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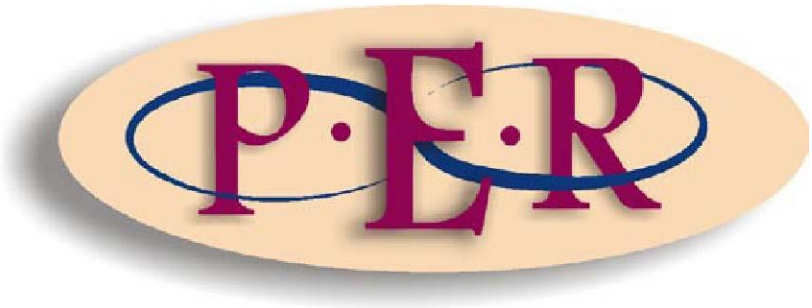

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JUDICIAL "TRANSLATION" AND CONTEXTUALISATION OF VALUES: RETHINKING THE DEVELOPMENT OF CUSTOMARY LAW IN *MAYELANE*

L Lewis*

1 Introduction

This article revisits the Constitutional Court case *Mayelane v Ngwenyama*[1] to explore specific aspects of the intersection between customary law and constitutional norms. A particular point of friction between these regimes, brought to the fore by the Court, concerns the status of women. While rights law insists on the dignity and equality of all persons, customary law is frequently, and often without any relevant qualification, construed as being discriminatory in its treatment of women.[2]

The South African *Constitution* has brought both positions into a normative "contact zone"[3] by making customary law an applicable source of law in South Africa.[4] *Mayelane* gives insight into how judges go about protecting the constitutional rights of women, while securing the "rightful place" of customary law "as one of the primary sources of law under the Constitution".[5] Put differently, *Mayelane* is a prime example of the way in which judges grapple with normative and cultural pluralism.

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1 *Mayelane v Ngwenyama* 2013 4 SA 415 (CC) (*Mayelane*).

2 In very general terms, and although contested, African customary law is based on a patriarchal system of male primogeniture which limits the rights of women, for instance, in terms of holding positions of authority, and in ownership and succession. Apposite examples are found in *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC); *Gumede v President of the RSA* 2009 3 SA 152 (CC); *Shilubana v Nwamitwa* 2009 2 SA 66 (CC). See further Bennett *Customary Law* 251-252, 255, 341-342, 356, 395 (note, however, how colonialism and the imposition of common law rules adversely affected the development of customary law in these areas); Albertyn 2009 *CCR* 165-208, in particular 197-201. On changing attitudes, Griffiths "Changing Dynamics of Customary Land Tenure" 83-113; Chanock 1989 *IJL&F* 72-88.

3 De Sousa Santos *New Legal Common Sense* 472, who describes "contact zones" as "social fields in which different normative life worlds meet and clash".

4 Section 211(3) of the *Constitution of the Republic of South Africa*, 1996 provides that "courts must apply customary law when that law is applicable", but the provision is qualified therein that such law remains "subject to the Constitution and any legislation that specifically deals with customary law".

5 *Mayelane* para 24. Customary law is defined, in s 1 of the *Recognition of Customary Marriages Act* 120 of 1998, as "customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the cultures of those peoples"; *Alexkor Ltd v Richtersveld*

Pluralism, in this context, refers to the intersection of multiple regulatory systems, which are distinct from one another. That is not to say, however, that individual normative and cultural orders are unitary and uncontested phenomena within themselves. Although the developments in *Mayelane* attest to this fact, the present discussion does not dwell on the internal conflicts and tensions existing within systems, but overtly on the variances between different systems.

In *Mayelane* the Court considers the question whether a particular relationship constituted a valid marriage according to customary law or not. The matter raised a number of important issues, many of which have been dealt with by various writers, while others might well deserve further attention.[6] One such concerns the "development" of customary law in view of its status as a legal system within the domestic system, and the corresponding role of courts to secure its rightful place therein. The article considers one aspect in particular, namely the manner in which the Court ascribes meaning to norms and values that are deployed across the diverse cultural and normative contexts adhering to customary and constitutional law respectively. Therefore, under consideration is how the Court deals with the intersection of potentially conflicting constructions of norms found in such a plural setting. In *Mayelane* these norms concern the dignity and equality of women in polygynous marriages.

In this commentary the judicial task of managing multiple systems of regulation is likened to a process of "translation", in that it presupposes "a need to translate norms from one community to another".[7] Proper translation is an important consideration

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Community 2004 5 SA 460 (CC) paras 52-54 offers a description of "indigenous law", *inter alia* that it "is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms"; Horn "Community Courts" 115: "Customary law is … a legal system based on the principles of justice and natural law, a system developed over generations to protect the morals and goodwill of the community."

6 See, for example, Kruuse and Sloth-Nielsen 2014 *PER* 1710-1738; Himonga and Pope 2013 *Acta Juridica* 318-338; Himonga 2013 http://www.customcontested.co.za/mayelane-v-ngwenyama-and-minister-for-home-affairs-a-reflection-on-wider-implications/; Van Niekerk 2012 *SUBB Jurisprudentia* 5-20 (on the decisions in the High Court and Supreme Court of Appeal); Bekker and Van Niekerk 2010 *THRHR* 679-689; Maithufi 2013 *De Jure*; Rautenbach and Du Plessis 2012 *McGill LJ* 749-780.

7 This apt metaphor is provided by Knop 2000 *NYU J Int'l Law & Pol* 504. She writes in the context of judges applying international law in domestic courts. It will become apparent, however, that

when judges seek to fulfil constitutional mandates that could conflict, because it will affect "the persuasiveness of their judgment to both communities" having an interest in the outcome.[8] With reference to the present case, the "communities" are, in broad terms, the (abstracted) national, as envisaged by the *Constitution*, and the subnational community of the Vatsonga.[9] Hence, in *Mayelane* the Court has to "translate" the constitutional values of dignity and equality, with reference to women, in a way that will resonate with the adherents of customary law.[10] If the translation is good, the judgment will be persuasive in its vindication of constitutional values and also of customary law.

2 Facts and divergent approaches

In brief, the facts of the case are the following. The applicant, Ms Mayelane, had been validly married, according to customary law, to Mr Moyana, now deceased. The respondent, Ms Ngwenyama, claimed that she had also been validly married to Mr Moyana according to customary law. Under the *Recognition of Customary Marriages Act* 120 of 1998 (hereafter "the Act"), which recognises polygynous marriage, both women could have been validly married to the deceased. Ms Mayelane, however, disputes the validity of Ms Ngwenyama's marriage primarily on two grounds, which were raised in the High Court.[11] The first is the contention that she, in her capacity as the first wife, had not been consulted about the second marriage as is customary in the Vatsonga community of which she and her deceased husband were members.[12] The second reason is that the deceased had not complied with section 7(6) of the

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the same principles are germane to the present discussion. Hence, in the words of Knop, "all justice may be understood and appraised as translation between different communities".

8 Knop 2000 *NYU J Int'l Law & Pol* 504.

9 The term *Vatsonga* is used, as opposed to *Xitsonga* (which is used in the main judgment in *Mayelane*), on the basis of the explanation given by Justice Zondo at para 92 note 78 (of the judgment).

10 Also see Allott *Limits of Law* 10-11, "the recipients of Law … are the all-important people in legal communication".

11 The case in the High Court is reported as *MM v MN* 2010 4 SA 286 (GNP). S 7(6) of the *Recognition of Customary Marriages Act* 120 of 1998 (the Act), which regulates the proprietary consequences of further marriages, provides: "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."

12 See *Ngwenyama v Mayelane* 2012 ZASCA 94 (1 June 2012); also cited as *MN v MM* 2012 4 SA 527 (SCA) (*Ngwenyama*) para 3.

Act.[13] In both the High Court and the Supreme Court of Appeal, the issue of the first wife's consent was not addressed.[14] Instead, both courts decided the matter on their respective, but opposing, interpretations of section 7(6) of the Act.[15]

In an incisive about-turn, the Constitutional Court adopts a different approach and asks, first, whether the Supreme Court of Appeal should have determined the "consent issue", and second, whether the consent of the first wife is necessary for the validity of a subsequent marriage.[16] The Court is of the opinion that the second question raises a constitutional matter and is an "important and pressing issue"[17] because it "implicates the courts [sic] powers and obligations both to apply customary law and to promote the spirit, purport and objects of the Bill of Rights when developing customary law".[18] The corollary to this dual obligation implies that the Court must confront any potential tension between customary law and the principles underlying the *Constitution*.

Since its inception, the South African Constitutional Court had been a steadfast defender of constitutional rights and values.[19] At the same time, in line with constitutional guarantees, it blazed a trail in the recognition of customary law as an independent source of law. Thus, when applying it, the Court has affirmed the constitutional status of customary law, which "acknowledges the originality and distinctiveness" of customary law, and the fact that it "must be understood in its own terms and not through the lens of the common law".[20]

It is therefore not surprising that in *Mayelane* the Court determines that a process of ascertaining the customary marriage law of the Vatsonga is necessary.[21] In this, it

13 *Ngwenyama* para 3.
14 *Mayelane* paras 5, 7.
15 *Mayelane* paras 5, 7.
16 *Mayelane* para 12.
17 *Mayelane* paras 19-21.
18 *Mayelane* para 20. (Footnotes omitted.)
19 Amongst others, a few of its most groundbreaking decisions are *S v Makwanyane* 1995 3 SA 391 (CC); *Grootboom v Oostenberg Municipality* 2000 3 BCLR 227 (CC); *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC).
20 *Mayelane* para 24 quoting from *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) paras 51, 56.
21 *Mayelane* paras 48, 53.

(untypically) becomes the court of first and last instance by directing that further representations be submitted to determine the content of the law, in order to establish whether the marriage between Mr Moyane and Ms Ngwenyama was valid under customary law.[22] This approach is thus in direct contrast to those adopted in the High Court and the Supreme Court of Appeal, where the validity of the marriage – in terms of customary law – was not considered.[23]

Yet, in the same breath as vindicating customary law, the Constitutional Court, here and as it had done in other cases, consistently emphasises the fact that such law is subject to the *Constitution* and must be interpreted accordingly.[24]

In *Mayelane* the Court therefore anticipates a situation of normative plurality that must be resolved, which is not an easy task. That being said, in a number of other cases the Court had opted for the relatively straightforward solution of choosing one set of norms over another, without attempting to resolve any fundamental conflict between them. Such an approach was followed, for example, in *Bhe*, where the Court invalidated certain rules of the customary law of succession which discriminated against women, and replaced them with existing statutory provisions.[25]

In *Mayelane*, on the other hand, the justices who concur in the main judgment are keenly aware that the *Constitution* also advances another jurisprudential approach, namely that of "developing" customary law in harmony with constitutional principles.[26]

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22 *Mayelane* paras 48, 53.

23 *Mayelane* para 52.

24 *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 51; *Mayelane*, for example, paras 71, 79.

25 *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC) paras 112-113. Also see Albertyn 2009 *CCR* 165-208, 207: "In both instances [*Bhe* and *Gumede v President of the RSA* 2009 3 BCLR 243 (CC); 2009 3 SA 152 (CC)], the Court rejected an invitation to develop customary law and to enable this development under court defined guidelines. Instead, it imposed statutory provisions based on civil law concepts of property, inheritance and family."

26 In s 39(2) the *Constitution* provides that "when developing … customary law, every court … must promote the spirit, purport and objects of the Bill of Rights".

3 The "development" of customary law and the need for "translation" and contextualisation

The Court is of the opinion that, while it "must accord customary law the respect it deserves", it must likewise not "shy away from [its] obligation to develop it in accordance with the normative framework of the Constitution".[27] It must be clear that the "development" of customary law (and presumably most other laws) does not mean that the agent, or court, simply chooses between two sets of norms and then replaces one with the other. Rather, as the Court states, the development of customary law implies a "process" that takes "the traditions of the community concerned" into consideration.[28]

In casu, such a process signifies to the Court that it must first ascertain the content of the relevant customary law, and then determine whether and to what degree it diverges from constitutional norms and values, in order to "develop" it to be congruent with the latter.[29] This type of approach followed by the Court, namely judging a matter with reference to an external, official standard, fits the description of "top down" adjudication, which, as explained below, could thwart the development process in fundamental ways.[30]

Alternatively, the Court could engage in a different enquiry by adopting a "bottom up" and "holistic" perspective of the customary order, which would focus to a much greater degree on the customary context and its relevant audience.[31] Such an approach would oblige the Court to "translate" constitutional principles to have meaning and relevance in that particular recipient context.[32] I maintain that this approach is of utmost importance in cases where the Court is intent on "developing" customary law.

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27 *Mayelane* para 71.

28 *Mayelane* para 45 with reference to *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

29 *Mayelane* paras 69-71, 75-79, 89.

30 See, for example, Twining *Globalisation and Legal Theory* 130-134, 253, on the different stances that can be adopted by those, such as judges, who "participate" in legal processes. Among others, their points of view could be "top-down" or "bottom-up", "internal" or "external", or "detached".

31 Twining *Globalisation and Legal Theory* 130-134, 253; Kruuse and Sloth-Nielsen 2014 *PER* 1731.

32 Viewed the other way around, customary concepts such as *ubuntu* might also have to be "translated" or adapted to a certain extent when used within a "foreign", constitutional context. See Himonga, Taylor and Pope 2013 *PER* 375-376.

By analogy, one can think of what happens when the script for a play is translated from one language – which implies a different context – to another.[33] For the play to have any relevance in the new context, translation requires a process of "interpretation", which results in "embedding the play in [a different] time and place".[34] Judges, as translators, therefore need to understand the idiom of the new "language" into which it is translated – but this is not all that is required.

While translators must obviously have a degree of knowledge of the recipient audience and context, they also have to give sufficient consideration to the language and background of the source, otherwise the "story", when translated, will be unintelligible. To complete the loop of the translation in *Mayelane*, it is therefore important first to ask from which script the constitutional principles come, and what is meant by "dignity" and "equality" in the constitutional sense.[35] Only after establishing these details can the judge translate the essence of the original narrative and make it accessible to a new audience. Both sides of the account must be rendered before the Court will be able to "develop" customary law in a meaningful way and according to the "spirit, purport and objectives" of the Constitution.

Translation, in the manner described above, is consequently closely allied to and presupposes a process of "contextualisation", a term which refers to the adaptation of concepts or, equally, of norms and values that are transferred from one context to another.[36] And because norms, and particularly their associated values, reflect the context or "world" from which they come, "what finds expression in one [context] may have no counterpart or resonance in another".[37] Accordingly, the discussion next focuses on the context from which constitutional values spring, and thereafter on that of customary law.

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33 Knop 2000 *NYU J Int'l Law & Pol* 534-535.

34 Knop 2000 *NYU J Int'l Law & Pol* 530, 533.

35 Himonga, Taylor and Pope 2013 *PER* 384: "terms derive their meaning from specific linguistic contexts … terms are *not* empty".

36 Note how Knop 2000 *NYU J Int'l Law & Pol* 528-535 describes the process of translation, variously, as "local adaptation", "interpretation" and "particularisation" with reference to its new context. (Also note again that her metaphors, which I have adapted to the present discussion, refer to the translation of international law in domestic contexts.)

37 Knop 2000 *NYU J Int'l Law & Pol* 529.

3.1 The sources and context of constitutional values

It is no secret that the principles underlying most constitutional bills of rights did not miraculously embed themselves in domestic constitutions. The prevalence worldwide of the direct and indirect borrowing of constitutional norms has resulted in a great "horizontal approximation" of national constitutions.[38] Much convergence has also been brought about by states being "independently influenced by a set of legal principles coming from above and beyond any of them".[39] When states readily adopt international norms in this way, constitutions become "globalised in form and substance".[40]

This means that many bills of rights contain almost nothing new, and are instead constructed from "old imported bricks".[41] They overtly echo international human rights law to the point where domestic and international provisions are almost indistinguishable in their wording and, importantly, in their meaning.[42] The so-called constitutional "context" is therefore not merely a national context, but to a large degree an international one. For this reason, judgments such as *Mayelane* that deal with the intersection of constitutional law and customary law represent in fact a confluence of international, national and, with reference to the latter, subnational interests.[43]

Since the human rights script which underpins most bills of rights, including the South African, is rooted in the ideological context of international law, it follows that the values contained in the Bill are not neutral but reflect the western-centric character of

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38 Peters "Globalization of State Constitutions" 297, 305; Weinrib "Postwar Paradigm" 93, on "the existence of a family of constitutions that are variants of the same postwar model".

39 Scheppele "Migration of Anti-constitutional Ideas" 350.

40 Peters "Globalization of State Constitutions" 305.

41 Mattei "New Ethiopian Constitution" 224; Grove 2001 *Harv L Rev* 2059, who argues that courts seem to view their constitutions as "part of a family of foreign and supranational documents".

42 I have called this the "Trojan horse effect" of international law, which refers to legislative and constitutional provisions and judicial precedent which, although deeply embedded in the national regime (and therefore usually go unchallenged), simply duplicate or mimic international norms. See Lewis "Trojan Horse Effect" 17-31. Also see, for example, An-Na'im "Protecting Human Rights" 42-43.

43 In addition, in s 39(1)(b) the *Constitution* provides for the application of international law when interpreting the Bill of Rights. See *Ngwenyama* para 25, where reference is made to "human rights instruments" which "support the purpose of the Act".

international law.[44] Thus, viewed from the perspective of a subnational, customary law context, these values could well appear to be from a foreign script.[45] Any such foreignness cannot simply be brushed over, but requires conscious judicial translation and contextualisation of the relevant norms and values in order to "legitimate" and imbue them with meaning in another context.[46]

3.2 Making constitutional values accessible in a customary law context

Certain consequences flow from the argument that constitutional values are scripted according to a shared international rights paradigm, and that they must therefore be particularised in other contexts. First, such a reading points to a disavowal of the universality of these values (and of the universality of human rights norms in general).[47] A second consequence is that it becomes "[i]mperative to rethink the hagiography of universal norms, including human rights norms, in the realisation that ultimately all laws and values are relative and culture specific".[48]

An acknowledgement of the non-universal, relative nature of constitutional norms and values leads us straight back to the need for translation and contextualisation, and prompts further questions about the nature and logistics of this process. It also highlights why the "legitimacy"[49] of norms which are transferred from one normative

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44 For example, Merry *Human Rights* 20-21, 90; Paulus 2001 *LJIL* 727, 732-733, who describes views on the "Eurocentric origin of rules and institutions of international law which are incommensurate with non-European experiences". Note his reference to the Third World Approaches to International Law (TWAIL) writers, who have consistently challenged the western-centric nature of international law. In this regard see, for instance, the contributions in Falk, Rajagopal and Stevens *International Law*.

45 See Menski "Monsters" 443-456.

46 Himonga, Taylor and Pope 2013 *PER* 389; Knop 2000 *NYU J Int'l Law & Pol* 529: "Since all languages, including law, reflect the world their speakers inhabit, what finds expression in one may have no counterpart or resonance in another". And further, as an example, "[h]owever much the uniformity of colonial law was sought, its reception required constant adaptation to local circumstances".

47 The view adopted here does not seek to resolve the universalism issue once and for all, and is rather straightforward in maintaining that, since it has been sufficiently established that human rights values are embedded in a certain (western) ideology, they cannot at the same time be universal. See again the references in notes 44 above and 48 below.

48 De Sousa Santos *New Legal Common Sense* 271-272. Also Menski *Comparative Law* 610; Falk Moore *Law as Process* 4-6.

49 For example, Himonga, Taylor and Pope 2013 *PER* 370, 384, 389, 418, at 370: "South Africa's legal system and culture are legitimate only if they reflect the demographic and cultural diversity of the country"; Knop 2000 *NYU J Int'l Law & Pol* 525.

world to another is at stake: if the intended recipients of certain norms do not view them as legitimate, those norms will lack bindingness in the particular context, and the audience will simply not "hear" them.[50]

While it is all very well for judges (and writers) to call attention to the importance of "context", the proper translation from one normative language into another "necessarily involves art and invention".[51] This is due to the polycentric structure of normative systems, each having "its own macro-context, the social and physical environment in which it is to operate".[52] Determining the content of and the interplay between the relevant contexts therefore becomes central to making constitutional values accessible.

It follows that, when judges contextualise constitutional values within a customary law framework, they cannot rely exclusively on perceived similarities.[53] Above all, they have to be conscious of the normative and cultural differences between the constitutional and the customary orders.[54] Without clearly identifying and understanding these differences, it is difficult to fathom how a court will be able to "develop" customary (or any other) legal system.[55] Hence, a "deliberative process" is required wherein judges engage fully with the content of customary law.[56] And as

50 Teubner 1998 *MLR* 18, on "law's binding arrangements", which are "selective" because "law is intricately interwoven with culture". Compare Dan-Cohen *Harmful Thoughts* 44, who develops the concept of "acoustic separation", that is, a situation wherein, "certain normative messages are more likely to register with one of the [relevant] groups" than another, which again points to the need to particularise such "messages".

51 Knop 2000 *NYU J Int'l Law & Pol* 530.

52 Allott *Limits of Law* 99, with reference to his analysis of "Law"; Falk Moore *Law as Process* 78; Albertyn 2009 *CCR* 184, advances "an approach that does not abstract rights from the concrete realities of people's lives." Compare *Mayelane* para 50.

53 Himonga, Taylor and Pope 2013 *PER* 416-417, in the context of the deemed compatibility of *ubuntu* with the Bill of Rights.

54 De Sousa Santos *New Legal Common Sense* 475.

55 The comparative law methodology offers a good analogy, cautioning as it does against reliance on superficial similarities. See for example *Schlesinger et al Schlesinger's Comparative Law* 153-162 regarding some of the serious divergences found amongst legal systems, even with respect to common words and concepts such as "law", "right" and "trust". Also see Knop 2000 *NYU J Int'l Law & Pol* 525-535, who advocates a comparative law methodology for dealing with the "foreignness" of another legal system (international law) in a domestic context, and which methodology consequently underscores her "translation" metaphor.

56 Albertyn 2009 *CCR* 184.

noted, such deliberation must therefore take cognisance of "the material conditions that shape people's lives".[57]

The difficulty with respect to the contextual approach is, of course, that of establishing the content of the relevant context(s), a problem that is exacerbated in the case of an uncodified, "living" system such as customary law.[58] In addition, it must be remembered that all cultures and contexts are permeable and fluid.[59] In the same way that languages change over time, contexts change, and judges have to consider the currency of the normative "language" they use. They cannot, for example, rely on an archaic version that the audience will find unintelligible. In terms of customary law, this means that courts – as the Court sought to do in *Mayelane* – must apply the "living" customary law and not an official, essentialised, and potentially outdated, version thereof.[60]

In summary, it is argued that the abovementioned factors should inform the manner in which the Court applies constitutional values within the customary law context pertaining to *Mayelane*. It is also argued that the Court has a duty to translate and particularise these values, instead of merely transplanting them, top down, on the assumption that they have the same content in both systems. This task entails the interrogation of the context and the sources of constitutional law, as well as those of the relevant customary law. By translating any potential "foreignness" of the constitutional values the Court will be able to ensure their legitimacy in the eyes of the intended recipients. How the Court actually approaches the matter is analysed next.

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57 Albertyn 2009 *CCR* 176; Legrand 1997 *MJECL* 111-124, for a similar view from a comparative law perspective.

58 *Mayelane* paras 44-46.

59 Merry *Human Rights* 6-11, 26-28; De Sousa Santos *New Legal Common Sense* 192; Albertyn 2009 *CCR* 176-177.

60 *Mayelane* paras 44-46; and, for example, Albertyn 2009 *CCR* 176-177, 178: "The 'living law' — like culture — is 'rich, varied and flexible', changing in response to changing conditions … it is an important site of change."

3.3 The Constitutional Court and the "untapped richness in customary law"[61]

As previously noted, in its determination of the matter, the Constitutional Court rejects positivistic reliance on section 7(6) of the *Recognition of Customary Marriages Act*. With reference to the resolution of the present matter, it sets out to vindicate the important role of customary law as a "primary" source of law.[62] In so doing, the Court relies on the requirements in section 3(1)(b) of the Act for the validity of a customary marriage, which determine that it "must be negotiated and entered into or celebrated in accordance with customary law". For these and other reasons the Court concludes that the relevance of the customary law regarding the consent of the first wife did not depend on whether it was raised in cross-appeal in the court *a quo*.[63] Hence, of its own accord the Court pursues the question of the content of the relevant customary law.[64]

Moreover, the Court is mindful of the fact that "customary law" means the "living" law.[65] The Court acknowledges the difficulty of ascertaining such living law and of meeting the apparently contradictory requirements for the application of customary law, namely flexibility and certainty.[66] In order to fulfil its obligations, the Court calls for the submission of further evidence to ascertain the content of the law.[67]

The submissions thus produced are not uniform.[68] The Court is nevertheless unperturbed by the numerous discrepancies, which it describes as "nuances and

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61 *Mayelane* para 50.
62 *Mayelane* paras 23-26.
63 *Mayelane* paras 13, 22. The Supreme Court of Appeal found that it was unnecessary to decide the matter, since no cross-appeal was brought "challenging the finding of the court a quo on its acceptance of the validity of the second customary marriage", that is, its validity under customary law. *Ngwenyama* para 11.
64 *Mayelane* para 42.
65 *Mayelane* paras 24-25, 32, 42-44, 46.
66 *Mayelane* paras 25, 44-45.
67 *Mayelane* para 53. Zondo J, in a separate judgment, at paras 111-115, vigorously challenges the call for further evidence.
68 *Mayelane* paras 54-61. Also see the analysis by Kruuse and Sloth-Nielsen 2014 *PER* 1717-1725 regarding the conflicting evidence and its implications.

perspectives that are often missed or ignored when viewed from a common-law perspective".[69] After studying the evidence, the court concludes that:

> ... customary law must be developed, to the extent that it does not yet do so, to include a requirement that the consent of the first wife is necessary for the validity of a subsequent customary marriage.[70]

While the Court takes seriously its mandate to develop customary law, can it do this in a vacuum, and does it manage to tap into the "richness" of its underlying values?

3.4 Dignity and equality - untranslated

Central to the argument in the High Court, the Supreme Court of Appeal and the Constitutional Court is the need to ensure the equality and dignity of women in the course of promoting the spirit of the *Constitution*.[71] It is remarkable, however, that the justices do not analyse these concepts in detail, and describe only in broad terms what various judicial interpretations of dignity and equality are. In the Supreme Court this is done predominantly with reference to Constitutional Court jurisprudence. For example, quoting from *Gumede* the court determines that the "Recognition Act is inspired by the dignity and equality rights that the Constitution entrenches and the normative value systems it establishes".[72] This approach, which simultaneously relies on and reinforces the idea that dignity and equality must be construed in terms of the *Constitution*, thus situates the meaning of these values within that particular context. As seen above, however, the constitutional context is neither neutral nor universal. Instead, it is "tightly coupled" to the international human rights law paradigm, which instantiates a particular rights script based on (liberal) individualism.[73] The court

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69 *Mayelane* para 60. Zondo J, at para 123, however, is of the opinion that "there are clear contradictions" between the various affidavits. Conversely, after stringent examination of the evidence Jafta J, at para 138, in a further separate judgment, is of the view that the "evidence supporting the applicant … is overwhelming".

70 *Mayelane* paras 75 and 85-86 respectively, where it is held that the new requirement must be published and distributed, and will have prospective effect. See the order, para 89.

71 Dignity, equality and freedom are the core values of the *Constitution*. S 10 states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected".

72 Ndita AJA quoting from *Gumede v President of the RSA* 2009 3 SA 152 (CC) para 21, in *Ngwenyama* para 12.

73 Albertyn 2009 *CCR* 171: "Although the Constitution affirms cultural communities, the rights vest in individuals rather than groups … [and] the Constitution expresses a commitment to cultural diversity and legal pluralism, again as rights of individuals not groups." I borrow the phrase "tightly coupled" from Teubner 1998 *MLR* 18-21.

confirms this link in the next part of the quotation therein that the constitutional value system envisaged by the Act "is also necessitated by our country's international treaty obligations".[74]

In *Mayelane* in the Constitutional Court, dignity is given an equally pivotal role. In reliance on other judgments, the Court establishes that "dignity is not merely a value, but a 'justiciable and enforceable right'".[75] Paradoxically, despite the fact that the Court is intent on valorising customary law and that the given context concerns customary marriage and the customary norms regulating it, dignity is construed purely in terms of the orthodox rights ideology. This means that the Court interprets human dignity as being synonymous with "[a]utonomy and control over one's personal circumstances".[76] *In casu* it is also noteworthy that, to a marked degree, dignity and equality are defined in the negative, hence not with reference to what they *are* within a customary context. Thus, for example, there would be an infringement of a wife's rights to dignity and equality if she were "unable to consider or protect her position" or "cannot take an informed decision".[77]

It can be concluded that neither the Constitutional Court nor the Supreme Court (or for that matter the High Court) reflects on what these concepts mean for the parties themselves in the context of their lived realities.[78] The courts do not consider the extent to which dignity and equality are context-specific, nor do they investigate the possibility of finer shades of meaning or outright divergences. Rather, in *Mayelane* these concepts are deployed by the Court as abstracted versions of the mainstream dialogue. They are not in any way "translated" into the cultural language or context applicable to the Vatsonga. It is unlikely that such decontextualised values can serve as a proper basis for the development of customary law.

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74 Ndita AJA quoting from *Gumede v President of the RSA* 2009 3 SA 152 (CC) para 21, in *Ngwenyama* para 12.

75 *Mayelane* para 68.

76 *Mayelane* para 73.

77 *Mayelane* para 72.

78 This, in spite of the Court's view that courts must "be careful not to impose common-law or other understandings of that concept" (such as "consent"), and "also not assume that such a notion as 'consent' will have a universal meaning". *Mayelane* para 49.

As the present matter shows, dignity and equality are difficult to describe in non-relational terms. Hence, the result is that there are competing arguments in the range of judgments about whose dignity is at stake. In the High Court the dignity of the first wife is paramount.[79] In the Supreme Court of Appeal the dignity and equality of the second wife *vis-à-vis* the first become the focus. In the Constitutional Court, albeit on separate grounds, the dignity and equality of the first wife are central to judgment.[80] The overall effect is one of disjuncture in the approaches adopted by the different courts, as well as in the conclusions reached by them – resulting in a plethora of unintended consequences.[81] Similarly, although not dissenting, the separate judgments in the Constitutional Court are in fundamental ways at variance with the reasoning in the main judgment.[82] It appears as though the actual audience has been forgotten in these renditions of the dignity-and-equality script.

4 The customary law context

In line with its existing jurisprudence, the Constitutional Court in *Mayelane* presents itself as a steadfast champion of customary law, at the same time it also displays certain ideological preferences.

As described above, the Court orientates itself according to the liberal, individualistic ideology upon which the human rights regime is founded, one that tends to trivialise the relationship between the individual and his or her community. Customary law, on the other hand, is overtly group centred, and ideologically aligns itself to the notion of the "duty of individuals to find their place in the order of the entire society".[83] This sense of group solidarity is clearly reflected in the important role ascribed to the greater family in matrimonial matters.

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79 See the argument in *Ngwenyama* para 10.

80 *Mayelane*, for example, paras 71-73. The judgment is also not compatible with the dignity and equality of all the wives in cases where there are more than two wives, since the Court requires the consent only of the first wife. See para 89 and compare para 153.

81 Kruuse and Sloth-Nielsen 2014 *PER* 1717-1728, who highlight a number of these issues.

82 The judgments of Zondo J and Jafta J respectively.

83 De Sousa Santos *New Legal Common Sense* 272-274. See, for example, Menski *Comparative Law* 411, 420-425; Himonga, Taylor and Pope 2013 *PER* 374-382, in the context of *ubuntu* that underlies customary systems.

Under customary law, marriage is not only about the union of the spouses in their individual capacity; rather, it signifies a relationship between two families, which fact the Court also records.[84] The group/family focus is clearly manifest in both the existing and the new evidence led in the Court. Time and again, the crucial role played by the family in the decision-making process is highlighted.[85] Not only is the family actively involved in the marriage negotiations and in seeking the consent of the wife (if withheld), but also the very decision for a man to enter into a subsequent marriage could come from his family.[86] The family is unmistakably an integral part of the legal underpinnings of marriage, and respect for the view of family members is no mere social nicety.[87]

Nevertheless, in the process of ascertaining the content of the customary law of the Vatsonga, the Court does not reflect on the position of the family in the matter, despite the fact that it has a definite and direct bearing on the validity of the second marriage.[88] Instead, the Court's approach, by reproducing the individualistic sub-structure of the Act, strongly endorses international rights law and in its wake the "egotism" of western "social atomism".[89]

For the simple reason that customary law configures rights from a different perspective, the Court cannot facilely transpose mainstream ideas about dignity and equality onto the customary system. As it appears from the evidence in *Mayelane*, the status and dignity of a wife in a customary marriage is to a large extent contingent on the views and participation of the family. Thus, for example, "the second woman will be regarded as a concubine if the husband's relatives do not support the husband".[90]

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84 *Mayelane* para 29 and compare with para 24, where the importance of "communitarian traditions" and their link to the "unity of *family structures*" is highlighted (my emphasis); and see for example, Bennett *Customary Law* 188, 199.

85 *Mayelane* paras 55, 56, 57, 58, 59, 105.

86 *Mayelane* para 56.

87 Compare Kruuse and Sloth-Nielsen 2014 *PER* 1722, who make the point that, by contrast, the first wife's consent to a second marriage may amount to a "courtesy call … at best".

88 Note again the references in note 84 above. Furthermore, with reference to the evidence, if the role of the family had been taken into account it would have been relatively easy to establish that on the face of it no valid customary marriage had been concluded. See, however, *Mabena v Letsoalo* 1998 2 SA 1068 (T) and the discussion in part 5.1 below.

89 Bennett *Traditional African Religions* xxx; Wa Mutua 1995 *Va J Int'l L* 339, 369.

90 *Mayelane* para 56.

If this is so, a judicial pronouncement on what constitutes her dignity could in fact be quite meaningless. In the context of a wife's lived reality, it appears that lack of recognition by the family will most certainly affect her status, and consequently her sense of dignity and equality within the community.[91]

The point is that the deep-seated gender identity and social structures, as reflected in the customary system, cannot hastily be rewritten in a judgment, since they are most resistant to change.[92] They are furthermore linked to values, such as dignity, which are particularly context-specific.[93]

The vindication of rights is without a doubt a primary consideration that animates the judgment in *Mayelane*. Yet it must be remembered that "[p]art of the reason for the failure … to respect human rights lies in the seemingly alien character of that corpus".[94] Every South African court, which takes seriously its dual mandate to promote on one hand the values underlying the Bill of Rights, and on the other to recognise and develop customary law, is therefore obliged to particularise those values in such a way that they will resonate with the given customary context in order to be accepted by participants.

Nevertheless, in all three courts there had not been any translation of the concepts dignity and equality from the mainstream script to that of the customary.[95] The result of the failure of the courts to establish a link between these values and their relevant context is evident in the abovementioned tangle of divergent judgments, wherein the

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91 *Mayelane* paras 55, 56.

92 Teubner's analysis of "tight and loose coupling" of norms to their social context is again helpful. He explains that "the resistance to change is high when law is tightly coupled in binding arrangements to other social processes". Teubner 1998 *MLR* 19. Also see Menski "Monsters" 452-453, on the importance of "culture" as a "grounded reality" that legal systems "cannot afford to ignore"; and (quoting Himonga) as not being "a superficial thing that people put on and off like shoes".

93 Thus, it has been argued by Legrand that it is "impossible" to "transplant" a legal norm or phenomenon from one socio-cultural context to another, since the meaning with which it is invested is "culture-specific" and therefore "never displaced because it always refers to an idiosyncratic semio-cultural situation". Legrand 1997 *MJECL* 117.

94 Wa Mutua 1995 *Va J Int'l L* 380.

95 For example, Menski *Comparative Law* 469; Himonga, Taylor and Pope 2013 *PER* 378-381, with reference to *ubuntu*, which encapsulates the customary order.

dignity and equality of wives in polygynous marriages were abstracted according to imported values – and according to what each judge understood these values to be.[96]

5 Two scripts: implications and the role of the Court

According to the analysis above, there are at least two different ways of construing the dignity and equality of wives in customary marriages. As will be explained below, their boundaries are not necessarily watertight, yet in broad strokes one construction is rooted in the liberal, individualistic ideology of the international and constitutional rights regime, while the other emphasises communalism and the importance of the extended family.[97]

In *Mayelane*, the abundant evidence about the part played by the family in validating the existence of a customary marriage is not taken into consideration. Although it has gone to great lengths to hear evidence in order to "ascertain" the applicable customary law, the Court is narrowly concerned with whether or not the consent of the first wife is necessary for the validity of the marriage, when other customary norms clearly also have a bearing on its legality.[98]

In its defence, however, it could perhaps be argued that the Court was correct in limiting its enquiry to the consent question, since it was pleaded in the High Court by Ms Mayelane, while other customary rules and requirements were merely alluded to.[99] As it is, the Court had taken a bold step in deciding the consent issue, which had not been raised in cross-appeal in the Supreme Court of Appeal, as well as by its ascertainment of the living customary law, and its subsequent development thereof.[100]

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96 See parts 3.3 and 3.4 above. This is perhaps also the reason why the development of customary law undertaken by the Constitutional Court produces a discrepant result if more than two wives are involved, since the Court requires only the first wife's consent. See in particular the separate judgment of Jafta J at para 153.

97 See in addition Wa Mutua 1995 *Va J Int'l L* 339-380; and Dan-Cohen *Harmful Thoughts* 150-151.

98 *Mayelane* paras 55, 56, 57, 58, 59, 105.

99 *Mayelane* paras 5, 9-10.

100 *Mayelane* paras 13, 89.

On the other hand, the Court strongly emphasises that "a court is obliged to satisfy itself, as a matter of law, on the content of customary law".[101] Furthermore, it determines that:

> It is incumbent on our courts *to take steps to satisfy themselves* as to the content of customary law and, where necessary to *evaluate* local custom in order to ascertain the content of the relevant legal rule.[102]

This reasoning corresponds to the analysis in *Shilubana*,[103] to which the Court refers with approval, namely that the "process" of determination must be informed, *inter alia*, by a "consideration of the traditions of the community concerned".[104] In addition, the Court makes frequent reference to "living" customary law as a "system", which implies that its rules do not operate in isolation.[105] It also recognises the fact that customary law may "impose validity requirements in addition to those set out in [the Act]".[106]

By focusing only on the consent of the first wife, the Court neglects these additional validity requirements, notably those relating to the family. They are overlooked, despite being linked by the Court itself to the fact that "in pre-colonial times, 'marriage was always a bond between families and not between individual spouses'", and that presently the values of customary law:

> ... provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as nurturing communitarian traditions like *ubuntu*.[107]

It can be inferred that the approach actually followed by the Court is the result of its preoccupation with individual rights and autonomy described above. It must therefore also be an approach that will skew the "ascertainment" of customary law and thus its proposed development, which presumably depends on the proper acknowledgement

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101 *Mayelane* para 48.
102 *Mayelane* para 48. (My emphasis.)
103 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).
104 *Mayelane* para 45.
105 For example, *Mayelane* paras 12, 43, 44.
106 *Mayelane* para 29. That there are other validity requirements is clearly brought out by the fact that Ms Ngwenyama sought to rely on the due payment of *ilobolo*, which is also a prerequisite for the validity of a customary marriage. See *Mayelane* paras 9, 128.
107 *Mayelane* paras 24, 29.

of its content. Furthermore, the Court does not follow its own logic, which prescribes that it must determine the "living content" of customary law and not only selected portions thereof.[108] Equally, the Court cautions that customary law must not be viewed "through the prism of legal conceptions foreign to it", and must be treated with the "deference and dignity it deserves".[109] Yet, the Court side-steps these very requirements and therefore fails to translate and contextualise dignity and equality appropriately.

5.1 Should the Court translate constitutional values at all?

The tough task the Court has set itself of ascertaining and developing the living customary law is further complicated by the overriding requirement that such law must reflect "the rights and values of the Constitution from which it draws its legal force".[110] The question is therefore whether the group-orientated underpinnings of dignity and equality in the customary system are in any way compatible with their construal in the constitutional context.

In the South African context, constitutional values are not of the static, textbook type. Dignity and equality are aspirational ideals associated with transformation and restorative justice, which the Constitutional Court has vigorously endorsed in a general sense, and in particular with respect to the rights of women.[111] Hence, as some of the abovementioned cases showed, oppressive customary norms which infringe upon the dignity of women have not withstood the scrutiny of the Court. One could thus reflect on whether any construction that might diminish the rights of women would or should fall foul of the Court's insistence on the need for transformation.

It is therefore important to consider whether the involvement of the family (and/or the community in general) and its views on the validity of marriages would detract

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108 *Mayelane* para 43. Thus, the Court should also pay attention to the internal development that customary law has undergone and ask, for example, to what extent individualism now plays a role in a particular system.

109 *Mayelane* para 44 (quoting from *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) paras 52-53), and para 47 respectively.

110 *Mayelane* para 46.

111 See Himonga, Taylor and Pope 2013 *PER* 371-372, and note the reference to the concept of "transformative constitutionalism"; Albertyn 2009 *CCR* 197-201.

from the dignity and equality of either Ms Ngwenyama or Ms Mayelane. In *Mabena v Letsoalo*[112] for example, the fact that the father of an adult man had not consented to his marriage and was not involved in the *lobolo* negotiations did not affect the validity of the marriage. The High Court held that not only did this determination reflect the living customary law, but also that such development of the customary law was congruent with the objects, spirit and purport of the Bill of Rights.[113] Is it therefore in the interests of transformative justice that the Court should restrict rather than endorse the role of the family in the present matter?

Ironically, the Court itself creates another hurdle that militates against the construal of dignity and equality within a customary context. It concerns the question of *who* gives evidence about the content of the law. In *Mayelane* the Court anomalously places conspicuous reliance on the opinion of male traditional leaders.[114] For courts to protect the dignity and equality of women by means of the development of customary law, it is necessary however that they discern clearly whether the script upon which its ascertainment relies is not a contested version that merely favours and reinforces oppressive power structures.[115]

One could therefore ask whether these apparent obstacles are reason enough to obviate the operation of certain customary values within a framework of transformational jurisprudence.

5.2 Inherent tensions in the context-specific development of customary law

Drawing a sharp distinction for example between liberal individualism and communalism is certainly an option available to courts, and one that avoids negotiating the vicissitudes of normative conflict between constitutional and customary systems of rights. But as Himonga *et al* [116] argue, such a choice is too "simplistic", because "it

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112 *Mabena v Letsoalo* 1998 2 SA 1068 (T) para C, 1073.
113 *Mabena v Letsoalo* 1998 2 SA 1068 (T) paras H/I, 1074-B/C, 1075.
114 See the useful summary of the evidence in Kruuse and Sloth-Nielsen 2014 *PER* 1718-1721.
115 Albertyn 2009 *CCR* 184-193, for her important analysis of dignity, and *inter alia* its relationship to hierarchical group structures.
116 Himonga, Taylor and Pope 2013 *PER* 417.

is unclear that liberalism and communitarianism necessarily conflict". It is, according to them, a "false dichotomy".[117]

Santos[118] goes further, saying that "rather than cannibalizing each other", individual and collective rights can in fact "strengthen each other". Thus, he propounds a "virtuous hybridization among the most comprehensive and emancipatory conceptions of human dignity" found in both the "human rights tradition" and in "other traditions".[119]

The idea that individual rights and communalism interlock makes good sense. Although under the *Constitution* we are predominantly individual right bearers, we are nevertheless, as recognised by the Court, "not islands unto ourselves".[120] This proposition is, after all, also implicit in the Court's claim of simultaneously vindicating constitutional values and customary law, which claim in theory embraces both positions. Such a dual mandate would be impossible if these systems were utterly oppositional.[121]

It was thus incumbent upon the Court to take due notice of the customary context, and not to entrench the "false dichotomy" between the constitutional and customary value systems. It is thus argued that the role of the family in the customary law of marriage should have been brought to bear on the validity of the marriage as a matter of customary law and, most importantly, in relation to the development of customary law in construing the dignity of both wives. This contention, however, immediately raises those prickly, age-old questions about discrimination so often associated with customary law and its patriarchal power structures.[122]

5.3 Contextual scripts of dignity and identity

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117 Himonga, Taylor and Pope 2013 *PER* 417.

118 De Sousa Santos *New Legal Common Sense* 475.

119 De Sousa Santos *New Legal Common Sense* 474.

120 Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37. He continues: "The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy."

121 Compare Wa Mutua 1995 *Va J Int'l L* 348: "While it is probably correct to argue that African societies did not emphasize individual rights in the same way that European societies did, it is not a correct presumption to claim that they did not know the conception of individual rights at all."

122 For example, Albertyn 2009 *CCR* 163-208.

Dignity cannot easily be severed from a person's self-understanding and identity, which are in many respects "socially constructed".[123] In reality, human beings do not have a single, monolithic identity, but several individual *and* collective identities, which continuously overlap.[124] Because these identities are embedded in their relevant socio-cultural contexts, and because people move between them, both identities and contexts are not "bounded", but are fluid and dynamic.[125] Thus, the individualism-versus-communalism debate is not about binary opposites but about degrees of emphasis. Both types of identity are important and both matter to people to varying degrees, depending on the given context.[126]

Therefore, one could not say that bringing the family into matrimonial affairs or even making the validity of a marriage dependent on the participation of the family is in itself an outright affront to a wife's dignity. From an "internal" perspective, much will depend on the importance that the wife attaches to her group identity and the value she attaches to her status within and solidarity with the community, and further, how this understanding intersects with her individual identity.[127]

On the other hand, if the dignity of women was contingent solely on potentially oppressive norms or practices, even if women themselves regarded them as acceptable or important, grave injustices would continue to be perpetuated in the name of culture or custom.[128] A court intent on securing the dignity of women through transformational jurisprudence cannot allow customary norms that could hinder such processes to remain completely "open-ended" in the name of cultural association or

123 Dan-Cohen *Harmful Thoughts* 2, 160; and compare Appiah *Ethics of Identity* 15.

124 For example, Appiah *Ethics of Identity* 17-24.

125 Albertyn 2009 *CCR* 184, on the links between culture and context, and "the actual reality of people's lives [and] their place within the community"; and at 195, on how the dichotomy between "western" and "indigenous" values reflects a "bounded view of culture", which, *inter alia*, ignores its contestation within communities. Also note the reference at 177, to *Mabena v Letsoalo* 1998 2 SA 1068 (T) para C, 1073, which illustrates how people move between civil and customary systems, and how the customary context can change to accommodate new realities.

126 Appiah *Ethics of Identity* 20, 23.

127 Compare Dan-Cohen *Harmful Thoughts* 164, on the "social meaning" associated with the dignity of women, which can be "assessed only in terms that are internal to the particular cultures concerned".

128 Dan-Cohen *Harmful Thoughts* 164, who gives the example of wife beating, which is such a firmly entrenched and accepted cultural practice in some communities that it gives rise to the so-called "cultural defence".

collective identities.[129] Thus, the issue of identity is relevant to the apparent "dichotomy" between the constitutional and customary worldviews pertaining to *Mayelane.*

If the Court therefore wants to instil the necessary respect for customary law, it must fully address – and not ignore – the power of the family (or the community) to dictate in certain matrimonial matters, while ensuring that this fact does not infringe the dignity of women in relation to both their individual and their collective identities. De Sousa Santos[130] provides helpful insights into the tensions between cultures based predominantly on individualism on the one hand, and communalism on the other by explaining that all cultures are "reciprocally incomplete". Thus, (the culture) of human rights, which focusses on "derivative" rights, "rather than on … the duty of individuals to find their place in the order of the entire society", is incomplete.[131] Conversely, a system that has a:

> ... strong undialectical bias in favour of harmony … neglects the fact that, without primordial [fundamental] rights, the individual is too fragile an entity to avoid being run over by whatever transcends him or her.[132]

De Sousa Santos's thesis thus provides another reason why the Court erred in *Mayelane* by neglecting the communitarian customary context. This is because it traded one incomplete regime for another, when a more meaningful "completion" of rights could be achieved by considering "the most comprehensive and emancipatory conceptions of human dignity" found in both systems.[133]

5.4 The Court as "virtuous" translator

Elevating one context and the value system it represents over another thwarts the idea of creating a "virtuous hybridization" between different constructions of dignity.[134]

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129 Himonga, Taylor and Pope 2013 *PER* 185, who caution against a legal norm being "so open-ended that it can be exploited to serve any conceivable purpose"; Albertyn 2009 *CCR* 171.

130 De Sousa Santos *New Legal Common Sense* 273-274.

131 De Sousa Santos *New Legal Common Sense* 273.

132 De Sousa Santos *New Legal Common Sense* 273-274, where he compares the "*topos* of *dharma*", which, like customary law is group-centred, to that of human rights.

133 De Sousa Santos *New Legal Common Sense* 474. Also see Wa Mutua 1995 *Va J Int'l L* 339, 344 on the human rights system being but a piece of the whole, "the gourd is only partially filled …".

134 De Sousa Santos *New Legal Common Sense* 474.

In *Mayelane* this approach meant that the Court reduced both the customary and constitutional contexts to "bounded" entities, thereby missing an opportunity to investigate how dignity is shaped by the porosity and coalescence of the individual and collective identities of women as respectively mirrored by these systems.[135] Yet it is vital that the Court "unbinds" and links these contexts.

Returning to the original metaphor and previous sections, the Court as translator of norms and values must take the contexts of both the original script and of the translation into account. If this process is successfully carried out, the narrative in the former will retain its integrity, yet it will be sufficiently particularised to make sense in a new context. The result will be a "virtuous" hybridisation or translation, wherein the original message is not lost nor rejected by the listeners, because they will understand its meaning relative to their own realities.[136]

A perplexing question is clearly that of *how* any court can accomplish the task of integrating different values. Although the details of the problem fall squarely within the domain of courts themselves, a few tentative observations can be made.

The first is that courts regularly wrestle with conflicting norms and values, their meaning and construction – no matter where they originate.[137] The resolution of competing interests animates constitutional and transformational jurisprudence, and it is something that the South African Constitutional Court is particularly adept at doing. As reflected in many of its judgments, the Court by carefully weighing different interests has been able to challenge and reject an array of oppressive and discriminatory norms. Hence, the jurisprudential logic found in *Makwanyane* for example, which allowed the Court to mediate between greatly divergent exigencies and thereby find the "golden thread" in constitutional and customary value systems, can be applied in all cases calling for such mediation.[138]

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135 I note again that the constitutional and customary systems are *predominantly* based on this division, but that it is nevertheless one of degrees. See part 5.3 above.

136 Compare again Allott *Limits of Law* 10-11, "the recipients of Law … are the all-important people in legal communication".

137 See for example Himonga, Taylor and Pope 2013 *PER* 418; Albertyn *CCR* 184-186.

138 Mokgoro J in *S v Makwanyane* 1995 3 SA 391 (CC) para 306, with reference to *ubuntu*.

This logic goes hand-in-hand with the methodology adopted by the Court, which relies on a number of important jurisprudential "tools", notably those of balancing and proportionality.[139] The associated principles, which are concerned with determining the relative or proportional weight of competing interests, are particularly useful for the resolution of conflict between norms.[140] They can similarly be applied in the balancing of potentially conflicting regimes, or even the Court's own competing mandates, such as those represented in *Mayelane*. These tools are also highly compatible with, and indeed, presuppose the processes of contextualisation and translation described above.[141]

Translating and contextualising the constitutional dignity script would, as explained above, require the Court to take seriously the place of the family, and if necessary that of the community, in the construal of a wife's dignity and equality. However, what it does not mean is that that factor should be afforded disproportionate weight. Instead, balancing and proportionality means that a court, in this situation, will consider dignity and equality from both an individual and a collective perspective and evaluate each one within the framework of its mandate. This exercise is not one that relies on monocultural preferences.

Elements of the proportionality test are described by Albertyn[142] in what is called the "Harksen test". According to her, the test:

> ... entails a contextual assessment of the impact of an impugned rule or conduct with due regard to the degree of disadvantage suffered by the complainant and his or her group, the purpose of the act/conduct and the extent to which the complainant's rights and interests are invaded. These factors are weighed up within an overall assessment of the impairment of human dignity, generally defined as a failure to be treated with equal concern and respect.[143]

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139 See Lewis *Application and Reconstruction of International Law* 238-248; Beatty *Ultimate Rule of Law*, whose entire book is devoted to an analysis of proportionality in the jurisprudence of courts in a number of countries.

140 Beatty *Ultimate Rule of Law* 159-188 for a detailed examination of the principles underlying proportionality enquiries.

141 Lewis *Application and Reconstruction of International Law* 224-237, 251-259.

142 Albertyn 2009 *CCR* 185, with reference to *Harksen v Lane* 1998 1 SA 1300 (CC).

143 Albertyn 2009 *CCR* 185.

All these considerations would have benefitted the Court greatly in being a "virtuous" translator. They would first have aided the Court in assessing the overall context in detail, which means both the customary and the constitutional context. This in turn would have allowed the Court to consider the impact of all the relevant (although not necessarily impugned) norms on those who are affected by them, and the manner in which they are thus affected. Lastly the Court would be in position to weigh up and balance all the relevant factors and interests. In terms of *Mayelane*, such proportionate balancing would imply placing the different constructions of dignity and equality on the scale, in order to produce a translation of constitutional values that acknowledges and respects their new context and audience.

6 Conclusion

By analogy with *Mabena*, the Court may well have concluded – after a "deliberative" proportionality enquiry – that allowing the family to have the power to determine the validity of a marriage will allow it to have too much power over the destiny of the women concerned. Or it may find that on balance a woman's individual identity and rights in a particular instance outweigh those that are construed collectively. There is, however, a salient difference between this scenario and the one in *Mayelane* where the Court neglected such inquiry altogether.

Had it been more conscious of the customary context, the Court would have substantiated its claim of respecting customary law as an independent source of law to a much greater extent. It would have been in a better position to deliberate the development of customary law if the varied interests represented in *Mayelane* were ascribed their proportionate weight and properly balanced. Even if the eventual outcome had been the same, such a judgment would have set a sound precedent for the need to contextualise and translate constitutional values in other socio-cultural contexts. Not only would their proper translation indicate respect for other cultures, but it could be a step towards finding cultural "common ground" among "the most

comprehensive and emancipatory conceptions of human dignity" found in both constitutional and customary systems.[144]

144 Albertyn 2009 *CCR* 182; De Sousa Santos *New Legal Common Sense* 474.

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LIST OF ABBREVIATIONS

CCR	Constitutional Court Review
Harv L Rev	Harvard Law Review
IJL&F	International Journal of Law and the Family
LJIL	Leiden Journal of International Law
McGill LJ	McGill Law Journal
MJECL	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review

NYU J Int'l Law & Pol	New York University Journal of International Law and Politics
PER	Potchefstroom Elektorniese Regstydskrif / Potchefstroom Electronic Law Journal
SUBB Jurisprudentia	Jurisprudentia Studia Universitatis Babes-Bolyai, Iurisprudentia
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
Va J Int'l L	Virginia Journal of International Law