resolution exist within the

[46] Tara Yosso, 'Whose Culture has Capital? A Capital race Theory discussion of community cultural wealth' (2005) 8 (1) *Race ethnicity and Education* 69, 80.
[47] Rosa Jimenez, 'Community Cultural Wealth Pedagogies: Cultivating Autoethnographic Counternarratives and Migration Capital' (2020) 57(2) *American Educational Research Journal* 776, 779.

collective memory of natives in the indigenous cosmology and it is widely used. The TCB imagines the phenomena of dispute resolution as part of the state apparatus of justice and as such attempts to 'modernise' it without paying attention to its details. The attempt to modernise it perverts it and erodes it of its natural fabric. The intellectual consciousness of Natives to evolve this system in line with the bottom-up changes in the indigenous cosmology must be studied attentively to correctly capture traditional dispute reality. At the base of this reality is the view that *Kgoro* is a public interest *fora* that also discharges the socially embedded need for harmony. In this discharge, care must be taken to note that there are no universal truths in the system.

- The study recommends a promotion of Natives' legal capital. The erosion of Native legal imagination in the jurisprudence amounts to its suppression. For that reason, this study positions the lenses of community cultural wealth to reject this state of being. In light of this rejection, the study proposes that Natives be seen as having the capacity, skill, intellectual consciousness and ability to discharge of justice in the indigenous cosmology. Properly applied, this is done through a responsive virtue of *Ubuntu* or *botho* to address the unique challenges arising from the indigenous cosmology. It is the view of this study that Natives do not need permission to advance their legal capital. It is in their collective memory and a part of their every day reality. There exists no omnipotent episteme with infallible criterion for justness that must be imposed on Native legal capacity as if the indigenous cosmology is a *terra nullius*. Instead, traditional dispute resolution is a comprehensive system of justice as proved through the study findings.
- The study recommends for a progressive alignment and reimagination of the participation of women in these *fora.* At present, there is commendable developments regarding the open access, participation and respect of women's rights in the system. However, there remains room for continuous promotion of women's rights. It is proposed that the constant changes in the socio-economic fabric of the indigenous cosmology, managed from a bottom up investigation, must be managed to further promote the rights of women.
- Lastly, the study proposes continuity of the system to be maintained through countering gerontocracy. Clause 22 of the constitution of *Kgoro ya Moshate* and clause 5 of the constitution in one of the *Kgoro* in jurisdiction B provides that people of 21 and 25 years respectively are illegible to attend *Kgoro*. However, the observed data largely confirms *Kgoro* as an old people's *fora*. This impression threatens continuity more so when one considers that foreign education and episteme is

threatening to alienate Native kids from their culture. It is proposed that *Kgoro* and by extension traditional dispute resolution must adapt to changes in the indigenous cosmology to attract young people to Native legal capital.

5. Limitations of the study

- The study arrives at the conclusion that there are no universal truths in traditional dispute resolution. As such, the conclusions reached in the study may not be applicable to all jurisdiction, wihout the necessary qualification. However, care was taken to present the results in a manner that allows for each system in the intellectual consciousness and legal capitals of other villages to draw on the findings reached here.
- The study was limited to three jurisdictions. While this was sufficient to provide an analysis of the Native legal capital, it provided a narrower scope. It is the view of the study that further improvements and studies will continue to be made to magnify indigenous legal capital.
- As an an advance of the linguistic capital in the community cultural wealth, the data was collected from people who largely communicated in the Sepedi language, transcribed and translated into English. This ensures navigation through the epistemic exclusion of Native reality in the dual language. Although care was taken to ensure correct capturing of the data and the findings, it cannot be ruled out that errors may have occurred in the process of either or both transcribing and or translating.

6. Conclusion

In conclusion, it has become evident in this study that the South African Constitution asserts itself as the supreme authority, even as it predominantly reflects none-Native epistemology. Despite the challenges posed by this constitutional framework, this study contends that the jurisprudence concerning customary law, and by extension, traditional dispute resolution, exists in a complex relationship. This research maintains that traditional dispute resolution, while often marginalised within the constitutional jurisprudence, continues to thrive and operate effectively within the broader societal consciousness of Natives.

The contributions of this study demonstrate that traditional dispute resolution is not only robust but also represents a value-laden and comprehensive system of justice deeply embedded in the intellectual consciousness of the Native population. Consequently, it is proposed that traditional dispute resolution should resist marginalisation and the

characterisation as an "other" system or an underdeveloped extension of the state's legal apparatus.

To realize this vision, this study recommends the recognition of legal capital as a means of resisting marginalisation, suppressing the indigenous legal reality, and reversing the perversion of Native legal traditions. Ultimately, within the indigenous cosmology, there is no plea for the practice of their legal system; instead, there is a profound awareness of the application of their legal principles to promote *Botho*, and this understanding should be acknowledged and respected.

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Appendences

Appendix 1 - Ethical clearance

University of Limpopo
Department of Research Administration and Development
Private Bag X1106, Sovenga, 0727, South Africa
Tel: (015) 268 3935, Fax: (015) 268 2306, Email: anastasia.ngobe@ul.ac.za

TURFLOOP RESEARCH ETHICS COMMITTEE

ETHICS CLEARANCE CERTIFICATE

MEETING: 23 May 2022

PROJECT NUMBER: TREC/82/2022: PG

PROJECT:

Title:	Customary Law Of Procedure And Evidence: A Juridical And Ethnographic Study In The Limpopo Province, South Africa.
Researcher:	PL Monyamane
Supervisor:	Prof SL Rapulana
Co-Supervisor/s:	Prof OS Sibanda
School:	School of Law
Degree:	Doctor of Law

PROF D MAPOSA
CHAIRPERSON: TURFLOOP RESEARCH ETHICS COMMITTEE

The Turfloop Research Ethics Committee (TREC) is registered with the National Health Research Ethics Council, Registration Number: **REC-0310111-031**

Note:

i) **This Ethics Clearance Certificate will be valid for one (1) year, as from the abovementioned date. Application for annual renewal (or annual review) need to be received by TREC one month before lapse of this period.**

ii) **Should any departure be contemplated from the research procedure as approved, the researcher(s) must re-submit the protocol to the committee, together with the Application for Amendment form.**

iii) **PLEASE QUOTE THE PROTOCOL NUMBER IN ALL ENQUIRIES.**

Finding solutions for Africa

Appendix 2 (a) – Consent form

I_____ hereby agree to participate in a doctorate's research project that focuses on the traditional justice in Limpopo Province.

The purpose of this study has been fully explained to me. Furthermore, I understand that I am participating freely and without being forced in any way to do so. I also understand that I can terminate my participation in this study at any point should I wish to do so and that this decision will not affect me negatively in any way.

I understand that this is a research project, whose purpose is not necessarily to benefit me personally. I understand that my details as they appear in this consent form will not be linked to the interview schedule and that my answers will remain confidential.

Signature: _____

Date: _____

Sehlomathišo 2 (a) – Foromo ya tumelelo

Nna_____ ka fao ke dumela go kgatha tema mo protšekeng ya nyakišišo ya bongaka yeo e lebanego le toka ya setšo ka Profenseng ya Limpopo.

Morero wa nyakišišo ye o hlalositšwe ka botlalo go nna. Go feta fao, ke kwešiša gore ke tšea karolo ka bolokologi ntle le go gapeletšwa ka tsela efe goba efe go dira bjalo. Ke kwešiša gape gore nka fediša go tšea karolo gaka thutong ye ntlheng efe goba efe ge nka rata go dira bjalo le gore sephetho se se ka se nkame gampe ka tsela efe goba efe.

Ke kwešiša gore ye ke projeke ya nyakišišo, yeo morero wa yona e sego go nkhola ka noši. Ke kwešiša gore dintlha tša ka bjalo ka ge di tšwelela ka foromong ye ya tumelelo di ka se kgokaganywe le lenaneo la poledišano le gore dikarabo tša ka di tla dula e le sephiri.

Mosaeno: _____

Letšatšikgwedi: _____

Appendix 3 (a) – Request for permission to conduct study

Ethical Clearance Reference Number:

Date:

Title of study: **CUSTOMARY LAW OF PROCEDURE AND EVIDENCE: A JURIDICAL AND ETHNOGRAPHIC STUDY IN THE LIMPOPO PROVINCE, SOUTH AFRICA**

Dear HE King or Queen

My name is Mr PL Monyamane and I am doing research at the University of Limpopo under the supervision of Professors SL Rapulana and OS Sibanda. I am approaching you in your capacity as The King or Queen to request your permission to enable me to conduct a study within the area of your jurisdiction. This study has received written approval from the Research Ethics Committee of the University of Limpopo. A copy of the approval letter is attached herewith for your attention.

Purpose and benefits of the study

Over the years, indigenous law has been subjected to various tests and strategies which sought to undermine it and advance western epistemologies of what the acceptable law ought to be. This study therefore intends to cleanse customary law and traditional justice off the stains of bad faith draftsmanship and rid it off the stigma of being the "other" law in South Africa. In essence, the research aims to create a space for customary law to nourish and nurture the state law of procedure and evidence in particular.

The lessons derived from this research study as a whole should be able to contribute meaningfully to transformative action by properly aligning the customary law paradigm to the realities of the people living under this system in your jurisdiction.

Nature of the study

In light of the purpose and potential benefit of this study, the researcher intends to spend some time in the villages within your jurisdiction attending trials as an observer. Furthermore, the researcher requires your permission to interview your subjects on the matters relating to the trials in terms of the attached questionnaire. The intention is to interview the court council(s) and the litigants. The researcher wishes to establish that he will NOT be a participant in trials and in no way will he influence decisions taken by the courts. The emphasis

should be placed on the researcher's role as observer of traditional justice and how it is dispensed off within your jurisdiction.

Voluntary and confidential nature of the study

The permission sought, and if granted, the subsequent study is distinctly based on consent. All relevant parties, councillor(s) of the court and litigants, will be required to sign a consent form herewith attached. Please note that the signing of such consent form is not unchangeable. At any given point during the cause of the interview and or observation, a person retains the right to withdraw from the process and inform the researcher of that decision. Any such withdrawal from this study will not attract penalties or loss for any such person wishing to withdraw from further participation in this study. If the withdrawal is made after the commencement of the study but before data collection is completed, the data so collected up to that point will be destroyed. There is no payment or reward offered, financial or otherwise for anyone of the people present in court or the litigants themselves.

Data Security Protection

Data from this research will be adequately secured and reported only as a collective combined total. Hard copies of the answers will be stored by the researcher for a period of five years in a locked cupboard at the researcher home or workplace office for future research or academic purposes; electronic information will be stored on a password protected computer. After the period of five years the information will be destroyed, if necessary. For example, hard copies will be shredded and/or electronic copies will be permanently deleted from the hard drive of the computer through the use of a relevant software programme.

Please note that the data may be used for other purposes, further research, journal articles and/or report to interested stakeholders such as the Department of Justice and Constitutional Development.

Other Considerations

If you would like to be informed of the final research findings, please contact me on- Tel: 015 268 4815 or e-Mail: lesetja.monyamane@ul.ac.za. Should you require any further information or want to contact the researcher about any aspect of this study, please use the same contacts as above.

Should you have concerns about the way in which the research has been conducted, you may contact the researcher's main supervisor, Prof SL Rapulana on – Tel: 015 268 2713 or e-Mail:

lawrence.rapulana@ul.ac.za. You can also contact the research ethics secretary of the University of Limpopo, Dr AJ Ngobe on - Tel: 015 268 3935 or e-Mail: Anastasia.Ngobe@ul.ac.za

Thank you for taking time to read this invitation and responding to it.

Thank you.

Sehlomathišo sa 3 (b) – Kgopelo ya tumelelo ya go hlahla thuto

Nomoro ya Tšhupetšo ya Tlhokomelo ya Boitshwaro: **TREC/82/2022: PG**

Letšatšikgwedi: 01 Phato 2022

Hlogataba ya thuto: MOLAOSETLWAEDI WA TSHEPEDIŠO LE BOHLATSE: THUTO YA ETHENOKERAFI LE TAOLO YA TOKA LE BOAHLODI PROFENSENG YA LIMPOPO, AFRIKA BORWA

Thobela Kgoši goba Kgošigadi

Leina laka ke Morena PL Monyamane ke dira nyakišišo Yunibesithing ya Limpopo ka tlase ga tlhapetšo ya Baprofesara SL Rapulana le OS Sibanda. Ke go batamela ka maemo a gago bjalo ka Kgoši goba Kgošigadi go kgopela tumelelo ya gago go nkgontšha go dira nyakišišo ka gare ga lefelo la taolo ya gago. Thuto ye e hweditše tumelelo ye e ngwadilwego go tšwa go Komiti ya Maitshwaro a Dinyakišišo ya Yunibesithi ya Limpopo. Khopi ya lengwalo la tumelelo e kgomareditšwe mo bakeng sa šedi ya gago.

Morero le mehola ya thuto

Go theoša le mengwaga, molao wa setlogo o ile wa ba ka fase ga diteko tše di fapanego le maano ao a bego a nyaka go o nyenyefatša le go tšwetša pele ditsebo tša bodikela tša seo molao wo o amogelegago o swanetšego go ba sona. Ka fao nyakišišo ye e ikemišeditše go hlwekiša molao wa setšo le toka ya setšo go tšwa matheba a go ngwala dingwalwa tša tumelo ye mpe le go e tloša kgethollo ya go ba molao "o mongwe" ka Afrika Borwa. Ge e le gabotse, nyakišišo e ikemišeditše go hlola sekgoba sa molao wa setšo go fepa le go godiša molao wa mmušo wa tshepedišo le bohlatse ka mo go kgethegilego.

Dithuto tšeo di hweditšwego go tšwa thutong ye ya nyakišišo ka kakaretšo di swanetše go kgona go tsenya letsogo ka mo go nago le mohola go tiro ya phetogo ka go swantšha gabotse mohlala wa molao wa setšo le dikokwane tša nnete tša batho bao ba phelago ka fase ga tshepedišo ye ka taolo ya gago.

Tlhago ya thuto

Ka lebaka la morero le mohola wo o ka bago gona wa nyakišišo ye, monyakišiši o ikemišeditše go fetša nako ye nngwe metseng yeo e lego ka gare ga taolo ya gago a tsenela ditsheko bjalo ka mmogedi. Go feta fao, monyakišiši o hloka tumelelo ya gago ya go boledišana le setšhaba sa gago ka ga ditaba tšeo di amanago le ditsheko go ya ka lenaneopotšišo leo le kgomareditšwego. Maikemišetšo ke go boledišana le (di)khansele ya kgorotsheko le basekiši.

Monyakišiši o rata go netefaša gore a KA SE be mokgathatema ditshekong gomme ga go ka tsela yeo a tlago go huetša diphetho tšeo di tšerwego ke dikgorotsheko. Kgatelelo e swanetše go bewa go karolo ya monyakišiši bjalo ka mmogedi wa toka ya setšo le ka fao e abjago ka gona ka gare ga taolo ya gago.

Tlhago ya boithaopo le ya sephiri ya thuto

Tumelelo yeo e hlokegago, gomme ge e filwe, nyakišišo yeo e latelago e theilwe ka mo go kwagalago tumelanong. Mekgatlo kamoka ya maleba, mokhanselara (bakhanselara) wa kgorotsheko le basekiši, ba tla swanelwa ke go saena foromo ya tumelelo yeo e kgomareditšwego mo. O kgopelwa go ela hloko gore go saenwa ga foromo e bjalo ya tumelelo ga se mo go sa fetogego. Ntlheng efe goba efe ye e filwego nakong ya lebaka la poledišano le goba tlhokomelo, motho o nale tokelo ya go ikgogela morago tshepedišong le go tsebiša monyakišiši ka sephetho seo. Go gogela morago gofe goba gofe mo go bjalo go tšwa nyakišišong ye go ka se gogele dikotlo goba tahlegelo go motho ofe goba ofe yo bjalo yo a nyakago go ikgogela morago go tšwa go go tšea karolo gape nyakišišong ye. Ge e le gore go gogwa morago go dirwa ka morago ga go thoma ga nyakišišo eupša pele ga ge kgoboketšo ya tshedimošo e phethilwe, tshedimošo yeo e kgobokeditšwego ka tsela yeo go fihla ntlheng yeo e tla senywa. Ga go na tefo goba moputso wo o newago, wa ditšhelete goba ka tsela ye nngwe go mang le mang wa batho bao ba lego gona kgorong ya tsheko goba basekiši ka bobona.

Polekego le tšhireletšo ya tshedimošo

Tshedimošo go tšwa nyakišišong ye e tla šireletšwa ka mo go lekanego gomme ya begwa fela bjalo ka palomoka ye e kopantšwego ya kopanelo. Dikhopi tša matlakala tša dikarabo di tla bolokwa ke monyakišiši lebaka la mengwaga ye mehlano ka khaboteng ye e notletšwego ka gae ga monyakišiši goba ofising ya mošomong bakeng sa nyakišišo ya ka moso goba merero ya thuto; tshedimošo ya elektroniki e tla bolokwa khomphutheng yeo e šireleditšwego ka nomoro ya sephiri. Ka morago ga nako ya mengwaga ye mehlano tshedimošo e tla senywa, ge go hlokega. Go fa mohlala, dikhopi tša matlakala di tla gagolwa le/goba dikhopi tša elektroniki di tla phumolwa saruri go tšwa go khomphutha ka tšhomišo ya lenaneo la maleba la softwere.

Hle ela hloko gore tshedimošo e ka šomišwa ka mabaka a mangwe, dinyakišišo tše dingwe, diathikele tša dijenale le/goba go bega go bakgathatema bao ba nago le kgahlego go swana le Kgoro ya Toka le Tlhabollo ya Molaotheo.

Dilo tše Dingwe tšeo di swanetšego go elwa tlhloko

Ge o rata go tsebišwa ka dipoelo tša mafelelo tša nyakišišo, hle ikopanye le nna go- Mogala: 015 268 4815 goba imeile: lesetja.monyamane@ul.ac.za. Ge o ka nyaka tshedimošo ye nngwe goba o nyaka go ikgokaganya le monyakišiši mabapi le karolo efe goba efe ya nyakišišo ye, hle šomiša dikgokagano tšona tše di lego ka mo godimo.

Ge o ka ba le matshwenyego ka ga tsela yeo nyakišišo e dirilwego ka yona, o ka ikgokaganya le mohlapetši yo mogolo wa monyakišiši, Prof SL Rapulana go – Mogala: 015 268 2713 goba imeile: lawrence.rapulana@ul.ac.za. O ka ikgokaganya gape le modulasetulo wa maitshwaro a nyakišišo wa Yunibesithi ya Limpopo, Ngaka AJ Ngobe go - Mogala: 015 268 3935 goba imeile: Anastasia.Ngobe@ul.ac.za

Re leboga ge o ipha nako ya go bala taletšo ye le go e araba.

Ke a leboga.

Appendix 4 (a) – Summons

Enquiries:

Contact details:

To:

Greetings

As Dikgale tribal authority, we request you to come to the council of the tribal authority regarding the collection of traditional beer of [complainant] on 14/02/2023

Date: 28/02/2023

Time: 09h00 in the morning.

Your presence will be appreciated

Thank you.

Yours sincerely

_____

Secretary

Sehlomathišo sa 4 (b) – Disamane

Dinyakisiso:

Mogala:

Go:

Thobela

Re le Moshate wag a Dikgale re le kgopela go tla tla Kgorong ya moshate. Mabapi le go tsea bjalwa ba bja setso bja ga [molli] ka di 14/02/2022.

Letsatsi: 28/02/2022.

Nako: 09h00 mesong.

Re ka thabela go ba le bona le tlile.

Rea leboga.

Wa lena.

_____

Mongwaledi

Apprendix 5 – Summons

Enq: Date

Cell:

Ms./Mr.

C/O Kgoro Ya Ga-Shiloane

Ga-Mamabolo

Dear Madam/Sir

RE: UNCOOPERATIVENESS WITH KGORO (GA-SHILOANE) REGARDING ILLEGITIMATE EXTENSIONS MADE ON YOUR YARD.

We are writing this letter on instruction by Bakgoma, Bakgomana and the above Traditional Council.

You are kindly requested to call in at **Moshate (Kgoshi's place Ga-Mahlanhle)** on Monday the **20th March 2023 at 10h00** in connection with the above mentioned matter.

We trust that you will find the above in order.

Kind regards.

Secretary: _____

Chairperson: _____

Mokgomana/Kgoshi: _____

Appendix 6 (a) – Summons

Reference number….. :LH12/5/2/11/2-89

Date :……..

LETTER REQUESTING YOU TO APPEAR BEFORE THE COUNCIL OF THE TRIBAL AUTHORITY

Mr/Mrs _____ you are hereby summoned to appear before the litigation council meeting which is arranged as follows:

Date : ……..

Time _____

Place _____

Matter summoned for:

_____

_____

_____

Complainant ……

God bless you

Thank you

_____

Public secretary

Sehlomathišo sa 6 (b) – Disamane

Nomorotshupetso:

Tsatsikgwedi:

LENGWALO LA GO IPONAGATSA KGORONG YA MOSHATE

Mr/Mrs …… o kgopelwa go iponagatsa pele ga kgoro ya tsheko yeo e beakantswego ka tsela ye:

Letsatsi: ……..

Nako: ……..

Lefelo: ……..

Taba yeo o bitswago mabapi le yona:

……

……

……

Molli: ……

Modimo a go segofatse.

Rea leboga.

……..

Mongwaledi wa sechaba

Apprendix 7 (a) – Rules of the *Kgoro*

GA-DIKGALE

RULES OF THE COURT OF TRIBAL AUTHORITY

1. The amount owing and due on the *trekpas* shall be paid in full. No instalments are allowed.

2. A member in good standing who, without just cause, is absent from the *kgoro* for a period of three months will be liable to pay a fine of R160.00 before reporting a statement or case.

3. A person who frequently misses sessions of the *kgoro* without just cause will be fined an amount of R10.00. This amount must be paid before the person can be assisted.

4. Starting time for the *kgoro* is 08h00 and shall knock off at 10h00. If there are more issues to be discussed, the time shall be extended accordingly.

5. A person is late for the meeting if he/she arrive at 08h15 or thereafter and the penalty for late coming is R5.00.

6. If a person is in arrears with the yearly contribution towards *mogobo* (a special ceremony to pray for rain) celebration, a penalty fee of R5.00 will be levied in line with the number of months that person is in arrears.

7. If a person is guilty of a misconduct arising out of the business of the *kgoro,* such a person is, by law, liable for none negotiable penalty fee of R200.00.

8. *Kgoro* does not loan money.

9. As of 19/03/2000, women were allowed to attend meetings of the *kgoro.*

10. If a person (resident of Ga Dikgale) wants a residential stand, he/she shall pay R250.00 to us and an amount of R500.00 in the tribal authority office. A non-resident shall pay R1500.00 to us and R3000.00 at the tribal authority office. If a resident wants a business stand (including a site to open an initiation school), he/she shall pay R5000.00 to us and pay the amount of R10000 in the tribal authority office. A non-resident who wants a site for business shall pay R7500.00 and the R15000 to the tribal authority office.

11. A new member shall be registered with a joining fee of R1250.00. The payment must be made at once.

12. When a person leaves from us, he/she shall pay an amount of R300.00 in cash and immediately.

13. The term of office for executive is three years and members shall be notified three months in time prior to the next elections.

14. If a person formally files a case and he/she does not attend the *kgoro* on the date set for the case, that person shall be fined an amount of R20.00. This penalty fee must be paid before his/her matter can be heard.

15. If a person is summoned by means of a letter and he/she does not honor it, he/she shall be fined R20.00.

16. If a person is tried and found guilty without a statement, the penalty fee is R20.00. (Every person is tried in their presence).

17. If a person is tried and found guilty but fails to honour his/her debt and three letters summoning him/her to the *kgoro,* he/she shall be fined an amount of R150.00.

18. A person shall not be allowed to pay the yearly contribution of R5,00 towards *mogobo* if he/she has other debts outstanding.

19. If a person (a man) who stayed with a mistress for a period exceeding six months dies, the mistress shall inherit the assets of such a man notwithstanding any differences that may have existed between the two.

20. Any person who needs a site (stand) for residential purpose or business shall personally come to the *kgoro* so that we can inform him/her of the rules of this *kgoro.*

21. A stand shall be issued to a person of 21 years of age and older.

22. A 21 year old person is allowed to come to the monthly meetings of the *kgoro*.

23. If a person wants to leave and join another headman, he/she can do so provided all the outstanding fines and contributions are settled.

24. Opening and closing of case is R25.00 (open-close).

25. A widow is excused from the meetings of the *kgoro* for a period up to 12 months.

26. A widower may be excused from the meetings of the *kgoro* for a period of up to three months. However, he may, if he wishes, attend the meetings.

27. If a person leaves as a result of feuding or fighting with the *kgoro*, and requests a letter he/she is not wanted anymore (cannot return).

28. If a person has an outstanding debt or commits a wrong against the *kgoro* and or its members, such a person shall not be assisted until payment is made in full. In the case of such a person being a business person, then we shall not buy from their place of business. This rule is related to no. 18 above.

29. If a person from the jurisdiction of our headman goes to another headman to request a stand without the knowledge of our headman, a penalty fee of R500.00 shall be levied against that person. It is expected that our members must get a stand with a knowledge of our headman.

30. A penalty fee of R200.00 shall be levied against any person who undermines our headman.

31. If a person's name does not appear in our books, you will be treated like a new member and therefore you shall join by an amount of R1250.00.

32. A person who is absent from the *kgoro* for a continuous period exceeding a year shall be fined an amount of R640.00.

33. A penalty fee for someone who is continuously absent for a period of three months is R160.00. A further continuous three months (3X2) an amount of R320.00 is levied. A further three months an amount of R480.00 is levied. A continuous absence of a year (3X4) R640.00 is levied. (Amended on 25/04/21).

34. If a person, for reasons of old age or work, is unable to attend the meeting of the *kgoro*, a proxy must be sent to act on such a person's behalf.

Sehlomathišo sa 7 (b) – Melawo ya *Kgoro*

GA- DIKGALE

MELAWO YA KGORO YA MOSHATE

1. Trekpas gae kolotwe, ebile ga e hafolwe
2. Motho wa go se tle kgorong e le moleloko wa kgoro, o lefa R160.00 pele a bega polelo goba molato. (not more than three months upset)
3. Motho ge a lofa ntle le lebaka, empa a fela a fithla kgorong, serotoke R10.00 le yona e lefiwa pele a thušiwa
4. Nako ya go thoma kgoro ke 08h00. Gomme ya tšwa ka 10h00. Ge gona le melato ye mentšhi, nako e a sutišiwa.
5. Nako ya ge motho a latetšwe ke 08h15, gomme seroto ke R5.00.
6. Motho ge a šaletse morago ka tshelete ya mogobo ya dikgwedi seroto ke R5.00 go ya ka tekano ya kgwedi ka kgwedi. Go ya ka tekano ya dikgwedi tsa go šalela morago.
7. Motho ge a tshwentšwe ka e goba kae mabapi le tša kgoro, seroto ke (R200.00). Ga e sekiwi ke molao.
8. Kgoro ga e adimišane ka tshelete.
9. Kgoro ya moshate e dumeletše basadi go tla kgorong. From 19/03/2000
10. Motho wa kgoro ge a nyaka jarata ya madulo (modudi wa ga dikgale) = R450.00 ka kgorong ye kgolo = R500.00. Motšweledi ke R1500.00. Ka kgorong ye kgolo ke R3000.00. Kwebo (serumula) modudi wa ga dikgale ke R4000.00, ka kgorong ye kgolo ke R8000.00. Jarata ya kgwebo (serumula) go motšweledi R7500.00. Jarata ya kgwebo (serumula) go motšweledi ka kgorong ye kgolo ke R15000.00.
11. Ge motho e le motsweledi a tsena kgorong ya rena, seroto ke R300.00, etšwa le smetseng (very soon).
12. ge motho a thothoga e le wa kgoro ya rena, seroto ke R3000,00 (le semetseng)
13. Executive e dula mengwaga ye meraro, feela go tla tsebišwa dikgwedi tše tharo pele ga dikgetho.

14. Ge motho a begile molato kgorong a se fihle, ke R20.00, pele go tšwelwa pele ka molato wa gage
15. Motho wa go bitšwa ka lengwalo gomme a se fihle kgorong, seroto ke R20.00
16. Ge motho a ka re a sekiswa, a bonwa molato ntle le polelo, seroto ke R20.00. (ga tšwele ntle o sekiswa,)
17. Ge motho a na le molato a se patele tefo, gomme a ngwalelwa mangwalo a mararo a sa fihle kgorong, seroto ke R150.00.
18. Ge motho a kolota kgoro, R5.00 ya mogobo ga re e tšeye. (ga a thušwe selo).
19. Ge motho (monna) a dula le nyatsi go feta dikgwedi tše thelela, gomme a hlokofala dthoto ke tš a nyatsi. (le ge ba fapane).
20. Re fa motho jarata re mmona ka mahlo e sego a segona ka kgorong. Gore re kgone go mo fa melao ya kgoro.
21. Re fa motho jarata a na le mengwaga e 21. (21 years)
22. Ge ngwana a na le mengwaga e 21, o dumeletšwe gotla kgorong
23. Ge motho a kgopela go ya kgorong ye nngwe, o dumeletšwe empa a fetše ka ditshwanelo tša gagwe. (dikoloto)
24. Go bula molato le go twalela ke R25.00 (vula-vala).
25. Ge mosadi e le mohwana o fetša twelve months (12) a sa tle kgorong. (o dumeletšwe).
26. Ge monna a hlokofaletšwe ke mosadi yena ke three months emapa ge a nyaka go fihla kgorong a ka fihla.
27. Motho ge a tlogile ka go ngala goba go fapana le kgoro, gomme a kgopela lengwalo ga a sa nyakega (ga a boye)
28. Motho ge a kolota kgoro, goba a diretše kgoro phoso, ga a thušwe ka selo, gofithla a lefa /patela. Ge e le rakgwebo ga re reke selo go yena, le yena ke go fihla a lefa /patela. E amana le molao no.18.
29. Motho ge a ile go ntona o mongwe a mo fa jarata, ntona wa rena a sa tsebe selo, seroto ke R500.00. Ka ge motho wa rena a swanetše go humana jarata ntona wa rena a tseba ka seo

30. Motho wa go nyatša ntona wa rena, seroto ke R200.00
31. Motho wa go se bonagale ka bukeng (leina la go se bonale) seroto ke R1250.00.
32. Motho wa go lofa tekano ya go lekana ngwaga go ya pele, seroto ke R640.00. (ngwaga le go feta fao)
33. Seroto sa motho wa go lofa three months ke R160.00. Ge ele tše tharo ga bedi (3x2) ke R320.00, ge e le tšetharo ga raro ke R480.00. Ge e le tše tharo ga four (3x4) ke R640.00. Ka di 25/04/21
34. Ge motho a tšofetše a palelwa ke go fihla kgorong o swanetše a romele a romele moemedi ka letšatši la kgoro. (akaretša le ba go se be gona kgaufsi, ba le kgolo ka mošomo).

Appendix 8 (a) – Constitution of a *Kgoro*

CONSTITUTION OF THABAKGONE/MAHLANHLE AND SAHARA's *KGORO*

1 NAME

Kgoro shall be called Thabakgone/Mahlanhle *Kgoro*.

Address: Box 14, Boyne 0728. *Kgoro* has jurisdiction over the following areas:

i. Mahlanhle;

ii. Thabakgone;

iii. Sahara;

iv. Viking.

2 *KGORO*'s LEADERSHIP

The leadership shall be selected for a term of five (5) years in office. Each leader must respect and serve his/her term in line with the provisions of this constitution. Failure to do so will result in the prosecution of that leader. The leadership consist of 10 executive members. However, additional members may be added as and when the need arises. The executive consist of the chairperson, deputy chairperson, secretary, treasurer and additional members. The Headman must have two (2) assistants; which comprises of the chairman and the secretary.

3 AIMS OF THE *KGORO*

Kgoro serves as the representative of *Moshate* in our communities, also it represents the community at *Moshate*. This *Kgoro* oversees the communities falling under its jurisdiction on behalf of *Moshate*. It is the intention of this *Kgoro* to ensure that the provisions of this constitution are followed. There shall be two (2) meetings per month. The said meetings shall be held between 08:00 and 10:00 in the morning. Each household is expected to be represented in the meetings of the *Kgoro*. A roll call will be used to register the name and address (stand number) of each attendant.

4 DRESS CODE

Men must wear a jacket whilst women must wear a doek and put a cloth over their shoulders.

5 A man or woman of 25 years of age and who is a resident of this jurisdiction is eligible to attend *Kgoro*.

6 Land and the cemetery, fee for people who are not residents of the communities falling within the *Kgoro*'s jurisdiction but who wish to be buried in any of the communities under this *Kgoro* is R2000.00. All funerals must be reported to the Headman. *Kgoro* will, where it is necessary to do so, issue a letter indicating where a deceased is to be buried.

7 FINES FOR NON-COMPLIANCE WITH *KGORO*

i. A fine of R250.00 shall be levied against a person who does not attend *Kgoro* before their case is heard.

ii. All visitors must be brought to the attention of the *Kgoro*. Failure to do so will result in a fine of R200.00 in the event of misfortune caused by such an unknown visitor.

iii. A fine of R200.00 is levied for undermining *Kgoro*.

iv. A fine of R20.00 per day is levied for non-compliance with the community.

v. An amount of R50.00 must be paid to open and close a case. An amount of R200.00 must be paid to register a grievance.

vi. A fine of R500.00 shall be levied for an unauthorised extension of a stand.

vii. A fine of R2000.00 shall be levied for unauthorised occupation of land.

viii. *Kgoro* must be notified if anyone of its members die outside of its jurisdiction or where death is caused by lightning.

8 STANDS

i. If a person wants a stand, he/she must approach *Kgoro* by way of a letter.

ii. An amount of R1000.00 must be paid in this *Kgoro*.

iii. The letter in i. must be accompanied by a copy of an ID.

iv. A child's application must be supported by the parent(s).

v. A child of 25 years is ellegible to pay levies set by *Moshate*.

vi. Stands on rural land must not be sold. However, persons can recoup expenses already incurred on the stand.

vii. If a person has been granted a stand, he/she must occupy it within a period of six (6) months. Old, abandoned houses must be demolished or given to other people.

viii. In the event of the death of both parents, a stand must be registered in the name of the person who will remain at home.

9 BUSINESS

i. Stand is R2500.00.

ii. Request for stand must be made by letter.

iii. *Moshate* requires a letter of request, supporting letter by the *Kgoro* and the roll call for the day on which the request was made.

iv. An amount of R5000.00 is payable to *Moshate* by locals, and R20000.00 is payable by those who are not under the authority of our Chief.

v. Foreign nationals who rent businesses within the jurisdiction of this *Kgoro* must pay R1000.00 to introduce themselves.

vi. *Kgoro* intends to co-operate with all organisations in the communities. e.g CPF and water com.

10 CEMETERY – OPERATION IN THE CEMETERY

i. Before a grave is dug, the family of the deceased must meet up with the representatives of the undertakers.

ii. The family of the deceased does not have a right to choose where the grave is to be dug.

iii. Kids' graves should be kept separate from those of adults.

iv. There shall be no unnecessary movements, no talking, and no use of cell phones in the cemetery. Failure to observe this rule will result in a fine of R500.00.

v. Undertakers shall not be paid nor bought alcohol. Failure to observe this rule will result in a fine of R1500.00.

vi. When there is an incident, it is expected that all undertakers under this jurisdiction must work together.

vii. A boy of 18 years is expected to join the undertakers.

11 DEBTS

Failure to observe the rules of undertakers will result in a fine of R500.00.

12 SAND

No sand must be dug next to the cemetery. A fine of R500.00 is levied.

Sehlomathišo sa 8 (b) – Molao-theo wa Kgoro

MOLAO-THEO WA THABAKGONE/MAHLANHLE LE SAHARA KGORO

1 LEINA

Kgoro e tla bitšwa Thabakgone/Mahlanhle Kgoro.

Address e tlaba Box 14, Boyne 0728. Taolo e akaretša mafelo ao a latelago:

i. Mahlanhle;

ii. Thabakgone;

iii. Sahara;

iv. Viking.

2 BOETAPELE BJA KGORO

Boetapele bo kgethiwa ka morago ga mengwaga e mehlano (5yrs). Moetapele yo mongwe le yo mongwe o swanetše go hlompha lego soma ka taelo ya molao-theo. Mme go ikaroganya lese o tla swanela kego sekišiwa. Maloko a komiti ke a lesome (10). Maloko a tlaleletšo aka kgethiwa goya ka hlokego ya meshomo. Komiti e bopsa ke modula setulo, motlatsa-modula setulo, mongwaledi, moswaramatlotlo le maloko a tlaleletšo. Ntona o swanetsi goba le bathuši ba babedi elego chairman le secretary.

3 MAIKEMIŠETŠO A KGORO

Kgoro ke moemedi waba Moshate mono motseng wa kgoro, ebile ke moemedi wa motse wa rena ka Moshate. Kgoro ke mohlokomedi wa tikologo legatong laba Moshate. Ke maikarabelo a kgoro go netefatša gore melao e ya obamelwa. Kgoro e swarwa ga bedi (2) mo kgweding. Kgoro e tsena ka 8h00 go fihla ka 10h00 mesong. Lapa le lengwe le le lengwe le swanetše goba le moemedi ka kgorong. Roll call e tla šomišwa nako le nako go ngwalwa maina le di stand number.

4 MOAPARO

Banna baa para dibaki, basadi baa para hlogong mme ba bea sengwe magetleng.

5 Monna goba mosadi wa mengwaga e twenty five (25) ele modudi wa mmato wa rena o swanetše ke gotla kgorong.

6 Mabu le ka dirapeng, phang ke R2000.00. Mahu ka moka a swanetše go begwa ka ntoneng. Kgoro etla dira lengwalo goya fao mohu a yago go bolokwa gona ge go hlokega.

7 DIKOTLO TŠA BAO BASA ŠOMIŠANEGO LE KGORO

i. Ge motho a satle kgorong, ge a tliša molato o tla lefa R250.00 fine.

ii. Baeng ba swanetse go begiwa ka kgorong, ge o sa dira bjalo wa hlagela ke se sengwe fine R200.00.

iii. Go nyatša kgoro R200.00.

iv. Go se some le setšhaba R20.00 ka letšatši.

v. Go bula goba go tswalela molato R50.00. Go bula molato R200.00.

vi. Go oketša setsha ntle lego kgopela R500.00.

vii. Šušumela R2000.00.

viii. Motho wago hwela nageng le magadima kgoro e swanetše go tsebišwa.

8 DITSHA

i. Motho ge a nyaka madulo o kgopela kgorong ka lengwalo.

ii. Madulo ke R1000.00 ka kgorong.

iii. Lengwalo lebe le bohlatse bja ID copy.

iv. Ngwana o sola ke motswadi.

v. Ngwana wa 25yrs o patella ditshwanelo tša Moshate.

vi. Ditsha tsa dinaga-magae gadi rekisiwe, go rekiswa ditshenyagalelo.

vii. Ge motho a filwe madulo o swanetše goba a dula morago ga kgwedi tše tshela (6 months). Matopa a swanetše go thubiwa goba a fiwe batho ba bangwe.

viii. Ge batswadi ba hlokofetše ka moka, bana aba swanetse go ngwadiša jarata ka masala-gae.

9 DIKGWEBO

i. Setsha ke R2500.00.

ii. Mokgopedi o kgopela ka lengwalo.

iii. Moshate o nyaka lengwalo la mokgopedi, le lengwalo la kgoro le roll-call ya letšatši leo.

iv. Go lotšha Moshate ke R5000.00 for locals, R20 000.00 ge ose wa Kgoshi ya rena.

v. Bahiri ba dikgwebo ele motšweledi ba lotsha kgoro ka R1000.00.

vi. Kgoro e ekemišeditše go šomišana le mekgahlo ka moka yeo elego mo motseng. e.g CPF le water com.

10 DIRAPENG TSHEPIDISO YAKA DIRAPENG

i. Pele serapa se epiwa ba gabo mohu ba bonane le balaodi ba ka dirapeng.

ii. Ba gabo mohu ga bana tokelo yago ikgethela mo ba bolokago gona.

iii. Dirapa tša bana di se hlakane le tša batho ba bagolo.

iv. Le ema-ema, go swara dikgang, tshomiso ya di cellphones le botagwa ga dia dumelelwa. Fine ke R500.00.

v. Go patella diphiri ka tšhelete, le go rekela diphiri bjala gago a dumelelwa. Fine ke R1500.00.

vi. Ge gona le kotsi diphiri ka moka tša meboto di thušane.

vii. Moshimane o swanetše goya diphiring ge ana le mengwaga e 18yrs.

11 DIKOLOTO

Ge osa obamele molato wa balaodi ba dirapa o ka otlwa R500.00.

12 MABU

Mabu gaa dumelelwa go epiwa kgaufi le dirapeng. Kotlo ke R500.00.